THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 471/2021

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL, EDUCATION, NORTH WEST PROVINCE	**APPELLANT**

and

IZAK BOSHOFF FOSTER	**FIRST RESPONDENT**
GUILLAUME HENRI BOSHOFF FOSTER	**SECOND RESPONDENT**
THE LEOPARDS RUGBY UNION	**THIRD RESPONDENT**
KOSH SPORT & TRAUMA SERVICES	**FOURTH RESPONDENT**

And

THE LEOPARDS RUGBY UNION	**FIRST THIRD PARTY**
KOSH SPORT & TRAUMA SERVICES	**SECOND THIRD PARTY**

Neutral citation: *The Member of the Executive Council, Education, North West Province v Izak Boshoff Foster & Others* (Case no 471/2021) [2023] ZASCA 11 (13 February 2023)

Coram: VAN DER MERWE, MOCUMIE and CARELSE JJA and GOOSEN and MASIPA AJJA

Heard: 9 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 13 February 2023.

Summary: Delict – negligence – whether public school hosting a sports tournament took reasonable steps to ensure the presence of competent and suitably equipped first aid provider.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Thobane AJ, sitting as court of first instance):

1 The appeal succeeds only to the extent set out in para 2 below.

2 Paragraph 2 of the order of the high court is set aside and replaced with the following:

'The first defendant is directed to pay the first plaintiff's costs, such costs to include the costs of two counsel.'

3 The appellant is directed to pay the costs of the appeal, including the costs of two counsel.

JUDGMENT

Mocumie JA (Van der Merwe, Carelse JJA et Goosen AJA concurring):

[1] Rugby (the sport code at the core of this appeal is defined in the *Concise Oxford English Dictionary* (12 ed) as 'a team game played with an oval ball that may be kicked, carried, and passed by hand, in which points are won by scoring a try or by kicking the ball over the crossbar of the opponents' goal'.[1]

[2] Despite it being a much-loved national sport in South Africa and played all over the world, because it involves physical contact, rugby is a dangerous sport in which players often sustain serious injuries; which may include permanent paralysis. Because of all the attendant risks, there has for many years been insistence on emergency measures, including professional first aid services, being available at rugby matches. One would therefore not expect a player to be injured by the

[1] Concise Oxford English Dictionary 12ed at 1258; See also *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) SA 428 (SCA) para 1.

paramedics and/or people who are meant to attend to their injuries in an emergency, as it happened in this case.[2]

[3] The facts of this matter are briefly as follows. On 6 May 2006, the first respondent (who was 18 years of age at the time and in matric) played in a rugby tournament representing his school, Hoërskool Lichtenburg (herein after referred to as Lichtenburg) against Hoër Volkskool Potchefstroom (herein after referred to as Volkskool). The latter hosted the tournament. Both schools fall under the appellant, the Member of the Executive Council of Education: North West province (the MEC). The first respondent was tackled by a player from the opposing team and fell to the ground. Whilst on the ground another player fell on top of him. He sustained an injury to his neck as a result of the impact. Two first aid personnel carried him off the field without stabilising his neck with a spine board or solid neck brace. This caused the second injury to the first respondent. This matter revolves around the second injury. He was later taken by ambulance to Potchefstroom Medi-Clinic, where he received treatment. Thereafter, he was airlifted to Pretoria Hospital, where he underwent surgery twice. After the first operation, the doctors informed the first respondent that he would not be able to walk again. This remained the position despite the second operation. He was discharged on 15 September 2006, four months after the incident.

[4] Following this tragic incident, the first respondent and his father, the second respondent, issued summons in the Gauteng Division of the High Court, Pretoria (the high court) in respect of the second injury, which was caused by the manner in which the first aid personnel carried the first respondent off the field without having stabilised his neck. The MEC was the first defendant in the high court whilst the first and second respondents (the respondents) were the first and second plaintiffs. The third and fourth respondents were respectively the third and fourth defendants as well as the first and second third parties.[3] The third respondent settled the claim with the respondents. The fourth respondent, Kosh Sport & Trauma Services, did not

[2] This is the essence of the words uttered by the second plaintiff, the father of the first plaintiff, in shock and disbelieve after his son was severely injured during a rugby game.

