

SOUTH AFRICA / JUDGMENT

Temo v Passenger Rail Agency of South Africa (2021/44430) [2025] ZAGPPHC 736 (21 July 2025)

[2025] ZAGPPHC 736**COURT**

North Gauteng High Court, Pretoria

BEFORE

Swanepoel

CASE / FILE NUMBER

2021/44430

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**IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA**

Case number:

2021/44430

Date of hearing: 12

May 2025

Date delivered: 21

July 2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO

OTHERS JUDGES: YES/NO

(3)

REVISED

DATE: 21/7/25

SIGNATURE

In the application

between:

MAROTOLA BERNARD

TEMO

Plaintiff

and

PASSENGER

RAIL AGENCY OF SOUTH AFRICA

Defendant

JUDGMENT

SWANEPOEL J:

- [1] The plaintiff sues the defendant for damages arising from a train accident that occurred on 4 October 2018. The defendant has conceded that it is liable for 100% of the plaintiff's damages arising from the collision.
- [2] The particulars of claim (issued in September 2021) alleged that the plaintiff suffered a severe bodily injury, namely, a fracture of the left knee. The plaintiff claimed R 25 000 for past hospital and medical expenses, R 100 000 for future medical expenses, R 1 000 000 for loss of earning capacity, and R 500 000 for general damages.
- [3] There is no evidence, and there has never been, that the plaintiff suffered a fracture of any kind. The hospital notes record that he suffered a left ankle and left knee soft tissue injury. The X-rays also do not reveal a fracture. By the time that the matter came before me, the plaintiff's alleged injury had, without explanation, changed somewhat. The plaintiff had no longer suffered a fracture of the left knee. Shortly before the trial commenced the plaintiff amended the particulars of claim to allege that the plaintiff had suffered the following injuries:
- [3.1] Left knee injury;
- [3.2] Lumbar and cervical spondylosis;
- [3.3] Chronic neck pain;
- [3.4] Chronic back pain;
- [3.5] Ankle injury.
- [4] Dr. Ramushu, an orthopaedic surgeon, described the plaintiff's injuries, (as described by the plaintiff and as set out in the hospital notes) as follows:
- [4.1] Lower back and neck;
- [4.2] Right foot;
- [4.3] left knee and ankle.
- [5] The exact nature of these injuries was not explained. There is no indication that the plaintiff suffered any back or neck injury in the accident. Dr Ramusho reported that the plaintiff had been taken to Zamokuhle Hospital after the accident, where X-rays were taken. The hospital report records that the plaintiff suffered a left knee and left ankle soft tissue injury. The plaintiff was reviewed and discharged on the same day. The plaintiff complained that he now suffers from pain in the left ankle, neck pain, lower back, left knee and right foot pain. He is unable to lift heavy objects, and he cannot jog any more. As far as treatment for his injuries is concerned, the plaintiff makes use of analgesics on occasion. Dr Ramushu's examination

revealed that the plaintiff was generally well and had a normal gait. He has mild knee tenderness but the knee had a full range of motion and was stable. There was no noticeable tenderness of the lower back and neck no radiculopathy or myelopathy

signs. X-rays of the left knee, ankle and right foot were normal. According to Dr Ramushu, the plaintiff suffered acute pain for a week following the accident, and he suffered temporary disability for two weeks. There is nothing in Dr Ramushu's report to suggest that the plaintiff has suffered a loss of earning capacity.

[6] In cross-examination Dr Ramushu confirmed that the plaintiff had not suffered a fracture of any kind. She also conceded that, although he plaintiff suffered from lumbar spondylosis, there may be multiple causes for the condition, including normal aging. Dr Ramushu did not consult with the plaintiff's employer, nor did she obtain collateral evidence.

[7] The occupational therapist, Ms. Marule, had regard to Dr Ramushu's report, to a radiology report dated 9 June 2022, and to the hospital records. The plaintiff reported the following complaints to Ms Marule:

[7.1] Difficulty in lifting heavy objects;

[7.2] Occasional swelling and pain in the left knee and ankle;

[7.3] Difficulty in standing for prolonged periods;

[7.4] Pain in the left knee when kneeling;

[7.5] Pain in the lower back.

