

SOUTH AFRICA / JUDGMENT

Malan v Dr FG Du Toit Inc (87250/18) [2022] ZAGPPHC 417 (17 June 2022)

[2022] ZAGPPHC 417**COURT**

North Gauteng High Court, Pretoria

BEFORE

Kooverjie

CASE / FILE NUMBER

87250/18

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 87250/18****DATE:**

17 JUNE 2022

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

In

the matter between:-

AW

MALAN

Plaintiff

VS

DR

FG DU TOIT

INC.

Defendant

JUDGMENT

KOOVERJIE J

A THE CLAIM

- [1] This action has been instituted by the plaintiff, Mrs Malan, against Dr du Toit Incorporated due to the wrongful and negligent breach of legal duty which resulted in the plaintiff suffering damages as set out in the particulars of claim.
- [2] It was alleged that whilst the defendant's employees, acting in the course and scope of their employment with the defendant, failed to treat the injury to the plaintiff's left ring finger in accordance with protocol and standard required for such injury sustained from a human bite.
- [3] The total claim for damages was R2 million, which constituted of hospital expenses, future loss of earning capacity and general damages respectively.
- [4] At the trial the parties sought an order separating merits and quantum. Such order was granted. The matter then proceeded only on the merits aspect.

B DOCUMENTARY EVIDENCE

- [5] The parties further agreed that the hospital records and the clinical notes would constitute admissible hearsay evidence in terms of section 3 of the Evidence Amendment Act 45 of 1988 and Section 34 of the Civil Proceedings Evidence Act 25 of 1965 insofar as the admissibility of the documents and not necessarily the weight of the evidence in question. This means that not every entry will be accepted by either of the parties or by all the witnesses as necessarily being correct or accurate.
- [6] I have been furnished with a bundle of the relevant documents that the parties intended referring to during the course of the trial which, inter alia, included:

6.1 the clinical notes of Dr Ramatshela[1] ("clinical notes");

6.2 the hospital records, mostly completed by the nursing staff[2] ("records");

6.3 in addition, during cross-examination, Dr Ramatshela referred to her own notes she made after becoming aware of these legal proceedings. These notes were admitted as Exhibit 'B';

6.4 the joint minutes of Dr le Roux and Dr Williams of 8 August 2020 and particularly the joint finding of the experts assisted the parties in formulating the issue for determination by this court. The joint minutes read:

“Our interpretation of the report is the same and it is stated that if the patient did not tell the nurse and the doctor that she was bitten by the assailant the medical treatment for this laceration was in order. If she did tell them then obviously the medical treatment that the patient received was not up to standard and this was the crux of the matter and must be decided between the different parties and even if this ends up in court this has to be finalized by the input from the judge.”[3];

6.5 a photograph of Mrs Malan depicting her injuries (taken by Mr Malan) at the emergency ward, upon arrival at the hospital;

6.6 medico-legal reports/summaries of the experts. It was agreed that this would be admitted in evidence without the need to call on the experts to testify.

C THE SALIENT COMMON CAUSE FACTS

- [7] On 17 January 2016 the plaintiff and her family were accosted in front of their home during an armed robbery. Both the plaintiff and her husband were assaulted. The plaintiff's visible injuries were on her face and left hand, particularly her left hand ring finger. The plaintiff was bit by the assailant on her ring finger. The plaintiff was rushed to the emergency centre at Kloof Hospital at around 13:56 for medical treatment.
- [8] The nurse and the doctor on duty attended to the plaintiff on the said day. Both Ms Sotlhane and Dr Ramatshela treated the Plaintiff and both acted within the course and scope of their employment.
- [9] Two prescriptions were issued, the first, whilst in hospital, and the second, upon discharge. It was not disputed that a few days later the pain in the left ring finger became unbearable and her hand became swollen. She urgently contacted her general practitioner, Dr van Niekerk, who referred her immediately to an orthopedic surgeon who then treated her. On 15 March 2017 her left hand ring finger was amputated.

D THE PLEADINGS

(i) Plaintiff's pleadings

- [10] The plaintiff's case is that the defendant was under legal duty to render the appropriate medical treatment and care at all times with the skill, care and diligence, and without negligence as expected of a professional medical doctor in similar circumstances. It was pleaded, that the defendant had wrongfully and negligently breached its legal duty in one or more of the following respects, namely:

“5.1 Having regard to the application of physical force, breaking of the skin of the ring-finger of the Plaintiff's left hand, to remove the Plaintiff's wedding ring from her left hand ring finger, breaking the skin of the ring finger of the Plaintiff's left hand, failed to, adequately, or at all, obtain a full medical history of the nature and the severity of the injury to the plaintiff's ring finger of the left hand[4];

5.2 failed to, adequately, or at all examine the Plaintiff and to explore the human bite to the ring finger of the Plaintiff's left hand, when in the circumstances, they could and should have been foreseen that a human bite created an orthopedic emergency which required immediate hospitalization, debridement of the hand and prescription of therapy antibiotics; to prevent, inter alia, infection to cause further sequelae;

5.3 failed to immediately and without a reasonable period of time refer the Plaintiff to an operating theatre and under regional or general anesthesia to properly assess the full nature and extent of the human bite to the Plaintiff's ring finger;

5.4 failed to adequately or at all monitor the condition of the Plaintiff so as to ensure that the Plaintiff recovered from a human bite to the ring finger of the Plaintiff's left hand, prevent the wound from becoming septic and prevent the loss of sensation, movement and functional of her ring and middle fingers, when, in the circumstances, they could and should have done so;

5.5 failed to adhere to the reasonable standards of medical practice applicable when confronted with a human bite hand."