[3] A third party claim refers to a claim made by a defendant during the course of legal proceedings with the intention of enjoining an individual or entity that is not involved in the original action to perform a related duty. One good example of a third party claim is an indemnity claim against a third party. In some situations, third party proceedings are undertaken to determine how negligence should be apportioned between a defendant and a third party (www//upcounsel.com Legal definition.)

participate in the proceedings. By agreement between the parties the high court had to determine the issue of liability as formulated by the parties: 'whether the first defendant is liable for the damages suffered, and if so to what specific extent and for what specific injuries. . . '.

[5] After proceeding to trial, the high court (per Thobane AJ), granted the following order:

'1. The *defendants* are liable for 100% of proven or agreed damages suffered by the first plaintiff as a result of the manner in which first plaintiff was carried off the field on 6 May 2006;

2. The *defendants* are directed to pay the plaintiffs' costs on a punitive scale as between attorney and client which costs shall include:

2.(1) Costs of procuring medico-legal reports, consultations, attending meetings and procuring joint minutes;

2.(2) Costs of all expert witnesses called by the plaintiffs;

2.(3) All costs of the action including costs consequent upon the employment of two counsel.' (Emphasis added.)

The effect of the order was that the second respondent's claim was dismissed.

[6] Thobane AJ was not available to hear the application for leave to appeal. The respondents also sought a variation of Thobane AJ's order. Because of the unavailability of Thobane AJ, Potterill ADJP heard the application for leave to appeal together with the application for variation. She partly granted the variation sought, but refused leave to appeal. This Court subsequently granted leave to the appellant to appeal to this Court.

Issues for determination

[7] The central issue for determination is whether the MEC was liable for the second injury that the first respondent suffered on 6 May 2010 at the rugby match held at Volkskool. A secondary issue is whether Potterill ADJP was empowered to vary the order. For convenience, I commence with the secondary issue to dispose of it.

The variation order

[8] The respondents sought to vary the order in three respects. First, that the phrase 'the defendants are liable' in para 1 and 'the defendants are directed to pay' in para 2 be corrected to read 'the first defendant'. Secondly, that para 1 of the order be amended to also make reference to the 'second plaintiff'' and thirdly that the injury for which the appellant is liable be described as envisaged in the separation order. As I shall show, the first and third proposed variations were granted. The second was refused and nothing further needs to be said about it.

[9] Potterill ADJP made an order on the variation application as follows:

'Prayer 2 of the application is thus not granted.

Accordingly, paragraphs [54]1 and [54]2 are varied to read as follows:

> 54.1 The first defendant is liable for 100% of proven or agreed damages suffered by the first plaintiff as a result of the manner in which first plaintiff was carried off the field on 6 May 2006, which aggravated an existing cervical spine injury with neurological fall out at C7, to become an effective C5 motor deficit.
>
> [54]2 The first defendant is directed to pay the plaintiffs' costs on a punitive scale as between attorney and client, which costs shall include:
>
> 2.(1) Costs of procuring medico-legal reports, consultations, attending meetings and procuring joint minutes.
>
> 2.(2) Costs of all expert witnesses called by the plaintiffs.
>
> 2.(3) All costs of the action including costs consequent upon the employment of two counsel.

No order as to costs in this application.'

[10] Rule 42 of the Uniform Court Rules of Court provides:

'(1) *The court* may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary:

. . .

(b) An order or judgment in which there is an *ambiguity, or patent error or omission*, but only to the extent of the ambiguity, error or omission.' (Emphasis added.)

[11] The Constitutional Court in *Minister of Justice v Ntuli,*[4] with reference to the seminal judgment of *Firestone South Africa (Pty) v Genticuro AG,*[5] stated the following on whether a court may vary, correct or amend its own order:

'The general principles of the common law applicable to the variation of orders of Court were summarised by Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG* as follows:

"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased."

