

IN THE HIGH COURT OF SOUTH AFRICA  
DURBAN AND COAST LOCAL DIVISION

CASE NO: 9261/2000

In the matter between:

EBNASAYED RAZACK  
Vs  
ROAD ACCIDENT FUND

PLAINTIFF  
DEFENDANT

---

JUDGMENT

---

DELIVERED ON: 19 October 2007

MOLEKO J

1. The Plaintiff a 48 year old male has instituted an action against the Road Accident Fund (Defendant), in terms of the Road Accident Fund Act no56 of 1996 (the Act) for payment of damages arising from a motor vehicle collision which occurred on 13 April 1997.
2. Plaintiff's claim as set out in his amended particulars of claim is for payment of a sum of R2 677.801,00 computed as follows:-
  - (a) Estimated future hospital

and medical expenses	R82.000,00
(b) Past loss of income	R472.964,68
(c) Estimated future loss of income	R1 717.981,00
d) General damages in respect of pain, suffering, disfigurement, disability and loss of the amenities of life	R200.000,00
e) Reasonable and necessary Costs incurred in travelling to:	
i) King George V Hospital for Medical treatment (45 trips x 5kms x 2 x R2,20)	R9.900,00
(ii) R.K.Khan Hospital for medical treatment (29 trips x 10kmn x 2 x R2,20)	R1.276,00
f) Costs of the hire of a domestic servant:	
(i) from January 2000 to December 2004 (5 years) (5 days a week at R300.00 per month) (that is 5 x 12 x	

R300.00) R18.000,00

(ii) from January 2005 to

June 2005 (6 months)

(2 days a week at  
R400.00 per month)

R2.400,00

g) Hire of a gardener from

January 2000 to June 2005

(5 ½ years)(2 days a month  
at R40.00 per day – 5.5 x  
12 x R80.00)

R 5.280,00

---

R2 677.801,00

---

3. I have been advised by counsel that on 12 November 2001 the Court ruled that Defendant was liable to compensate Defendant. Therefore the only issue I am required to determine is the quantum of damages which the Plaintiff has proved for which Defendant is liable to pay to the Plaintiff.

4. At the commencement of the trial it was agreed and noted between the parties that:-

4.1 Defendant has agreed that they will furnish the Plaintiff with a certificate in terms of Section 17(4)(a) of the Act to cover the

Plaintiff's claim in respect of future hospital, medical and related expenses.

4.2 The Plaintiff's claim for general damages was agreed in an amount of R200.00,00.

4.3 The reports of the experts Professor L.E. Goga, an orthopaedic surgeon, Mr S.A. Osman, also an orthopaedic surgeon, Dr T. Fourie, a urologist, Dr S. Nadvi, a neurosurgeon and Dr Hugh Staub, a neurologist were admitted by Defendant as being true and correct without the necessity of proof thereof save for the statements made to the said experts by the Plaintiff.

5. The issues that remain to be determined are:-

- (a) Whether Plaintiff has proved that he is entitled to payment of future and past loss of earning.
- b) If that is proved what the quantum of such damages have been proved by the Plaintiff.
- c) The reasonable and necessary travelling costs incurred by the Plaintiff in travelling to King George V Hospital and RK Khan Hospital for the purpose of medical treatment.

- d) The cost of hire of a domestic helper.
- e) The costs of hire of a gardener.

6. As far as the quantum of the Plaintiff's claim for loss of earnings is concerned it was agreed that:-

6.1 It would not be necessary for the actuaries retained by the parties to testify.

6.2 That I would be required to rule on the disputed assumptions which should be submitted to actuaries or one of them for purposes of calculation of Plaintiff's claim for loss of earnings.

7. I shall start with the issue of whether Plaintiff has proved that he is entitled to be compensated for past and future loss of earnings, the latter entails determining whether Plaintiff has residual capacity to resume employment or to obtain employment in the open market.

8. I shall start with the Plaintiff's brief background up to when he was involved in a collision and admitted to hospital.