[11] It was further pleaded that as a result of the defendant's negligent breach of its legal duty, the plaintiff's ring finger of the left hand was amputated resulting in the plaintiff suffering the following sequelae:

"6.1 Plaintiff underwent medical treatment and will have to undergo further medical treatment in future;

6.2 Plaintiff further endured severe shock, pain, suffering and discomfort and will continue to endure pain, suffering and discomfort in the future;

6.3 Plaintiff's permanent loss of amenities of life;

6.4 Plaintiff has been rendered an unequal competitor in the labour market with regard to pre-traumatic employment."[5]

(ii) Defendant's pleadings

[12] The defendant, in its amended plea, denied the allegations concerning the alleged breach of legal duty, unlawful conduct, and alleged negligence. The defendant admitted that the plaintiff received treatment at the emergency centre at the Kloof Hospital at around 13:56 on 17 January 2016. The plaintiff suffered from multiple injuries which included:

(i) facial injuries with laceration and swelling of the upper lip;

(ii) left ring finger swollen with a superficial laceration;

(iii) nose bleeding;

(iv) tenderness over the right temporal mandular joint.

- [13] It was denied that the plaintiff informed Dr Ramatshela or any of the other nurses on duty that her finger had been bitten. It was further denied that the plaintiff requested Dr Ramatshela and the attending nurses whether she should take anti-viral prophylaxis.
- [14] The defendant specifically pleaded that the plaintiff was properly and thoroughly examined, assessed and treated in respect of her injuries with reasonable care and skill as could be expected of a medical practitioner in the same circumstances. The treatment of the plaintiff included:

“4.3.1 the wounds were cleaned;

4.3.2 referral for x-rays of the chest, left hand, and facial bones;

4.3.3 blood tests;

4.3.4 insertion of drip;

4.3.5 admission and prescription of pain medication.

4.4 The patient was discharged after she was in a stable and satisfactory condition.”

- [15] The defendant pleaded in paragraph 4.6 “that all the Plaintiff’s wounds were cleaned and that the Plaintiff was, inter alia, referred for x-ray examination, prescribed pain medication and the Plaintiff was discharged”, thereby denying that it acted wrongfully and negligently and that it breached a legal duty.
- [16] The defendant further pleaded that in the absence of Dr Ramatshela or the nurses being informed that the injury was caused by a human bite, they could not know, or reasonably expected to have known or foreseen that the injury was caused by a human bite.
- [17] The defendant also pleaded that no causal connection was established, that is, between the alleged negligence of the defendant and the amputation of the ring finger, if one has regard to the subsequent treatment which the plaintiff received. There was a prolonged period since the plaintiff receiving the initial treatment on 17 January 2016 to the date when her finger was amputated, being 15 March 2017.

E ISSUE FOR DETERMINATION

- [18] It is trite that the plaintiff bears the onus to prove all the aspects pertaining to the alleged negligence of the defendant in order to establish liability on the part of the defendant. As part of the preparation for trial the parties undertook to obtain a joint minute between Professor le Roux and Dr Williams. The essential issue for determination was whether or not the nurse and the doctor treating Ms Malan were made aware that she had been bitten by the assailant on her ring finger. It was argued that such disclosure was alleged to have been made by not only Mrs Malan but by Mr Malan as well as their son who were all present at some point in the emergency ward on the said day.

[19] It was agreed that the issues for determination are of a factual nature and that this court should concern itself with the following enquiries:

- (i) whether the plaintiff informed Dr Ramatshela or any of the attending nurses that her finger had been bitten;
- (ii) whether the plaintiff enquired from Dr Ramatshela and/or the attending and/or assisting nurses regarding anti-retroviral prophylaxis medication;
- (iii) whether in the absence of Dr Ramatshela and/or the nurses being informed that the injury was caused by a human bite, they could not know or reasonably be expected to know or could have foreseen that the injury was caused by the said human bite;
- (iv) whether Dr Ramatshela and/or attending or assisting nurses acted negligently and in breach of their legal duty.

F THE PLAINTIFF'S EVIDENCE

- (i) Testimony of Mrs Malan

[20] Mrs Malan testified in Afrikaans. The plaintiff testified that she was rushed to Kloof Hospital as a result of her injuries. At the time she was in tremendous pain, particularly her left ring finger was terribly sore. She was then immediately directed to the ward and treatment commenced immediately.

[21] She, inter alia, testified on the issue of the disclosure of the bite and the treatment administered that:

- (i) she told the receptionist that “she was in an armed robbery and that the guy tried to bite off her finger”;
- (ii) she informed the nurse who attended to her that she was in an armed robbery and the guy wanted the ring and he tried to bite off her finger;
- (iii) when Dr Ramatshela attended to her, Mrs Malan told her that “the guy tried to bite off my finger as he wanted the ring”;
- (iv) she confirmed that she was sent for x-rays on her chest, her left hand and facial bones;
- (v) when she returned from x-rays she recalled having repeated the fact that she was bitten (the guy tried to bite off her finger). She focused on the pain she felt on her ring finger as the pain was excruciating;
- (vi) she was given some medication through the saline drip but she could not confirm the dosage and the type of medication that was given;
- (vii) she had asked whether she would require antibiotics and anti-retroviral medication. Dr Ramatshela advised her that it is not

necessary;

(viii) she explained that even though she was discharged her finger remained very sore and by the Tuesday (19 January 2016) it got worse. By that Thursday (21 January 2016) the pain was unbearable and her hand was swollen. She made an appointment with her general practitioner, Dr van Niekerk. He immediately referred her to the orthopedic surgeon who then treated her over time. Her left ring finger was amputated months later;

(ix) she confirmed that the photograph shown to her depicted the injuries she suffered, particularly her ring finger, where there were blood stains around the finger and blood on her face;