Certain exceptions to this general principle have been recognised and are referred to in *Firestone*. They are [i] variations in a judgment or order which are necessary to explain ambiguities, to correct errors of expression, [ii] to deal with accessory or consequential matters which were "overlooked or inadvertently omitted", and [iii] to correct orders for costs made without having heard argument thereon.

Trollip JA was prepared to assume in the *Firestone case* that the list of exceptions might not be exhaustive and that a Court might have a discretionary power to vary its orders in other appropriate cases. He stressed, however, that the

> ". . .assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded . . .".'

[12] The high court was fully aware that in terms of the separation order, only the liability of the MEC was in issue. That is how the trial was conducted. And the high court determined that issue. The references in its order to 'the defendants' were therefore clearly patent errors that resulted in the order not giving effect to the high court's true intention. It is trite that such errors may be corrected in terms of exception (ii) in *Firestone*. According to exception (iii), a court may 'correct a clerical, arithmetical or other error in it judgment or order so as to give effect to its true intention . . .'.[6]

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[4] *Minister of Justice v Ntuli* 1997 (6) BCLR 677; 1997 (3) SA 772 (CC) para 22 -23. See also *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC); 2001 (8) BCLR 765 (CC); D E van Loggerenberg & E Bertelsmann *Erasmus: The Superior Courts Practice* at B1-22 with reference to *Geard v Geard* 1943 CPD 409.

[5] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

[6] *Firestone* ibid at 307C ie to correct orders for costs made without having heard argument thereon.

[13] Paragraph 1 of the order is ambiguous having regard to what the high court was called upon to decide in terms of the order it granted on the separation of issues under rule 33(4). It required the court to be specific on the description of the injuries. It clearly made the required finding but failed to reflect it in the order. This was an ambiguity, which could be corrected without changing the 'sense and substance' of the judgment or order. Thus, the addition of the words, '*which aggravated an existing cervical spine injury with neurological fallout at C7, to become an effective C5 motor deficit. . .'* was in line with exception (ii) in *Firestone.*[7]

[14] On this basis, it is clear that Potterill ADJP acted within the powers vested in her. The variation of the order she granted was justified. The MEC fails on this secondary issue.

[15] As I have said, the first respondent suffered a neck injury after a player fell on top of him whilst on the ground after he was tackled by a player from the opposing team a few minutes before. He was carried off the rugby field, against his protestation, by two first aid personnel, without stabilising his neck with a spine board or neck brace. It is undisputed that this caused the first respondent's second injury. This is clear from the evidence of the two medical experts, Dr Edeling (for the MEC) and Dr Gianluca Marus (for the first respondent), who compiled their respective reports and thereafter a joint minute.

[16] From the outset, the experts agreed that the first respondent had sustained an initial and second injury. The initial injury consisted of a dislocated fracture of the cervical spine at the C4/C5 level, with partial severing of the spinal cord that resulted in neurological fallout at C7. The second injury to the spinal cord resulted in full and permanent neurological fallout at C5. Although the two experts were initially not agreed on the cause of the second injury, they subsequently filed a joint minute, a 'Further Qualification of Combined Neurosurgical Report, 5th June 2017 on Isak Boshoff Foster'. In it, they stated that:

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[7] *Firestone* fn 6 above at 307C para (i) therein states: 'the principle judgment or order may be supplemented in respect of accessory or consequential matters. . .'*Firestone* para (ii) reads: 'The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give it effect to its true meaning, provided it does not alter the "sense and substance" of the judgment or order.'

'We now agree that there was a second deterioration in his neurological condition due to further spinal cord injury due to the neck not being appropriate[ly] immobilised while being transported off the field.'