[8] The plaintiff is a welder. He has been in the employ of Actom Switchgear ("Actom") since 2005, and since 2010 he has been employed by Actom as an assembly welder. He reported to Ms Marule that his employer had moved him to light duty at work in order to accommodate his injuries. He said that after the accident he had been moved to a different department where he was responsible for assembling small parts, avoiding the need to lift heavy objects. He struggled to stand for prolonged periods of time. She classified his work as light to medium before the accident, and light, post-accident.

[9] In contrast to Dr Ramushu, who opined that the plaintiff walked with a normal gait, Ms Ramule said that he walked with a limping gait. As an aside, the two assessments were conducted within months of one another, and there was no explanation for the disparate findings by the two experts on this aspect.

[10] Ms Marule opined that the plaintiff would be able to continue working in his current position, albeit with appropriate accommodations. She was of the view that the plaintiff would not be able to return to his pre-accident work. As a result, she said, the plaintiff was a vulnerable employee and is reliant on a sympathetic employer.

- [11] As far as loss of amenities of life is concerned, Ms Marule reported that the plaintiff had reported loss relating to personal care, sexual activity, domestic chores, gardening, maintenance, access to transport, shopping and leisure activities. The exact nature of the loss in respect of each activity is not explained. Ms Marule did not confirm the plaintiff's version with his employer, nor did she obtain any collateral information.
- [12] It was put to Ms Marule in cross-examination that the first time that there was any evidence of problems with the plaintiff's knee was on 11 April 2025, some seven years after the accident (and approximately a month before the trial), when Dr Brian Makine diagnosed the plaintiff with knee tendinitis, and recommended that he should avoid squatting, bending and heavy lifting for a period of three months. It was put to Ms Marule that this was the also first time that the plaintiff's employer was made aware of the fact that the plaintiff was suffering from a physical disability. She was unable to deny that averment.
- [13] Ms Maitin, an industrial psychologist, had regard to the orthopaedic surgeon's report, the occupational therapist's report, the hospital records, and to the collateral evidence of a co-worker of the plaintiff, Mr Sam Mabawa.
- [14] Ms Maitin reported that the plaintiff had been working pre-morbidly as an assembly welder, in which position he had been appointed in
2010. At the date of assessment, in 2022 (four years after the accident), he was still working in the same position. The plaintiff described his injuries to Ms Maitin as a neck, left ankle and right foot injury. The plaintiff did not report the knee injury, allegedly the most serious injury, to Ms Maitin. The plaintiff's current complaints were neck pain, left ankle pain, right foot pain, difficulty carrying heavy objects, and reduced range of movement in the neck.
- [15] Mr Mabawa allegedly reported to Ms Maitin that the plaintiff had been able to meet the physical requirements of his job, but when heavy lifting was required, the plaintiff was excluded from such activities. He apparently confirmed that the plaintiff complained about pain in his knee. Mr Mabawa never testified and his alleged version is thus hearsay. Ms Maitin reported that the plaintiff is, however, able to meet the physical demands of his job.
- [16] Ms Maitin postulated the following pre-morbid scenario:
- [16.1] That the plaintiff was at an advanced state of his career, earning R 166 512 per annum.
- [16.2] The plaintiff had a Grade 10 qualification, had started working as a wood chipper, and had advanced to become an assembly welder, a level that most people with Grade 12 did not achieve.
- [16.3] The plaintiff would likely, had it not been for the accident, have advanced a further one or two levels to Patterson B 3 to 4 levels.
- [17] Post-morbid Ms Maitin concluded that:

“Post-accident, and whilst he is able to meet the physical demand of his job, according to his employer, he is less competitive at his current workplace in comparison with his uninjured peers in that he has restrictions for tasks that require heavy lifting and/or carrying. This renders him more at risk of retrenchments in comparison with others, because it is not uncommon for employers to dismiss less effective employees when they are faced with budgetary constraints that necessitate headcount reduction. Mr Temo is also less competitive in the open labour market in comparison with his uninjured peers. The writer concurs with Occupational Therapist, Ms Marule, that should he lose his current job, he may find it difficult to secure alternative employment in the open labour market. With his current employer, and all things being equal, he should be able to sustain employment until he retires.”