(x) she noted that when she had entered the emergency unit it was quiet. However, when she returned from x-rays it was relatively busy. Thereafter, Dr Ramatshela, whilst attending to her, was interrupted by another patient. She, however, returned and completed the consultation with Mrs Malan. She was discharged thereafter;

(xi) in cross-examination Mrs Malan testified that her son, upon arrival in the emergency unit, informed the nurse of the bite. He spoke in Afrikaans “die ou het my ma gebyt”;

(xii) she further confirmed that she spoke English to the staff. She used the word “robbery” she did not use the term “hi-jacking”. She, however, conceded that it could have been possible that she could have used the word “hi-jacking”;

(xiii) when taken through the clinical notes, particularly the “history”, she testified that the recordal was incorrect and incomplete. Although she was kicked and hit several times by the assailants, their focus was on her ring. So much so that she was dragged to the assailants’ car after they had difficulty in removing the ring. They even threatened to shoot off her finger;

(xiv) regarding the “report”, she did not dispute that a medical assessment was conducted, which included her vitals being monitored and that she underwent x-rays. She, however, denied that she was asked about her gastro-intestinal status. She did not inform the nurse about her “diet”, “appetite”, “stools” and her “last oral intake”;

(xv) further in cross-examination, when it was put to her that she did not inform Dr Ramatshela of the bite to her hand, she remained adamant that this fact was not true. Her words were: “there is no way that I didn’t say to the doctor that I was bitten. I had informed her that the man tried to bite off my finger and I said so in no uncertain circumstances”;

(xvi) she persisted that she had advised not only the nurse and the doctor but the radiologist of the fact that she was bitten;

(xvii) when it was put to her that she was emotional and could have forgotten to state that she was bitten. She responded by stating that she was not emotional. If she was crying it was because of the pain. She was relatively calm. She insisted that she had informed the relevant individuals treating her that she was bitten.

(ii) Testimony of Mr Malan

[22] Mr Malan also testified in Afrikaans. Mr Malan was the plaintiff's husband and the second witness. He confirmed Mrs Malan's testimony as to the manner in which she was attacked. He testified that:

- (i) they had arrived at the Kloof Emergency unit around 14:00;
- (ii) upon their arrival, the staff attended to Mrs Malan immediately. He testified that he advised the doctor in Afrikaans "gewapende roof, een ou probeer vrou se vinger af byt om die ring uit te trek";
- (iii) he completed the relevant forms and then went to see his wife;
- (iv) he took a photograph of his wife which depicted the injuries she sustained;
- (v) he advised the nurse treating his wife that her finger was bitten and even when his son came he also asked what was done with the finger;
- (vi) he particularly stated that there was discussion around the take-out prescription between Mrs Malan and the doctor;
- (vii) in cross-examination Mr Malan was directed specifically to the timelines set out in the medical records, namely the admission time, when the doctor examined her, when she was taken to x-rays and when she returned. He did not dispute the time recorded, but recalled that they arrived at home much earlier than 17:00;
- (viii) he testified that his wife was shocked and emotional upon their arrival at the hospital;
- (ix) when it was put to him that the doctor was not told of the fact that Mrs Malan was bitten on her finger, he denied this. He responded by stating that the doctor must live with such response;
- (x) he also confirmed that it was Mrs Malan who received the take-home prescription.

G THE DEFENDANT'S EVIDENCE

[23] The witnesses who testified on behalf of the defendant was Ms Sotlhane (the nurse), and Dr Ramatshela (the doctor). They both testified in English.

(i) Testimony of Ms Sotlhane

[24] Ms Sotlhane testified that she treated Mrs Malan on the day of the incident. She in essence completed 90% of the medical report[6]. Questions were put to her as to the manner in which she filled the form. She testified that:

- (i) Mrs Malan was in extreme pain. She was treated on an urgent basis and sent directly to the emergency room upon her arrival;

- (ii) in filling the forms she noted Mrs Malan's explanation in her own words and confirmed that the patient had spoken in English. Ms Sotlhane recorded as the presenting complaint on the form the following: "Patient was hi-jacked and during hi-jacking they hit her several times with a gun on her head and on her face, kicking her as well, pulling left hand as they were taking out the ring". She also noted that on the top right hand side of the first page of the record: "painful left hand and face";
- (iii) her examination of the patient was separate from the doctor. When Dr Ramatshela attended to Mrs Malan, she was not present during the doctor's examination. The doctor had, however, given instructions on Mrs Malan's treatment plan on the said day;
- (iv) the photograph was taken before Mrs Malan was treated. She noted blood stains on the clothing, and blood on her left hand as well as her face;
- (v) Mrs Malan had a superficial laceration on her ring finger with minimal bleeding;
- (vi) Mrs Malan was given medication[7]. She confirmed that medication "tramol" and "maxalon" were administered at around 16:00. The medication was administered to her through a saline drip. Only Tetavex was injected intra muscularly and as indicated as per the report ("Tetavex 0.5 ml, IMI");
- (vii) she conceded the recordal in respect of the Tetavex was incorrect as the Tetavex dosage entry was made where the entry for Maxalon should have been made;
- (viii) insofar as the treatment to Mrs Malan's hand and face is concerned, she stated that she cleaned her face and left hand,
- including her ring finger. She dressed the finger with a "ring elastic" which is a type of gauze;
- (ix) when asked what she understood by "superficial laceration" she explained that only the surface layer was off so it was not a deep laceration;
- (x) Mr Malan had also given details of the incident, which she considered in her recordal on her form. She persisted that "attempted
- hi-jacking" was referred to;
- (xi) she testified that at no stage was she advised by Mrs Malan or her husband that she was bitten;
- (xii) she explained when Mrs Malan came into the ward she was crying and shaking but she became calmer thereafter. She was, however, alert and not disorientated;
- (xiii) she also testified that Mrs Malan did not have a discussion with her regarding a prescription of antibiotics or anti-retroviral drugs.