[17] Both experts testified and explained their joint opinion. Thus, the experts were in agreement that the second injury was caused by the conduct of the first aid personnel in carrying the first respondent off the field. It is easy to understand that to carry a person with a suspected spinal injury off the field without carefully stabilising the neck of the person and with their head dangling about, may severely aggravate the initial injury. This joint opinion was therefore clearly cogent and based on logical reasoning. In the result, the high court correctly accepted the joint opinion.

Liability of the MEC

[18] I turn to the central issue before this Court, namely whether the MEC was liable for the second injury that the first respondent suffered on 6 May 2006 at the rugby match held at Volkskool. Section 60 of the Schools Act 84 of 1996 (the Schools Act) provides as follows:

'**Liability of State**. — (1) *(a)* Subject to paragraph *(b)*, the State is liable for any delictual or contractual damage or loss caused as a result of *any act or omission* in connection with any *school activity* conducted by a public school and for which such public school would have been liable but for the provisions of this section.

. . .

(*3) Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned*.' (Emphasis added.)

[19] The rugby game was 'an activity in connection with an educational activity' as described in the Schools Act.[8] It was admitted in the plea that the MEC would be liable for damages caused by a wrongful and negligent omission on the part of Volkskool . A legal duty to avoid negligently causing harm rested on it, based on the relationship of *loco parentis,* which the educators and coaches have *vis-a-vis* the learners as players during school games when the latter are in their custody.[9] Wrongfulness was thus rightly not in dispute and neither was causation. In the result, the central question is whether the high court correctly held that Volkskool was

[8] See definitions in the Act.

[9] J A A Basson and M M Loubser (eds) *Sport and the Law in South Africa* (2000) at 5-30.

negligent in failing to take reasonable steps to ensure the presence of a competent and properly equipped first aid provider.

[20] From the outset, counsel for the MEC conceded that based on the evidence, which the first respondent presented, both schools, in particular Volkskool as the host school had to take reasonable steps to ensure that competent and sufficient first aid personnel were present at the games on 6 May 2006 to deal adequately with foreseeable injuries sustained by the first respondent and any other player on the day in question.

[21] Counsel submitted that Volkskool could only be expected to take reasonable steps and provide the degree of care that was demanded by the prevailing circumstances. Volkskool denied that it was directly and solely responsible for the first respondent's second injury because, on the common cause facts and experts' opinion, the second injury was caused by the first aid personnel in the manner in which they carried the first respondent off the rugby field; without stabilising the neck of the first respondent. Relying on the minority judgment of this Court in *Chartaprops 16 v Silberman* (*Chartaprops*),[10] it was contended that when Volkskool appointed the fourth respondent, as an independent contractor, it acted reasonably. He submitted that the fourth respondent had the necessary expertise and that Volkskool took reasonable steps under the circumstances.

[22] Counsel for the MEC also submitted that there was one spine board available in the morning. At the time the first respondent was injured, it was being used at another sports field. An ambulance was available in the morning. According to the Rugby Guidelines: The Green Book, only two first aid personnel referred to as 'first aid trainees' were required. The Green Book makes no reference to their experience and qualifications. The third respondent provided five first aid personnel, including Mr van Staden, the sole director of the third respondent. They attended to the first respondent properly and immediately on the field. The Green Book prescribed 'transport', without any specification including an ambulance. The presence of a medical doctor is a recommendation, not a requirement. He argued that there was

[10] *Chartaprops 16 v Silberman* 2008 ZASCA 115; 2009 (1) SA 265 (SCA); [2009] 1 All SA 197 (SCA).

no evidence that linked the second injury to a lack of services on the day. He contended that even if this Court was to find that the steps undertaken were not sufficient, at the time the first respondent was injured, it was not necessary for Mr van Staden to have been registered with the HPCSA. He was experienced, well known at schools and his services had been used over the years, without any complaints.

[23] Over and above, he submitted that according to Mr Bantjies, the Lichtenburg headmaster and coach of the first respondent's rugby team, at the time of the incident, what Mr Meintjies (an educator and the sports organiser for the games at Volkskool) did was reasonable: Mr Meintjies obtained a quotation that had all the specifications for the games. In the quotation he also requested the qualifications of the employees of the fourth respondent.