## BACKGROUND

9. The Plaintiff's back ground up to the collision briefly is in essence as follows:-

9.1 Plaintiff, is a male born on 2 February 1956. He is married and has three children. He passed standard 6 and left school in standard 7. He was employed by his brother, Arthar Hussen Razack (Mr Razack) from January 1995 as a driver/supervisor at a business known as Babs Waste Paper (Babs) a business which was initially run by their father and was later taken over by Mr Razack. Plaintiff was involved in the collision while driving when another motor vehicle collided with his vehicle. It appears after the collision he became unconscious. The following morning he was taken by paramedics to R.K. Khan Hospital where he was treated, he was also treated at King George V Hospital for his injuries to the thoracic region.

9.2 At the time of the collision Babs Waste Paper was conducted at Barrier Place in Durban, in 2000 or 2001 it moved to Brookland road Jacobs, Durban.

9.3 It is common cause or is not seriously disputed that as a

result of the collision Plaintiff sustained injuries which include:-

- a) multiple fractured ribs on the left between 3 and 6.
- b) fracture of left clavicle.
- c) a severe flexion distraction injury of the thorax segments of 8 and 9 with subluxation anteriorly of the thorax.
- d) Mild to moderate head injury.

10. The effect of the injuries he sustained are dealt with by the experts whom I have already referred to. In order to have clear view of the nature and sequelae of these injuries (particularly the injury to the thoracic region), I shall now briefly refer to some aspects which appear in the experts reports.

11. Mr Osman an orthopaedic surgeon in his report dated 8 November 1999 sets out the history of the Plaintiff from the time he was injured. He states that on the morning following the date of the accident (13 April 1997) Plaintiff

was taken to R.K.Khan Hospital where he was diagnosed to have multiple fractured ribs with underlying pneumothorax to his chest. He was later discovered to have an injury to his thoracic spine. He was then sent to Wentworth Hospital where an MRI scan was used to examine his thoracic spine. After that examination he was transferred to King George V Hospital. Initial, x rays showed evidence of a flexion distraction injury of the thoracic segment of 8 and 9 with subluxation anteriorly of thoracic vertebrae. There was evidence of damage to the inter-vertebral disc at this level. On the 12 August 1997 Plaintiff was taken to theatre where he had trans – thoracic decompression with excision of the vertebral bodies of T8 and T9. He also had decompression of the spinal cord, intra operation, findings showed 60% compression of the cord anteriorly compromised by segments of the disc on the cord (a rib) a spinal cage was inserted, with use of rib graft. He was ultimately discharged on 21 August 1997.



12. In his summary Mr Osman says that following surgery Plaintiff has not made any significant improvement in terms of neurological recovery. He states that he has made satisfactory motor recovery and presently has only mild weakness of his left. He remarks that it is about 2 years since Plaintiff's injury and he has made no further improvement in his neurological injuries.

13. In regard to loss of income he says:-

"He has not returned to work from the time of his injuries.

It is expected that he will have ongoing disability, in view of the sensory deficit and ongoing imbalance.

In view of the prolonged recovery period that he has already had, it is not expected that he would make any further improvement in his present disability.

It is therefore considered that this man would not be able to return to his previous job description. He requires a sheltered employment, mainly sedentary in nature, for which unfortunately, he is not presently qualified."

14. Professor Goga, an orthopaedic surgeon retained by Defendant, states the following in his report dated 6 August 2004:-

"Dorsal Spine Injury: Mr Razack sustained a very serious and significant dorsal spinal injury. Fortunately he was not totally paralyzed and presented

mainly with a sensory deficit to his left lower limb. He was recorded as having a Frankel D level of neurological compromise (essentially a sensory deficit). On my examination of his lower limbs his motor power is good but not normal. He has loss of sensation over the lateral thigh and over the plantar aspect of his toes. I believe that Mr Razack has significant injury to the posterior columns with alterations of light touch, vibration and joint position sense.”

**On effect of employment and loss of amenities he further says:-**

“Mr Razack will definitely not be able to resume his job as a driver supervisor. Mr Razack is 48 years old presently and educated only to standard 7. He has problems with lower backache as well as urinary tract dysfunction. I believe that Mr Razack will need significant retraining and a sheltered employment. If this cannot be arranged then he needs to be medically boarded.”