[25] During cross-examination, Ms Sotlhane testified as follows:

- (i) she admitted that it is important to keep accurate records as it has an impact on the treatment of the patient as well as the patient's future treatment;
- (ii) in respect of her notes under "special investigation"[8] she conceded that she only noted "left hand" despite the fact that the patient was requested to go for chest and facial x-rays as well;
- (iii) she further testified that the incorrect recordal of the medication could have been made due to the fact that they were busy at the time in the ward;
- (iv) with regard to the "presenting complaint", she testified that she had written exactly what the patient had told her. It was put to her whether she had a duty to ask and make further enquiries as to exactly how the injury was sustained on her finger. She conceded she should have made further enquiries;
- (v) it was also put to her - the fact that she did not record everything, there could have been a likelihood that she failed to note the fact that Mrs Malan was bitten. Ms Sotlhane did not deny this proposition;
- (vi) with regard to her working with Dr Ramatshela she stated that she was not with Dr Ramatshela at all times. She confirmed having given a quick explanation of the patient's condition to Dr Ramatshela. When Dr Ramatshela completed the examination, Ms Sotlhane conducted the treatment plan which included cleaning Mrs Malan's wounds, taking her for x-rays and administering the prescribed medication;
- (vii) she confirmed that she did not focus on only the hand but on all her injuries;
- (viii) she conceded that since she had no independent recollection of her interaction with Mrs Malan, she was therefore only able to testify with reference to the medical records;
- (ix) Ms Sotlhane conceded that she could not independently remember the incident, her examination of Mrs Malan as well as the treatment given. It was put to her that she could not then remember the type of dressing she used. More particularly, that she did not record the manner in which she dressed the wound, namely with a "ring elastic";
- (x) in respect of her conversation with Mr Malan, she insisted that Mr Malan informed her that it was hi-jacking and did not mention that Mrs Malan's finger was bitten;
- (xi) it was pointed out to her that due to the inaccuracies and incompleteness of the records, the records are not reliable. She conceded that the records were incomplete. She also confirmed that not all of her notes were made at the bed-side;
- (xii) she further conceded that she did not record the "emotional status" of Mrs Malan and the "wound assessment" as required in her report;

(xiii) under re-examination it was re-affirmed that her medical record did not constitute the patient's entire records. It was pointed out that the radiology as well as the doctor's records also form part of the medical records. She further confirmed that the medical report recorded the relevant and material information.

(ii) Testimony of Dr Ramatshela

[26] Dr Ramatshela testified that:

(i) she had an independent recollection of the events and this was obvious from the "notes" that she had made almost two and a half years after the incident (exhibit 'B');

(ii) she could remember Mrs Malan's admission at Kloof on the day of the incident. Mrs Malan was taken directly to the ward when she arrived and that she was holding her nose. Dr Ramatshela immediately attended to Mrs Malan. She noted that Mrs Malan was shaking and her husband was with her at the time. He was requested to fill in the necessary forms while Mrs Malan was being settled;

(iii) Dr Ramatshela confirmed that she recorded the incident under "History" as explained by Mrs Malan. She recorded the following:

"Patient brought in by husband and history of being assaulted in attempted hi-jacking that occurred at their front gate. They assaulted the patient with a gun and hit her several times with a fist and kicked her as well. They possibly forcefully removed her wedding ring as well";

(iv) in the "Notes" (Exhibit 'B') she made the following notes:

"She was attacked by four suspects.

2. Front gate (attempted hi-jack);

3. Came back in car with husband (lunch/church);

Two sons in yard/house (witnessed the motion at front gate and came out). Robbers left, two tackled husband, one came to the door, forcefully removed ring from her index fingers; assaulted in back of gun of force, bleeding from the nose";

(v) regarding Mrs Malan's emotional state, Dr Ramatshela stated that "she could see that Mrs Malan had been through a traumatic event but she tried to be brave, that she was okay but she was shaking". She explained that Mrs Malan was certainly not calm but was shaking when she arrived;

(vi) she confirmed that the pain level was very high and hence it was recorded as 9/10 in her "clinical notes";

(vii) when asked as to how she examined the left finger, she stated that she saw blood stains and noted a superficial laceration on her finger. The injuries accorded with her explanation of the incident, in particular, that the ring was pulled from her finger. She explained the small abrasions that were visible and caused by pulling out the ring. She requested x-rays as there could have been a dislocation due to her hand being pulled;

(viii) Mrs Malan had at no point made the disclosure that she was bitten by the assailant in an attempt to get the ring out;

(ix) she was asked whether she could assess from the wound whether she had a bite mark or that she could have been bitten. She responded that she could not differentiate whether it was a bite mark or an injury just by looking at it;

(x) she clearly indicated that if she was aware that she was bitten she would have treated Mrs Malan in a very different manner, particularly that antibiotics would be prescribed and arrangements would be made for an orthopedic surgeon to attend to her immediately. She added that such treatment was necessary as a bite mark is considered to be infectious. She advised that the treatment going forward would possibly have included debridement and antibiotics;

(xi) she testified that she was not negligent in any way. She had been working in the emergency department since 2010 and she would have reacted accordingly;

(xii) she prescribed medication based on Mrs Malan's explanation of the incident. She prescribed "tetavex" which is often administered for any open wound injury which includes bite wounds as well;

(xiii) when Mrs Malan's son visited her, she remembered that he asked if she was fine ("okay") and he was rubbing her hand;