- [18] In cross-examination it was put to Ms Maitin that Actom is affiliated to Seifsa, the Steel and Engineering Industries Federation of South Africa, and that the basis of the plaintiff's remuneration was determined not according to Patterson scales, but according to agreements reached between employer and employee organisations. Ms Maitin conceded that she had not been aware of that fact. It was put to Ms Maitin that the entire basis for her postulation was incorrect, inasmuch as she had applied the Patterson scales, and had not considered the bargaining council scales. Ms Maitin denied the allegation, saying that whatever scale was applied, the question is how much money the plaintiff stands to lose. It was also put to Ms Maitin that the plaintiff had been employed as an assembly welder for thirteen years, that he had not progressed any further, and that he was not qualified to be promoted. Ms Maitin had not obtained collateral evidence on the possibility of the plaintiff being promoted, nor could she substantiate her belief that the plaintiff would have progressed at all. Her view was that the plaintiff would likely have moved into a management position, but there is no evidence to support that view.
- [19] The plaintiff testified that he has a Grade 10 qualification and that he has been employed by Actom for twenty years. Before the accident he was employed as an assembly welder which required some heavy lifting. Post-accident the plaintiff has been accommodated in his work. He is unable to lift heavy objects, and, when he engaged with his employer regarding his physical difficulties, another person was employed during 2020 to assist him.
- [20] As far as his loss of amenities of life are concerned, the plaintiff says that he used to jog and lift weights, which he cannot do any longer. He used to do his own gardening, which he also cannot do any longer. His sexual abilities have been compromised. The plaintiff did not explain what effect his injuries have on these daily activities, nor how they inhibit his activities.
- [21] In cross-examination the plaintiff testified that he had on occasion consulted a doctor about his knee injury. He confirmed that he had never suffered a fracture of the knee, and that the injury to the knee was only a soft-tissue injury. The plaintiff also testified that he had consulted with different doctors concerning his knee injury, but he acknowledged that the first time that he had produced a certificate to his employer that referred to the knee injury was in April 2025. I must also point out that the certificate only required the plaintiff to be

accommodated for three months. It did not indicate that the injury was likely to be permanent.

- [22] The plaintiff was of the view that his injuries render him more vulnerable to retrenchment. However, he had never been warned that he might be retrenched, and there seems to be no factual basis to his belief. That concluded the evidence for the plaintiff.
- [23] Mr Milton Xaba testified for the defendant, that in 2018 he was the plaintiff's direct supervisor in the assembly department. He is now the plaintiff's line manager in charge of, inter alia, the assembly department. He said that the plaintiff had been off duty for a few days in 2018, and upon his return he told Mr Xaba that he had been involved in an accident. The plaintiff had not again complained of suffering from an injury until he produced the doctor's note in April 2025.
- [24] Mr Xaba testified that Actom has an internal process by which employees are assisted if they are unable to perform their duties. The employee would present a sick note to his supervisor which would then be handed on to the company clinic, where the employee would be assessed by a nurse. The employee might also be referred to the company doctor in appropriate circumstances. Where necessary, employees are accommodated to assist them in performing their duties. Mr Xaba says that the plaintiff has never complained, nor did he take advantage of the company resources that are there to assist employees, until April 2025.
- [25] Once Mr Xaba had received the sick note in April 2025, the plaintiff was placed on lighter duties in order to assist him in performing his duties for a period of three months. He was also provided with a crane to assist him in lifting heavier items.
- [26] In cross-examination it was put to Mr Xaba that he does not know of the plaintiff's alleged difficulties because he does not interact with him on a daily basis. He denied the allegation. He said that he interacts with the plaintiff directly. He said that the only reasons why the plaintiff was currently accommodated was because of the April diagnosis of tendinitis of the knee. He denied that the plaintiff had been moved to a different department.
- [27] Ms Laetitia Kruger testified that she is the human resources manager at Actom. As such, she is directly responsible for all aspects pertaining to the workforce. She first became aware of the plaintiff's physical difficulties when she received the doctor's note in April 2025. She said that if the plaintiff had been suffering from a medical condition, Mr Mabawa, as the plaintiff's supervisor, would have reported it to her. She would then have arranged for the plaintiff to be assessed.
- [28] Ms Kruger testified that the plaintiff is a Grade AA 6 employee, and that, if he wanted to qualify for promotion, he would have to complete a trade test. However, he would not be able to write a trade test unless he first obtained a N2 or N3 engineering qualification. It is clear from her evidence that in practical terms, the plaintiff was never in line for promotion due to his lack of qualifications.