[24] In conclusion, he urged this Court to take into account that, the incident occurred in 2006, where only one first aid assistant was required to be present during a rugby game. Back then, so counsel submitted, the SA Rugby requirements were extremely low, but (he acknowledged) over time the requirements have increased.

[25] As Scott JA aptly puts it in *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage Pty Ltd,*[11] on negligence and its determination:

'A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes *JA in Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F. It reads:

"For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps to guard against such occurrence.".'

[11] In *Caparo Industries PLC v Dickman and Others* [1990] 1 All ER 568 at 586, Lord Oliver observed: 'the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense.'

[26] Volkskool is a well-resourced school in the North West Province. Its educators include dedicated sports events organisers, trained by the Department of Sports, (Arts), Recreation and Culture in partnership with Department of Basic Education. They are equipped to organise games and are fully aware of the basic requirements that must be in place at the commencement of every game.[12] The school has the necessary resources to manage all sports codes during the various sports seasons. Its educators have the necessary experience and knowledge to ensure that there is *inter alia* equipment, proper facilities and emergency services available during the games. It is well-known that the school has hosted sports events including rugby for years. Any reasonable person in the position of Volkskoolwould have foreseen the harm that occurred: well knowing that rugby is a dangerous contact sport that often leads to injuries. Some more serious and with dire consequences, as in this case, than others.

[27] Volkskool should have foreseen that if any neck injury was not treated properly and immediately, it could lead to a spinal injury. Volkskool therefore had to take reasonable measures to ensure the appointment of a first aid provider and personnel that were qualified for the job, if not qualified as prescribed by the Health Professional Council of South Africa (HPCSA) and in terms of the Green Book, at least experienced and competent to deal with neck injuries (typical in rugby games) and the kind of injury the first respondent suffered arising from the initial neck injury.

[28] The first respondent (at 18 years then and not an expert in rugby or neck injuries) stated without contradiction that while he was lying on the field he could not feel his legs. When the two first aid personnel approached him, he protested more than once (three times as the record indicates) that they should not carry him off the field without a spine board. He said:

'I did not know what was wrong with me…I just knew that they should use equipment to carry me off the field as I did not want anything that was wrong with me to worsen…I suspected I had a neck injury…As they were carrying me off the field my head fell backwards and frontwards and my head was loose. I was not able to keep my head still.'

[12] Department of Sport and Recreation South Africa, in partnership with the DBE, hosted the National School Sport Championships.

[29] The evidence of the first respondent, as supported by that of eyewitnesses (Mr Mayne and a retired medical doctor) shows that the fourth respondent's employees, in particular Mr van Staden, were hopelessly incompetent and ill-equipped. The facts speak for themselves.

[30] What did Volkskool do to ensure that the first aid personnel were competent and properly equipped to do the job? Nothing really. It is on record that Volkskool engaged the services of the fourth respondent on the simple basis that Mr van Staden was well known in the area and had provided emergency first aid services for schools in the area. And that there had been no previous complaints about the fourth respondent. It was only discovered after this tragic incident that the fourth respondent did not have the necessary qualifications and competence to do the work. On the probabilities, reasonable enquiries would have uncovered that Mr van Staden had a certificate of an ambulance driver, which is not what the HPCSA prescribed (according to the evidence of Ms Nkoane of the HPCSA). Ms Nkoane stated without contradiction that anyone who dealt with such serious injuries (which the first respondent suffered) had to have received training in treating such injuries and should update themselves from time to time. It is on record that Mr van Staden obtained his certificate as an ambulance driver in 2006. The certificate did not mention any of his qualifications. In other words, reasonable scrutiny and even the most basic enquiry by Volkskool would have established very easily that Mr van Staden of the fourth respondent was not registered and did not have the necessary training required under the circumstances. This probably would have led to the discovery of the incompetence of Mr van Staden and his staff, as well as the lack of sufficient equipment. It was indeed 'chilling… [to have] only one spine board available for all three sports disciplines'.[13]

[31] Contrary to what counsel for the MEC argued, this is not hindsight wisdom. On the evidence that the high court had before it, Volkskool acting in *loco parentis*; and as the host responsible for providing emergency services on the day in question, failed to take reasonable steps to ensure that competent and properly equipped first

[13] The finding of the high court.

aid personnel were available to deal with the clearly foreseeable possibility of serious injuries and their consequences.