(xiv) during the time that Mrs Malan was in the ward, she had multiple interactions with her and had frequently asked her if Mrs Malan was "okay". She, however, did not record each attendance at her bed-side;

(xv) although Mrs Malan did mention the pain in her hand, she was evaluated in respect of all her injuries including her finger. Dr Ramatshela therefore did not specifically focus on her finger. She had felt the finger and noted that it was tender, but did not make specific notes regarding the injury on her finger;

(xvi) she did not set out any specific treatment for her hand on her notes;

(xvii) with regard to the injury on her finger she testified that she saw superficial lacerations on the inner side of the finger. By the time Mrs Malan arrived at the emergency unit, her bleeding had stopped. There was only blood stains on her hand. She testified, however, that she did not record the fact that there was a laceration on the finger;

(xviii) the injuries she found was “in keeping with the explanation that was given as to how the injury happened”. It was a superficial injury that means that the skin was disrupted and which could cause bleeding. She specifically requested that the finger be irrigated with saline and that a betadine dressing be applied. She stated that the nurse was given instructions to do so. Once again this treatment was not recorded;

(xix) in cross-examination she was referred to her “clinical notes”. It was pointed that her recordal[9] only made reference to a “swollen upper lip”, and not “laceration on the upper lip”. Furthermore, her recordal was not in accordance with Ms Sotlhane’s notes – wherein she recorded that Mrs Malan sustained a “laceration on the upper lip”;

(xx) although the discrepancies and the incompleteness of her report was pointed out, she persisted that her records are still reliable. She stated that the observations of the nurse and herself can be different because independent examinations are conducted;

(xxi) Dr Ramatshela was referred to the photograph of Mrs Malan. It was pointed out that it was not only Mrs Malan’s face but her hand where the major injuries occurred;

(xxii) it was put to her that the plaintiff was in severe pain, mainly because of her finger. Moreover, it was pointed out that it was concerning that she failed to make notes of the finger or the hand;

(xxiii) she further did not dispute that she had no interaction with Mrs Malan’s husband;

(xxiv) she, however, accepted that the probabilities are that if a patient was bitten by an assailant on the finger, the patient would place emphasis on the injury to the finger and this fact would be communicated to the medical staff;

(xxv) in re-examination it was specifically put to her that according to the record, if it is not written, then it means it was not said or it was not done. The doctor stated that this is the correct proposition. Simply put, the fact that the bite was not recorded, meant that it was not disclosed;

(xxvi) she further confirmed that Mrs Malan suffered trauma on her face, her body and her hands and that it was recorded accordingly. If she was bitten it would have certainly been an important aspect and been considered by the doctor;

(xxvii) it was also put to her that it could have been equally probable that in Mrs Malan’s condition, namely emotional and the fact that she had multiple trauma that she could have forgotten to mention the fact that the finger was bitten. She answered in the affirmative.

H

ANALYSIS

- [27] In evaluating the facts before me, I have taken into consideration the evidence as well as the submissions proffered by both parties.
- [28] The plaintiff argued that Mrs Malan testified in an open and honest manner. No contradictions were pointed out from her evidence, nor was she contradicted by the evidence of her husband in any material respect.
- [29] Both witnesses of the defendant conceded that it was more probable that the patient would have conveyed the fact that she was bitten. This was her main concern and the source of pain.
- [30] It was pointed out that the plaintiff is the one who had experienced the human bite and the injury to her finger and therefore both her and her husband were in a better position to recall what transpired at the emergency unit and what was conveyed to the treating doctor and nursing staff. It is highly improbable that the doctor and nurse were able to recall what transpired in an emergency department some 6½ years later with regard to Mrs Malan without the benefit of proper, complete and accurate records.
- [31] The evidence of the plaintiff, when taking into account the fallibility of memory and the poor record-keeping, was more reliable than that of the defendant's witnesses. Ms Sotlhane had no independent recollection of the incident. She relied solely on the medical reports.
- [32] The defendant, on the other hand, submitted that more reliance should be placed on doctors' and nurses' notes which constituted a contemporary record of events of the day in question. The documentary evidence before the court (namely, the clinical notes of Dr Ramatshela and the hospital records of the Medi-Clinic Kloof casualty), recording the incident which the plaintiff was exposed to and the treatment she received in the emergency centre, was more reliable than the oral evidence of the plaintiff and her husband (almost 6 years later).
- [33] It was further argued that the records cannot be dismissed on the basis of unreliability even if there are discrepancies. Although the reports had shortcomings and mistakes, they are not of such a nature as to render the content of the documents void of reliability. In this regard, reference was made to the AM and SM v MEC Health Western Cape[10] matter wherein the court explained that medical notes should not be overly scrutinized[11].
- [34] It was further argued that, in the absence of a recordal, neither the nurse nor the doctor were told of this by the plaintiff or her husband.
- [35] It was emphasized that Dr Ramatshela had an independent recollection of the matter apart from her hospital notes. This was evident from independent "notes", taken some two years after the incident.

- [36] Even though Dr Ramatshela omitted to record the injury, and the treatment of the finger in her notes, it cannot be disputed that she had examined the wound on the finger, instructed that x-rays be taken and that the wound be treated. She, therefore, did not ignore the injury to the plaintiff's finger.
- [37] Furthermore, the contents of the medical report concerning the examinations and treatment of the plaintiff were not denied nor seriously contested during cross-examination. In fact, many of the aspects raised with the plaintiff and her husband during the course of their evidence could not be recalled or seriously disputed by them.
- [38] It was submitted further in argument that it is more likely that the plaintiff simply forgot or neglected to inform the nurse and/or the doctor that she had been bitten in view of the following facts:
- (i) The robbery/hijacking was undoubtedly a traumatic event;
 - (ii) The plaintiff was extremely emotional when she attended the emergency centre, she was crying and her husband testified that they were both in shock;
 - (iii) Dr Ramatshela testified that the plaintiff was also shaking and apparently her voice was quivering.