- [29] Ms Kruger's evidence concluded the evidence for the defendant. In argument I enquired about the status of the actuarial report that had been uploaded to CaseLines, but in respect of which there had been no evidence. The defendant's counsel indicated that it did not admit the contents of the report, at which point the plaintiff sought to reopen its case to call the actuary. It became clear that the failure to call the actuary resulted from an error by the plaintiff's legal team. To obviate the obvious prejudice to the plaintiff, I granted the plaintiff leave to reopen its case, whereupon the plaintiff called the actuary.
- [30] Mr. Lucky Miya testified that he is an actuarial analyst. He had prepared the actuarial report which had then been checked by Mr Itai Karidza. He confirmed that the report was correct. Mr Miya was cross-examined on the basis of the postulation provided by Ms. Maitin in the industrial psychologist's report. It was put to him that the report relied upon Patterson Scale figures, whilst the plaintiff's employment was subject to the salary scales agreed upon in the Bargaining Council.
- [31] Mr Miya was unaware of the fact that the metal industry's agreement governed the plaintiff's income. However, when he was made aware thereof, Mr Miya conceded that the entire basis for his report was incorrect. He said that that had he had the correct information, his calculation would have been different, although he could not say what it would have been.
- [32] The plaintiff's case is problematic on many levels. Firstly, the most glaring difficulty that he faces, is the allegation made in the first particulars of claim that the plaintiff had suffered one injury, a left knee fracture. That turned out not to be the case. At best for the plaintiff he suffered a soft tissue injury of the left knee and ankle. In the amended particulars of claim the injuries listed were substantially different. The plaintiff has provided no explanation for that fundamental difference.
- [33] The second major difficulty that the plaintiff faces is the quality of the expert reports of Dr Ramushu and Ms Marule. Expert reports are intended to place facts before the Court that justify the expert's opinion. Courts are not bound by expert opinions, but must consider their reliability given the surrounding facts of each case. In *AM and Another v MEC for Health, Western Cape*[1] the Supreme Court of Appeal said the following regarding expert witnesses:

"[17] Something needs to be said about the role of expert witnesses and the expert evidence in this case. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts

that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge

concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes

evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning that their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.”

[34] From BEE v Road Accident Fund[2] and other authorities the following principles relating to experts can be extracted:

[34.1] An expert witness is there to assist the court and not to usurp the function of the court.

[34.2] Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court;

[34.3] The court must be satisfied as to the correctness of the expert’s reasoning;

[34.4] Absent any reasoning, the opinion is inadmissible;[3]

[34.5] A court is not bound by an expert’s opinion;[4]

[34.6] For an expert’s evidence to be helpful he or she has to be neutral;[5]

[35] Both Dr Ramushu and Ms Marule relied largely on the plaintiff’s version, and where they do so, they even contradict one another, for instance as far as the injuries that the plaintiff complains about. Furthermore, one would think that where a plaintiff complains about a life-altering leg injury, his gait would be relevant, and whether he limps or not. A limp is directly relevant to the plaintiff’s loss of amenities and loss of earning capacity. Nonetheless, Ms Marule reports that the plaintiff walks with a limping gait whilst Dr Ramushu says his gait is normal. The discrepancy on this issue is not explained. Furthermore, neither of these experts attempted to obtain collateral evidence.