**15. Dr Nadvi, a neurosurgeon said in his report dated 6 May 2005:-**

“There is also no doubt that Mr Razack suffered an extremely severe spinal cord injury, which has left him with a permanent paraparesis with a negative impact on bladder, bowel and sexual functioning. Once again, as 8 years have since the accident, I do not expect any further improvement on his neurological condition with regard to his spinal injury.”

In regard to employment prospects Dr Nadvi stated:-  
“There has been a gross diminishment in Mr Razack’s employment prospects. Clearly he will not be able to drive a heavy duty vehicle. At best he will be suited to protected or sheltered form of employment. This is both as a result of his spinal cord injury as well as his cognitive deficits pertaining to his head injury.”

16. Dr Hugh Staub, a neurologist examined Plaintiff and reported on 12 May 2004 that:-

“As a result of the injury to his thoracic spine, he sustained some spinal cord damage which has left him with a mild paraparesis, particularly affecting the left leg. The patient has had a stabilizing procedure done on his thoracic spine.

The patient still has some neurological disabilities relating to this fracture and there is no significant prospect of recovery in the near future. The severity of his injury has result in some disabilities which will be outlined in detail below.”

Some of the disabilities he found on examination of the Plaintiff include:-

- a) slight weakness of the left leg.
- b) Sensation was diminished on the left side from about T7 down on the left side to light touch and pinprick.

17. Professor Lazarus report was not admitted by agreement consequently he was called to testify and was cross examined at length. What emerged from his evidence was that he basically confirmed his findings in his report. His basic findings were left unscathed by the cross examination. His findings were made after reviewing the findings of the other experts, interviewing and performing tests on the Plaintiff, including interviewing his wife.

He for example referred to the effect of the injury to the spine and referred to the report of Dr Nadvi, Professor Goga, M/s Bainbridge and Mrs Kisten.

After interviewing Plaintiff and examining him and subjecting him to neuropsychological tests, he found he has a sense of helplessness and hopelessness about his current functioning arising from his urological condition.

He also displayed a significant irritability and lack of insight into his difficulties. He identified several other cognitive factors that would impact negatively on Plaintiff's employability, such as:-

- a) short term memory;
- b) impaired ability to learn new information which would also negatively impact on his retrainability;
- c) organisation and goal setting tests fell below normal.

He found that Plaintiff is not able to return to his previous employment of driver supervisor even in part, and that alternative employment even in a reduced capacity is unlikely in view of the neuro-cognitive and emotional sequelae associated with the accident. He opined that at best some form of sympathetic employer is the more probable option.

#### AGREEMENT BY OCCUPATIONAL THERAPISTS:

18. At the commencement of the trial the two occupational therapists M/s Jane Bainbridge retained by Plaintiff and Mrs Colleen Kisten retained by Defendant, met with a view to achieving consensus in regard to their opinions regarding the extent of the Plaintiff's vocational compromise resulting from the injuries he sustained in the

collision.

19. On 22 June 2005 the occupational therapists produced a minute of an agreement between them which is exhibit A177 and reads as follows:-

“1. Ms Bainbridge and Ms Kisten agree that Mr. Razack sustained a severe spinal cord injury and continues to suffer residual sensory and neurological and urological difficulties.

2. Agreement was reached regarding deferring to a neuropsychologist re: residual sequelae of a head injury suffered in the accident.

3. Ms Bainbridge and Ms Kisten agree to defer to the neurosurgeon regarding whether a head injury occurred and the severity thereof.

4. Ms Bainbridge and Ms Kisten agree their physical assessment findings pertaining to:

- (a) compromised mobility, altered balance, reduced weight-bearing on the left lower limb;
- (b) altered joint range and muscle strength of the left lower limb which impact upon mobility and stability;
- (c) altered sensory abilities of the left lower limb and foot which will impact functionally upon his ability to drive especially a heavy duty vehicle.

5. Ms Bainbridge and Ms Kisten agree that future training is not a probable option, owing to age, limited education. The experts defer to the neuropsychologist regarding residual sequelae of a head injury and the impact thereof upon retraining.