The only logical conclusion one can draw from the said facts is that the plaintiff and her husband might have forgotten to mention a very important fact to the staff of the defendant.

- [39] It was further highlighted that there would be no reason for the nurse or doctor to deliberately omit to record the bite if they were informed thereof. It is highly unlikely that the doctor would simply have ignored the bite wound and in doing so failed to treat it as such.
- [40] What I have before me are two mutually destructive versions on the issue whether Dr Ramatshela and Ms Sotlhane were informed that the plaintiff was bitten on her ring finger? Having regard to the principles set out by our leading authorities, I am ultimately required to assess the following:
1. the credibility; and
 2. reliability of the witnesses; as well as
 3. the probabilities of each party's version on the disputed issues.

[41] In the matter of National Employers General Insurance Co Ltd v Jagers 1984

- (4) SA 437 (E) at 440E - 441A. The court stated:

"... where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore

acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true, and that the defendant's version is false." (My emphasis)

[42] In resolving factual disputes where there are two irreconcilable versions before a trial court, the Supreme Court of Appeal in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* 2003 (1) SA 11 (SCA) at 14J - 15E, further set out on how to approach such a situation. It was stated:

"To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the

probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and

(c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it... But when all factors are equipoised probabilities prevail". (My emphasis)

[43] In this instance, the plaintiff bears the onus to prove that disclosures were made that she was bitten on her finger. In my evaluation of the evidence presented by the respective witnesses, my observations are set out below.

[44] I have found Mrs Malan to be a credible witness[12]. In instances where she was unable to furnish an answer she did not persist with a version. She made concessions in those instances. I also did not find that her evidence was fabricated to suit her version.

- [45] For instance, under cross-examination she testified that she was unable to identify when the prescribed medication was given. During her evidence in chief and under cross-examination she maintained that she had on separate occasions informed the treating nurse and the doctor that she had been bitten by the assailant. This was also communicated to other members of the nursing staff as well as the radiology section. In fact, she stated that the nurse responded by stating that “it is unfortunate this happens in South Africa”.
- [46] Under cross-examination when it was put to Mrs Malan that due to her emotional state she could have neglected to inform the staff that she had been bitten. Her response was again, that she had in no uncertain terms informed them that she was bitten and she did so more than once. I have further observed that her responses were not evasive during her testimony.
- [47] It was not disputed that the main focus was the pain she experienced as well as the injury she sustained on her left ring finger.
- [48] Her evidence of the disclosure of the bite was corroborated by Mr Malan. Their testimonies did not contradict each other. Although there were certain minor differences, for instance, when the photograph was taken and the time she was discharged. It was also evident to me that they testified independently of each other. They both persisted of having disclosed the fact that Mrs Malan was bit on her ring finger.
- [49] The evidence in totality reflects that Mrs Malan was emotional and was “shaking”, but she had calmed down. Dr Ramatshela testified that Mrs Malan was “okay” and she put on a brave front. No evidence was presented to suggest that she was not in her full senses, “out of control” or did not communicate with the staff.
- [50] Regarding her request for antibiotics and/or anti-retrovirals, Dr Ramatshela denied this. However, under cross-examination Dr Ramatshela testified that she could not recall such a request being made.
- [51] Mr Malan testified that the doctor was advised of the bite. He specifically told the staff in the ward that his wife’s finger had been bitten. Mr Malan also came across as an honest and credible witness. Although his evidence was brief, he responded to all the questions being asked. He also did not come across as fabricating a version that would suit Mrs Malan’s testimony. He was also found to be reliable as he testified independently on the relevant aspects.
- [52] I am mindful that although the demeanour of a witness is an important factor in assessing the credibility of the witness, it must always be considered in conjunction with the surrounding circumstances, inferences and other factors affecting the probabilities[13].

- [53] It became evident that in presenting her testimony Ms Sotlhane relied on the contents of the medical report. Ms Sotlhane conceded that she had no independent recollection of Mrs Malan's incident and what transpired on the specific day at the emergency department. Hence she was only able to testify to the extent of her notes in the Report.
- [54] Ms Sotlhane, during cross-examination, accepted that part of her duties was to ensure that the medical records should be completed comprehensively. Under cross-examination she conceded that the record was incomplete and in certain instances inconsistent, particularly when compared to the notes of the doctor as well as the instructions from the doctor.
- [55] She testified that Mrs Malan was emotional and crying when she arrived, yet she conceded that she failed to record the "emotional status" in her report (where specific provision was made for such recordal).
- [56] Ms Sotlhane's testimony as to how she treated the finger is concerning. She testified that she applied a "ring elastic" dressing. Under cross-examination it became evident that she was only able to testify as to what she thought or how she would have treated the wound as she had no independent recollection of the incident. Moreover, she failed to record the manner and type of dressing in the Report. Her testimony in this regard cannot be relied upon.
- [57] Under re-examination, she confirmed that it does get busy in the ward and not everything is noted. The priority was to treat the patient. It could then, in my view, be more probable that she did not record all the pertinent facts regarding Mrs Malan's injuries. Furthermore, she could only testify as to what was written in the report.
- [58] Dr Ramatshela makes no reference of a bite. She persisted in her evidence that Mrs Malan had not disclosed the fact that she was bitten on her finger to her. If she had done so, her treatment protocol would have been very different.
- [59] It was concerning that Dr Ramatshela also made no recordal of the plaintiff's injured finger, the extent of the injury and the specific treatment protocol for the finger. Under cross-examination, she responded that "it could have slipped her mind". She further testified that the injury was treated with betadine. However, there is no recordal thereof and neither was this corroborated by Ms Sotlhane. In fact, neither she nor Ms Sotlhane recorded how the wound on the finger was treated.
- [60] She testified that if something "was not recorded, it was not done". This proposition is faulted and does not weigh in her favour. For instance, she explained that the finger was treated in a specific manner, but she failed to record same.
- [61] Insofar as the personal notes are concerned, "Exhibit B", she testified that the notes were made almost 2½ years after the incident. I find it rather improbable that she was able to remember the treatment given to Mrs Malan as she has worked in several emergency units and treated hundreds of patients thereafter, both in the public and private space.