[36] Ms Marule’s strange explanation for her failure to obtain collateral evidence is that she never obtains collateral evidence as family members tend to lie to assist the plaintiff. One would have thought that the person with the greatest motive to lie is the plaintiff and that it is important to test his version against other available evidence. The question remains, if Mr Mabawu had confirmed the plaintiff’s version, why was he not called as a witness? Ms Marule’s explanation for failing, for instance, to contact the plaintiff’s employer (other than Mr Mabawu), does not convince.

[37] I align myself fully with the dictum in *Adv Claire Cawood obo Cloete v Road Accident Fund*[6] where the court said:

“...in *Ndlovu v the Road Accident Fund*, 2014

- (1) SA 415 (GSJ), the Court warned against expert reports or evidence where the expert does not distinguish between objective originating data (such as, in that case, hospital records), and Mr Cloete's say-so or unsubstantiated hearsay. "An opinion is of little value if the material facts relied upon are flawed."
- [38] In this case the facts relied upon by Dr Ramushu and Ms Marule originated largely from the plaintiff. The only objective evidence is the hospital report and the X-rays. Both of those contradict the plaintiff's original averment that he suffered a knee fracture. There is no basis laid in Dr Ramushu's report that the plaintiff's spondylosis originated from the accident, and her evidence was that there could be many possible causes for that condition. Her opinion that the plaintiff should be compensated for spinal injections at R 30 000 per session is therefore inexplicable.
- [39] The main difficulty with the opinions expressed by Dr. Ramusho and Ms. Marule is that they are contradicted by the evidence of Mr Xaba. The plaintiff suggested in argument that I should ignore Mr Xaba's evidence on the grounds that he did not have daily contact with the plaintiff, and did not have knowledge of his condition and the fact that he is being accommodated.
- [40] In my view Mr Xaba's evidence cannot be ignored. At the time of the accident he was the plaintiff's direct supervisor, and subsequently he has become his line manager. The accident occurred seven years ago, and on the plaintiff's version he has been accommodated by his employer since 2020. It is inconceivable that Mr Xaba would be unaware, for this length of time, of the physical difficulties that the plaintiff complains of. Had the plaintiff been accommodated by the appointment of an assistant, it is extremely unlikely that Mr Xaba would have been unaware thereof.
- [41] Each employee of Actom undergoes a medical assessment annually. There is no record of the plaintiff complaining that he was in any manner compromised in his work. Furthermore, Mr Xaba's uncontested evidence is that in March 2025 he conducted an interview with the plaintiff to ascertain why he was underperforming. The plaintiff did not report any difficulty in coping physically with his work. Had he truly had difficulties in coping, that interview would have been the perfect opportunity for the plaintiff to have reported his complaints. For the reasons set out above, I cannot rely on the evidence of Dr Ramushu and Ms Marule, and I accept Mr Xaba's evidence that there has been no indication during the previous (almost) seven years (until April 2025) that the plaintiff had suffered any loss of earning capacity. Even if the plaintiff has some residual difficulties as a result of his ankle and knee injuries, there is no evidence that he will suffer patrimonial loss. He is secure in his employment. It is unlikely that even if he had remained uninjured, he would have been promoted. There is no evidence that he is likely to be dismissed or retrenched, nor that his career path has in any way been affected by his injuries. The plaintiff's injuries have not impacted his retirement age. If he is compromised, Actom will accommodate him.