[32] In any event, *Chartaprops*[14] does not assist the MEC at all for two reasons. First, counsel for the MEC relied on the minority judgment of Nugent JA, which is impermissible. The view pronounced in the majority judgment is binding precedent, which must be followed. Second, in *Chartaprops*, the appointed contractor was not manifestly *imperitus.*[15] On the facts of this case, the fourth respondent through Mr van Staden was evidently *imperitus.* Volkskool made no effort to establish this and to find an alternative but went according to the mere say-so that Mr van Staden had provided the emergency services for many years without any complaint about his services.

[33] It follows from what I have stated in the preceding paragraphs, on the basis of the first respondent's unrefuted evidence supported by medical evidence; that the conclusion the high court reached cannot be faulted. The manner in which the first respondent was carried off the rugby field caused his second injury and the *sequelae* that flowed therefrom. The steps Volkskool took in preparation of the games to prevent the foreseeable injuries, were not reasonable under the circumstances. The appeal therefore ought not to succeed.

Costs

[34] Last, I turn to the issue of costs. It is trite that the determination of costs lies within the discretion of the court (of first instance). In recognition of this basic principle, a court of appeal will only interfere under limited circumstances ie where the trial court did not exercise its discretion judiciously or where it committed a material misdirection. The trial court mulcted the MEC in punitive costs for two reasons. First, that the MEC did not put up any defence to the action. Second, that because the experts were agreed, there was no dispute on the second injury and thus no reason for evidence to be led. What the high court lost sight of, however, was that the question of negligence was a material issue at the trial and was a matter of some complexity. The MEC was fully entitled to dispute that issue and to

[14] *Chartaprops* fn 13 above.
[15] *Imperitus* is defined in the English dictionary as inexperienced; ignorant.

present evidence in respect thereof. It could not fairly be said that the MEC acted unreasonably in its conduct of the trial. Counsel for the first respondent therefore did not defend the punitive costs order with any enthusiasm.

[35] The high court thus clearly committed a material misdirection that enjoins this Court to interfere in respect of punitive costs. For that reason, the order as to costs (to the extent that punitive costs were imposed) has to be set aside. The appeal should therefore succeed to the extent that paragraph 2 is amended. This, however, cannot be deemed to be success to the extent of entitling the appellant to the costs of partial success as it would be ordinarily.

[36] In the result, the following order issues:

1 The appeal succeeds only to the extent set out in para 2 below.

2 Paragraph 2 of the order of the high court is set aside and replaced with the following:

‘The first defendant is directed to pay the first plaintiff’s costs, such costs to include the costs of two counsel.’

3 The appellant is directed to pay the costs of the appeal, including the costs of two counsel.

_____

B C MOCUMIE

JUDGE OF APPEAL

Masipa AJA (dissenting)

[37] I have read the judgment of my colleague, Mocumie JA (the main judgment). Regrettably, I am unable to agree with its reasoning and conclusion. My disagreement primarily pertains to its endorsement of the high court's findings. For reasons that will become evident, I respectfully hold the view that the judgment of the high court was premised on an erroneous evaluation of the evidence and the law.

