

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 12843/2020

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

Date: 23 October 2023 E van der
Schvff

In the matter between:

NELSON DINIS NEVES

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Van der Schvff J

[1] The only contentious issue in this matter is whether the plaintiff, a foreign national, who was living and working in South Africa when he was injured in a motor vehicle

accident, in circumstances where he did not possess a work permit and was not an asylum seeker, can claim loss of income from the defendant (the Fund).

- [2] It is the defendant's position that the plaintiff cannot succeed with his claim for loss of income because he is a foreign national who was not issued a work permit and was also not an asylum seeker.
- [3] The law denies compensation where bodily injuries prevent someone from earning money illegally.¹ Where a person who earns income unlawfully is injured, the fact that he cannot recover compensation for such loss does not exclude a claim for the possible impairment of his lawful earning capacity. In quantifying a claim for loss of earning capacity, proper provision has to be made for the fact that the plaintiff failed to employ his lawful earning capacity or, in all probability, would not have done so in future.²
- [4] *In casu*, the plaintiff, a foreign national, earned an income as a mechanic or assistant mechanic. I am of the view that it is irrelevant whether the plaintiff was a mechanic or assistant mechanic, as his evidence that he earned R250 per day was not challenged. Since the unlawfulness of the employment does not flow from the nature of the specific activity but from the fact that the plaintiff did not possess a work permit, I am of the view that in the current matter, the quantification of the loss of earning capacity can be based on the actuarial calculation, in that the income-generating activity gives an indication of the plaintiff's income generating capacity. The plaintiff's income-generating activities can and should be distinguished from scenarios like earning a living through theft or human trafficking, where the income derived from such activities cannot be used as a basis for quantifying the loss of earning capacity.

¹ *Dhlamini v Protea Ass Co* 1974 (4) SA 906 (A); *Nkwenteni v Allianz Ins Co Ltd* 1992 (2) SA 713 (Ck). Visser PJ, Potgieter JM *et al. Visser and Potgieter's Law of Damages* 2nd ed. JUTA 40.

² Visser and Potgieter, *supra*, 284.

[5] I am of the view that a higher-than-normal contingency deduction will address the issue of fluctuating earnings and provide for the fact that this claim is for the loss of earning capacity and not a claim for loss of future income. I am of the view that a 15% contingency deduction is sufficient.

[6] The parties settled the issue of general damages.

ORDER

In the result, the following order is granted:

- 1. The draft order marked 'X' dated and signed by me is made an order of court.**

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the plaintiff:	Adv. C Jordaan
Instructed by:	Spruyt Inc.
For the defendant:	Mr. Mabena
Instructed by:	State Attorney
Date of the hearing:	18 October 2023
Date of judgment:	23 October 2023