- [42] I find, therefore, that the plaintiff has not proven that he has suffered patrimonial loss for future earning capacity. Even if I had found otherwise, the figures presented to me by the actuary are, on Mr Miya's own version, incorrect, having been based upon the incorrect premise that the plaintiff's income may be predicted by the application of the Patterson Scale. The defendant has submitted, on the one hand that the plaintiff has failed to prove patrimonial loss due to loss of earning capacity, but on the other hand it has submitted that I should award a nominal sum of R 100 000 for loss of income. Those two propositions are incompatible with one another. Given the above, I see no legal basis to make such an award.
- [43] As far as future medical expenses are concerned, Dr Ramushu testified that there is a 60% to 80% possibility that the plaintiff would have to undergo surgery. She also believes that analgesics will relieve his condition. However, he will require arthroscopy on both his ankle and his knee. Those procedures attract a cost of R 80 000. Analgesics will cost a further R 5000. The plaintiff has not proven that his spondylosis is the result of the accident, and he is not entitled to damages relating to that injury. Ms Marule reported that the plaintiff has suffered loss of amenities in respect of his personal care, sexual activity, domestic chores, gardening, maintenance, transport access, shopping and leisure activities.
- [44] In respect of none of these alleged difficulties has there been any evidence that the loss is the result of his ankle or knee problems, as opposed to the spondylosis, neither did the plaintiff explain how the knee and ankle injuries have impacted on the above activities.
- [45] The plaintiff is therefore entitled to be compensated for the likely arthroscopy in the sum of R 80 000 and analgesics in the sum of R 5 000 and no more. In my view there is insufficient evidence that he is entitled to any other future medical expenses. There is no evidence that he has suffered damages for past medical expenses. I have already held that the plaintiff has not proven that he has suffered a loss of earning capacity. The only remaining head of damages is general damages relating to the left knee and left ankle soft tissue injuries.
- [46] As far as comparable awards are concerned, in *Pieterse v Santam Versekeringsmaatskappy*[7] the plaintiff suffered a left knee and left hand injury, with accompanying ligament and nerve damage. He required surgery to repair his injuries. The court awarded R 1500 which equates to R 153 150 in current terms. In *Armstrong v President Versekeringsmaatskappy*[8] the plaintiff suffered a knee and ankle injury that required future arthrodesis to both the knee and ankle. He had already undergone two operations to repair the injury. The plaintiff walked with a limp, and his leg was stiff, leaving him effectively crippled. The court awarded R 3500, which equates to R 357 350 in today's terms. In this case the injuries fall somewhere in the middle of the two cases mentioned above. Both parties submitted that an amount of R 200 000 is appropriate as general damages. I agree.
- [47] In my view the following award is appropriate:
- [47.1] Future medical expenses: R 85 000;

[47.2] General damages: R 200 000

Total:

R 285 000

[48] I make the following order:

[48.1] The defendant shall pay the plaintiff R 285 000 in respect of general damages and future medical expenses.

[48.2] The defendant shall pay interest on the aforesaid amount calculated from 14 days after this judgment, at the applicable interest rate, a tempore morae;

[48.3] The defendant shall pay the plaintiff's costs of the action on Scale B.

SWANEPOEL J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

Counsel for the Plaintiff:

Adv S Mayo

Adv. P Makhubela

Instructed by:

Mashabela Attorneys Inc

Counsel for the Defendant:

Adv. F Opperman

Instructed by:

Norton Rose Fulbright SA Inc

Heard on:

12 - 13 May 2025

Judgment

on:

21 July 2025

[1] AM and Another v MEC for Health, Western Cape 2021 (3) SA 337 (SCA)

[2] BEE v Road Accident Fund 2018

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- (4) SA 366 (SCA)
- [3] Masstores (Pty) Ltd v Pick and Pay Retailers (Pty) Ltd 2016 (2) SA 586 (SCA)
- [4] Road Accident Appeal Tribunal v Gouws and another [2017] ZASCA 188 (SCA); Michael and another v Linksfield Park Clinic (Pty) Ltd and another
- [2002] 1 ALL SA 384 (A); Michael and Another v Linksfield Park Clinic 2001 (3) SA 1188 (SCA)
- [5] Stock v Stock 1981
- (3) SA 1280 (A) at 1296 E-F; Jacobs v Transnet Ltd t/a Metrorail 2015
- (1) SA 139 (SCA);
- [6] Adv Claire Cawood obo Cloete v Road Accident Fund [2017] ZAGPPHC 828
- [7] Pieterse v Santam Versekeringsmaatskappy 1968 QOD 844 (C)
- [8] Armstrong v President Versekeringsmaatskappy 1967 QOD 839 (T)
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