6. Ms Bainbridge and Ms Kisten agree that part time domestic assistance is allowed, should Mr Razack live alone in future (15hrs/week @R11/hr). A handyman twice a month @ R60/day is deemed necessary.

7. Ms Bainbridge and Ms Kisten agree that Mr Razack have access to 12 hours of occupational therapy for advice on the use of assistive devices/leisure time pursuits/ergonomic intervention. Regular annual review (1hr per annum) is also required.

8. Ms Bainbridge and Ms Kisten agree that Mr Razack will benefit from the items of specialised equipment as indexed in the report by Ms Bainbridge.



9. Future loss of earnings:

Ms Bainbridge and Ms Kisten agree that:

- 9.1 Mr Razack cannot drive a heavy duty vehicle.
- 9.2 Mr Razack is no longer suited to working as a driver/deliveryman where unloading or loading goods is required.
- 9.3 Mr Razack cannot return to or resume his former employment as a driver/supervisor if it required him to act primarily as a driver (70% of his time as reported by Mr Babs Razack – employer).
- 9.4 Open labour market employment options as a driver/supervisor are negligible.
- 9.5 Mr Razack may be accommodated in a reduced sedentary capacity as a supervisor (i.e. limited duties and limited responsibility due to physical limitations excluding tasks which include dynamic postures, balance, climbing, inspection of machinery, climbing in and out of trucks or hoppers which will limit involvement to ground

floor observation of waste sorting) within a sympathetic environment, with a tolerant charitable employer.

9.6 Reduced capacity employment will impact upon earnings capacity.”

20. The two occupational therapists produced a further minute of an agreement which is exhibit A180 and reads as follows:-

“1. Ms Bainbridge and Ms Kisten agree that Mr Razack’s pre morbid occupation responsibilities were as follows:

1.1 Driving duties:

- (a) driving 4-10 ton vehicles;
- (b) climbing on and off such vehicles to pack waste;
- (c) climbing on and off such vehicles to estimate waste proportions;
- (d) weighed waste at site of collection;
- (e) paid suppliers from cash float;
- (f) helped load trucks if short staffed;
- (g) occasionally drove hyster.

## 1.2 Supervisory duties:

- (a) oversee 60-70 general workers;
- (b) oversee 11 drivers;
- (c) allocation of hyster duties;
- (d) forwarded documentation re weights/  
respective figures to secretary;
- (e) started up baling machine.

2. Ms Bainbridge and Ms Kisten agree that  
he no longer is capable of executing  
driving or duties related to driving.

3. Ms Bainbridge and Ms Kisten concur  
that he is no longer responsible for the  
following supervisory duties:

- (a) forwarding of documentation from day shift  
deliveries to the secretary;
- (b) overseeing 11 drivers.

4. Ms Bainbridge and Ms Kisten concur

that should he be employed in a reduced capacity (i.e. night shift supervisor) he is capable of :

- (a) overseeing the night shift general workers;
- (b) help/oversee the starting up of baling machine;
- (c) occasional allocation of hyster duties.

5. He thus appears capable of less than 50% of former supervisory duties (i.e. 25% of former overall function as a driver/ supervisor)

6. In the context of him working at night (i.e. under less demanding circumstances, the depot working at 17.7% of day shift function), Mr Razack's residual capacity as a supervisor in a sympathetic environment is estimated to be 8.5% of his former

overall function, but for the accident, as a driver/supervisor.”

21. Jane Bainbridge when she testified, her evidence was in essence that on 18 and 19 April 2005, she assessed the Plaintiff and did a work visit. She referred to her meeting with M/s Kisten whose minutes I have already set out above.
22. She said in the context of Plaintiff working at night, which constituted less demanding circumstances, they roughly estimated that the depot work at 17.7% of day shift function based on the number of labourers who are employed, that is the residual capacity as a supervisor in a sympathetic environment was estimated at 8.5%.
23. She said “If one assumes that he is capable of 8.5% of his function within a supervisory capacity in a sympathetic environment, and then take him and stick him back into full day work with full quota of drivers, full load of

employees, full requirement for functioning, they regarded his overall function to be reduced, that is saying that he was then capable of 4.25% of his overall function as a driver supervisor”.