[38] I agree with the main judgment in respect of its categorization of the issues to be determined as well as the conclusion reached in respect of the secondary issue. I however disagree with the conclusion that the appellant was liable for the secondary injury sustained by the first respondent. My dissent is based on whether a case for negligence has been made out against the appellant. The nature of the first and the second injuries were not issues for determination in this appeal and the appeal turns mainly on the issue of negligence. As was set out in *Mashongwa v Passenger Rail Agency of South Africa,*[16] the test for negligence is whether a reasonable person in the appellant's position would have reasonably foreseen harm befalling the respondent as a result of his conduct and if so, would have taken reasonable steps to prevent the harm. If he would have, did he take reasonable steps to avert the harm that ultimately occurred.

[39] I similarly agree with the main judgment on the legal responsibility/liability imposed on the appellant in terms of the Schools Act. My view is borne out by the facts I set out hereinafter. In my view, what the main judgment omits are the facts relating to the steps taken by Volkskool in preparation of the matches. On 6 May 2006, when the first respondent was injured on his neck following a tackle, two first aid personnel carried him off the field without stabilising his neck with a solid neck brace and without a spine board. This resulted in the first appellant sustaining the second injury. The negligence in this matter revolves around the second injury.

[40] Prior to a rugby match commencing, there are certain requirements which must be met. These requirements are set out by the South African Rugby Union

[16] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 para 31.

(SARU). The minimum requirements in respect of first aid personnel for club and school matches in 2006 were:

'1. PERSONNEL

1.1 a PERSON OR PERSONS SUITABLY TRAINED IN Emergency Field-Side Care (A Trained First Aider or Paramedic).

1.2 At least 2 trained first aid assistants

1.3 Referees/coaches who have first aid knowledge could be of immense value

1.4 Some form of transport should be readily available if it is not possible to have an ambulance on standby. An ambulance at the playing venue is the ideal.

1.5 The presence of a Sports Medicine Trained Doctor or a doctor experienced in treating sports injuries is highly recommended

2. FIRST AID EQUIPMENT

2.1 Trauma Board or any suitable Stretcher.

2.2 Acceptable First Aid Kit which should include the following: -

(i) Splints

(ii) Neck Braces

(iii) Trauma Bandages

(iv) Antiseptics and Strapping.'

A note was added as follows 'If the minimum medical requirements at a field are not met, then a rugby match should not be allowed to take place. The referee *must* ensure that these basic minimum requirements are met before allowing the match to commence.'

[41] In order for the appellant to be held liable for the second injury sustained by the first respondent, it must be proven that the appellant was negligent. In my view, this was not proved. On the evidence, the applicant took all relevant steps to ensure compliance with the requirements set by SARU. I say so because prior to the rugby match, Volkskool engaged the services of the fourth respondent as a service provider. I accept, as was found by the main judgment, that the conduct of the first aid personnel in removing the first respondent from the grounds without a neck brace and without a stretcher was negligent.

[42] According to the first respondent, as set out in his heads of argument, the appellant is not held vicariously liable for the failure of the fourth respondent and its employees. He contends that the appellant is liable for the negligence of the

employees of Volkskool because they failed to vet and appoint suitably qualified, experienced and equipped first aid providers and to make sure that the service provider is adequately equipped to comply with its contractual obligations.

[43] As regards the failure to vet the fourth respondent, the evidence is that the fourth respondent was a known service provider in Klerksdorp, Orkney and Potchefstroom. Its services were not only utilized by the local schools but was also used by the local university. Due to the fourth respondent's busy schedule, Volkskool sent the fourth respondent dates of all the sporting competitions at the beginning of the year and he would quote them as and when necessary for each event. They pre-booked the fourth respondent.

[44] As appears from the minimum requirements, it was not a requirement of SARU that a first aid service provider present at the matches should be registered with the Health Professions Council of South Africa (the HPCSA). Accordingly, the fact that it subsequently came to light that he was not registered is a red herring. The main judgment placed much reliance on this issue to arrive at a finding that the appellant failed to act reasonably to ensure that the fourth respondent was suitably qualified.