[62] More particularly, I find it highly improbable that she could have an independent memory regarding exactly what was relayed to her by Mrs Malan, Mr Malan and their son 2½ years and then 6 years later.

[63] In fact, she testified that the staff on duty on the said day, namely, nurse Afrika, Reynecke and Dr Pannell, could not recall what transpired on that specific day with Mrs Malan. Even Ms Sotlhane had no independent recollection.

[64] I find it apt to refer to the matter of Sampo & another v Ivan Davies Theunissen Inc & Others[14] where the court stated:

“In assessing the reliability of the witnesses, I bear in mind that the evidence was given almost 4 years after the events. Human memory is inherently and notoriously liable to error. One knows that people are less likely to be complete and accurate in their accounts after a long interval than after a short one. It is a matter of common experience that, during the stage of retention or storage in the memory, perceived information may be forgotten, or it may be modified or added to, or distorted by subsequent information. One is aware too that there can occur a process of unconscious reconstruction (see Commissioner for Inland Revenue v Pick ‘n Pay wholesalers 1987 (3) SA 453 (A) at 469F – G”. (my emphasis)

[65] Furthermore, Dr Ramatshela testified that Mrs Malan was very descriptive. She also testified that she had attended to Mrs Malan several times that afternoon before her discharge. She was also there when Mrs Malan’s son visited. Mrs Malan testified that not only she but her husband had at various occasions disclosed the fact that her finger had been bitten. In my view, it was therefore more probable that the disclosure of the bite was relayed to her.

[66] Mrs Malan could also not have informed Dr Ramatshela that the assailants removed the ring since it was Mr Malan who eventually removed the ring. The recordal in the report was therefore incorrect.

[67] I have noted the defendant’s reliance on the report and notes. It was submitted that the documentary evidence, i.e. the reports are more reliable and they were recorded on the day of the incident. However, it has been illustrated that the records were inconsistent and incomplete in various aspects. It could therefore be probable that the recordal of the incident was also not complete.

[68] Furthermore, Dr Ramatshela had under cross-examination conceded that it would be very probable that in these circumstances where the patient’s wedding ring is stolen, and the ring being the main motive for the robbery as well as the fact that she was bitten, the focus of her injuries would be on her ring finger.

[69] Both Ms Sotlhane and Dr Ramatshela confirmed that the photograph shown to them depicted her appearance when she was admitted at emergency. The photograph glaringly illustrates injury to the face and the finger.

[70] In weighing of the evidence of the plaintiff against the evidence of the defendant's witnesses. I find it more probable that both Mrs Malan and her husband would have disclosed the fact that Mrs Malan had been bitten on her finger.

CONCLUSION

[71] In conclusion, therefore, my findings on the four main issues for determination are set out below. In respect of the first enquiry, the issue for determination is whether the plaintiff informed the staff that the finger had been bitten. The joint minute of the

experts pointed out that if the patient told the staff that she was bitten, then the medical treatment the patient received was not appropriate. On this enquiry, I have found that it was highly probable that the disclosure of the bite was made, hence the

treatment was not appropriate. Consequently, the defendant has wrongfully and negligently breached its legal duty.

[72] With regard to the second enquiry, whether an enquiry was made to Dr Ramatshela or the assisting nurses regarding anti-retroviral prophylaxis. From the evidence, Ms Sotlhane testified that the aspect was not discussed with her. In examination in chief, Dr Ramatshela testified that Mrs Malan had not made this enquiry. Under cross-examination, she responded that she could not remember. My finding on the conspectus of the evidence is that it was probable that this enquiry had been made.

[73] On the third enquiry – as to whether the staff could be expected to have known or foreseen that the injury was caused by a human bite. In this regard the defendant's evidence that the staff could not have arrived at such conclusion has merit. I find that no satisfactory evidence was led to counter this enquiry.

[74] No evidence was presented to the court that the wound on the plaintiff's finger displayed any discernible marks which would distinguish it as a bite wound, let alone a human bite wound. It could not be expected of the doctor or nurse, under the existing circumstances at the time, to have gained such knowledge through mere observation of the wound.

[75] It was pointed out that the plaintiff's evidence corroborated the evidence of the nurse and the doctor that the wound which was visible to them appeared to be a superficial laceration. Early in her evidence the plaintiff was asked what the nurse did when she came to her bed, and in this regard she said that the nurse "het my bloed afgehaal" and then went on to say that the nurse "(het) gekyk na my vinger. Op die oog af nie die slegste gelyk nie. It was a cut. My gesig skoongemaak. My oë was fine maar hulle het skoongemaak."

[76] In my view, there is no evidence before this court that the injury to the ring finger was, reasonably capable of observation or diagnosed as a human bite absent the nurse or doctor having been expressly informed thereof.