[45] Mr Meintjies testified that he was responsible for planning the sports events for the periods 2002 to 2007. When he started at the school, Mr van Staden was already providing the services. They used the Leopard Rugby Union (the third respondent) referees for the match. As set out earlier, Volkskool was contracted to the fourth respondent.

[46] A copy of Mr van Staden's certificate was kept in the school sports file for contractors. This was required as it was necessary to know that Mr van Staden, the sole director of the fourth respondent, was qualified to do the work as set out in the Green Book for Rugby (the SARU requirements). According to Mr Bantjies, they followed a similar procedure. After requesting for first aid services from the fourth respondent, he received a quotation setting out costs for six first aid personnel, and the school paid in terms of the quotation. Meintjies had, prior to the first respondent's

incident, never heard of any incident involving the fourth respondent or Mr van Staden's services.

[47] The evidence of Ms Dara Kgomotso Nkoane of the HPCSA is relevant to the extent that it confirms that Mr van Staden qualified as an emergency care provider as was set out in his certificate issued by Cape Provincial Administration Ambulance Personnel Training Centre and irrelevant for the determination of the appellant's liability. Had the registration been necessary, it would have been set out as a SARU requirement. In this regard, I differ from the main judgement. I am satisfied that the appellant satisfied itself that Mr van Staden was suitably qualified. Having received Mr van Staden's certificate, being aware of his credentials and experience, it was reasonable to accept that he was suitably qualified. By way of analogy, when visits are made to doctor's rooms daily to consult them, patients are treated without any enquiries from the HSPCA on whether the doctor is registered or even qualified. To expect that Mr Meintjies should have contacted the HSPCA to verify Mr van Staden's qualifications is beyond the bounds of reasonableness. I accordingly agree with counsel for the appellant that when Volkskool appointed the fourth respondent as an independent contractor, it satisfied itself that it had necessary expertise, and its actions were reasonable under the circumstances.

[48] In respect of ensuring that the fourth respondent was adequately equipped, regard must be had to the SARU requirements. Mr Meintjies testified that on the morning of the tournament after the reception, he met Mr van Staden and other first aid personnel. He believed the first aid personnel were employed at the nearby hospital and were using their time off to assist the fourth respondent. This evidence was not challenged. There were two fields, A and B, and four first aid personnel, meaning two per field. He conducted an inspection and was shown the first aid kit, ice, and a spine board on each field, a neck brace and straps. Mr van Staden told him that since they could not let an ambulance stand on the premises, he was in contact with the ambulance staff and would call them should it be necessary. It is not in dispute that there was a provincial hospital 400 metres from the school and an ambulance could be called from there if needed. The evidence of Mr Bantjies was that he saw an ambulance in the morning when he walked out from breakfast at Volkskool.

[49] In order to satisfy the SARU requirements, Meintjies organized a referee from the Leopards Rugby Union. Mr Meintjies was satisfied that the requirements were met and his undisputed evidence was that having satisfied himself that the requirements were met, his role ended there. He then left for Klerksdorp for other school sporting activities, returning after the first respondent's incident. When he enquired from Mr van Staden about the absence of the spine board when the first respondent was removed from the field, he was informed that they were used for prior injuries. Mr Mentjies' evidence was not disputed.

[50] On the evidence, the SARU requirements in respect of equipment required in rugby matches during 2006 were met. Having ensured compliance, it was reasonable for Mr Meintjies to leave the school since the responsibility shifted from the school to the referee. It was for the referee to ensure that all requirements were met before the rugby game could start. He had the authority to stop the game at any stage where there was non-compliance with the requirements. Accordingly, liability in this regard should be placed at the door of the referee and not the appellant.

[51] In view of the reasons, I set out above, my view is that the first respondent failed to prove negligence on the part of the appellant. Consequently, the conclusion arrived at by the high court holding the appellant liable is, in my view, misguided. I would accordingly uphold the appeal with costs.

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M B S MASIPA

ACTING JUDGE OF APPEAL

Appearances

For appellant:	S Joubert SC with J C Klopper
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	The State Attorney, Bloemfontein
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