- [77] On the fourth enquiry – whether Dr Ramatshela and/or the attending or assisting nurses acted negligently and in breach of their legal duty. The evidence on the probabilities illustrate that the staff did not pay attention to Mrs Malan’s finger despite it being mentioned several times that she was bitten.
- [78] A finding of negligence on the part of the defendant is not sufficient to establish liability. It is incumbent upon the applicant to prove, on a balance of probabilities, the elements of negligence, wrongfulness and causation[15].
- [79] The standard against which a medical practitioner is judged is that of the reasonable medical practitioner in the same circumstances[16].
- [80] A successful delictual claim requires proof that a causal link between the Defendant’s actions or omissions, on the one hand, and the harm suffered on the other hand has to be established[17]. This accords with the well-established and accepted “but for” test for factual causality.
- [81] In the matter of Chapeikin & Another v Mini[18] the Supreme Court of Appeal cited with approval an earlier decision of that court, namely ZA v Smith[19]. It stated:

“What [the but-for test] essentially lays down is the enquiry - in the case of an omission – as to whether, but for the defendant’s

wrongful and negligent failure to take reasonable steps, the plaintiff’s loss would not have ensued. In this regard this

court has said on more than one occasion that the application of the “but-for test” is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant’s wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish the causal link with certainty.” [20]

- [82] In this instance, the enquiry would be – but for the defendant’s negligent failure to appropriately treat the plaintiff, the plaintiff’s amputation would not have occurred. In my view, there is a nexus between the damage suffered by Mrs Malan and the negligent conduct of the defendant’s staff.
- [83] Dr William’s report (defendant’s expert), confirmed that “the amputation of the patient’s left ring finger appears to have been primarily due to the damage to the joints of the finger, caused by bacterial infection”. He found that the infection appears to have been caused by the patient having sustained a bite wound of her finger[21]. Dr Williams further confirmed that a human bite requires concerted treatment. This included prophylactic antibiotics, hospitalisation,

intravenous antibiotics and debridement. Therefore, had the appropriate treatment been administered, the circumstances Mrs Malan

found herself in could have been avoided.

[84] In Mrs Malan's case, I find that the treatment was inappropriate. The plaintiff has, on a balance of probabilities, proved that the disclosure of the bite was made to the staff of the defendant.

[85] Consequently, I make the following order:

1. The defendant is ordered to pay the plaintiff's proven damages.
2. The defendant is ordered to pay the costs of the action.

H KOOVERJIE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff:

Adv H Joubert

Instructed by:

Attorneys

Counsel for the Respondents: Adv GW Alberts (SC)

Adv HR du Toit

Date heard:

17-29 & 24 May 2022

Date of Judgment:

17 June 2022

[1] folder 010 of the record

[2] folder 011 of the record

[3] my emphasis, P009-1-2 of the record

[4] my emphasis, 004-8 of the record

[5] 004-9 of the record

[6] folder 011

[7] as indicated at 011-3 read with 011-4

[8] 011-3 of the record

[9] on page 010-7

[10] [2020] ZASCA 89

[11] “[50] Dr Horn’s evidence was that she conducted a proper examination of J’s injury. She palpated the swelling of his head and noted it as being simply ‘a bump’. No doubt, if she had been aware at the time that in 2018 she would have to give evidence about these events, her note would have been fuller and included the dimensions of the bump, its consistency and details of how she took J’s history and the grounds upon which she concluded that there had been no loss of consciousness, no amnesia and no seizures. But that is a counsel of perfection and the note was entirely consistent with her view that on a proper examination this was a harmless bump on the head of a child showing no signs of neurological deficit. The medical notes prepared by a duty doctor in a trauma unit are not to be passed as, or equated to, a detailed commercial contract or statute.”

[12] I am mindful that the credibility of a witness is interlinked with my assessment on the probabilities of the case. See National Employers General Insurance Co matter

[13] The Constitutional Court in *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000

(1) SA 1 (CC) at para [79] stated: “The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including,

especially, the probabilities., a finding based on demeanour involves interpreting the behaviour or conduct of the

witness while testifying. A further and closely related danger is the implicit assumption, in deferring to the trier of fact’s findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of the witness,

notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs

fundamentally from that of the trier of fact.”

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fundamentally from that of the trier of fact."

[14] [2007] JOL 20692 (T) at par 16

[15] Oppelt v Department of Health Western Cape 2016 (1) SA 325 (CC) at paragraph 34. At paragraph 51 the court held: "The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of

delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific

conduct." At paragraph 54, the court held: "There is no doubt that the legal convictions of the community demand that hospitals and health care practitioners must provide proficient health care services to members of the public. These convictions demand that those who fail to do so must incur liability."

[15] Oppelt v Department of Health Western Cape 2016 (1) SA 325 (CC) at paragraph 34.

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[16] Oppelt (supra) at paragraph 71

[17] Oppelt (supra) at paragraph 35

[18] [2016] ZASCA 105, at paragraph 49

[19] 2015

(4) SA 574 (SCA) at paragraph 30

[20] (eg Minister of Safety and Security v Van Duivenboden (SCA) 2002 (6) SA 431 (SCA); ([2002] 3 All SA 741; [2002] ZASCA 79) para 25; Minister of Finance & others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) para 33. See also Lee v Minister of Correctional Services 2013 (2) SA 144 (CC) (2013 (2) BCLR 129;

[2012] ZACC 30) para 41.)” See also: Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) at paragraph 65. Legal causation must be proved on a balance of probabilities (Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) at paragraph 39).

[20] (eg Minister of Safety and Security v Van Duivenboden (SCA) 2002 (6) SA 431 (SCA); ([2002] 3 All SA 741; [2002] ZASCA 79) para 25; Minister of Finance & others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) para 33. See also Lee v Minister of Correctional Services 2013 (2) SA 144 (CC) (2013 (2) BCLR 129;

[2012] ZACC 30) para 41.)”

See also: Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) at paragraph 65.

Legal causation must be proved on a balance of probabilities (Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) at paragraph 39).

[21] P. 008 – 15 and 16 of the record

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