24. She further said a supervisor has to access the weight bridge above the offices where the cardboard is stored and also climb up the truck to assess the approximate weight of waste in the back of the truck. Under this environment she could not recommend Plaintiff's employment there. She referred to Plaintiff's injuries as follows:-

24.1 Fractured ribs with underlying pneumothorax requiring insertion of a chest drain.

24.2 Flexion distraction injury of his thorax, spine with damaged spinal cord at this level (T8 and T9).

24.3 Fractured left clavicle.

24.4 Lost 4 front bottom teeth.

24.5 Injury to his thoracic spine.

24.6 Numbness in his lower limbs.

25. After setting out Plaintiff's above injuries she said the damage to the thoracic level at 8 and 9 level left Plaintiff with residual weakness particularly of the left lower limb. She deferred to urologist in so far as effect of these injuries on his urological contents.

26. She then set out Plaintiff's problems with his mobility to be as follows:-

26.1 Walks with an altered gait with aid of walking stick.

26.2 The deficits are primarily related to the limp and instability and need of external support.

26.3 Reduced weight bearing on the left side.

26.4 Walking slowly than normal.

27. She referred to the fact that Plaintiff has a significant spinal operation. Intervention and a cage inserted. She said a person with that injury must be cautioned of further

physical damage but would deferred to the neurosurgeon regarding the effects should Plaintiff sustain further injury. She was however of the opinion that Plaintiff is at risk of injuring himself because of instability in the environment like his work situation, Plaintiff also demonstrated pain behaviour.

28. Future prospects of Plaintiff uninjured she said he would have involved more supervision with prospects which would have involved supervision or directorship with more managerial content.

29. In regard to the option of sedentary employment within Babs Waste Paper she said Plaintiff would



require occupation that would allow him to intersperse sitting and standing, she saw very few options within the company other than the weighbridge operator. She said here again there are drawbacks in his cognitive and visual difficulties evident during her assessment and elaborated by the neuropsychologist.

30. She said Babs Razack informed him that the weigh bridge is the center of the operation, money is made or lost there because as the weigh bridge operator has to be *au fait* with all nature of waste products brought into the company, has to personally ensure the grading of that waste and appropriately sort and cost it before the customers collect their payment. She said of concern is Plaintiff's weak mathematical and cognitive abilities.

31. Plaintiff appeared in Court walking with the aid of a stick. His evidence in essence was that he was born on 2 February 1956 and has standard 6 education. From January 1995 he started working for his brother at Babs wastepaper as a truck driver/ supervisor.
32. On 13 April 1997 he was involved in an accident as a result of which he was injured and was admitted in hospital for six weeks. Upon discharge he could only walk with the aid of crutches. At about that time his mother died, he had to be carried on a mattress in order to attend the funeral because he could not walk. He was again admitted into hospital because he could not walk because of a spinal injury.
33. In August 1997 he was discharged from hospital, he could only walk with the aid of a walking frame. He used the walking frame for more than a year. Thereafter he walked with the aid of a quadripod which he used for about three years. After the quadripod he walked with the aid of a walking stick which he was still using when he testified on 21

April 2006. He is able to walk very short distances without a walking stick.

34. As at the time he testified he said his main problem is lack of balance because of his spinal injury. In so far as his left leg is concerned he said from his hip to the knee he has a reduced feeling and has numbness on his left lower leg which extends to his foot and toes, he has very slight feeling on his left foot. He has a problem when walking, on few occasions he fell as he could not balance. He usually has difficulty walking on gravel and uneven surfaces therefore he avoids areas where he is likely to fall.

35. He also has poor memory if he has to go somewhere he has to be reminded three or four times. He also suffers pain for which he takes prescribed medication three times a day.

36. After the accident he was not able to support himself, he was assisted by family members, his wife has had to take up employment.

37.Round about 1999 he said he tried to go back to work. He tried to get into the drivers cab but could not get in and he had to be assisted by his brother and some workers. After he got in he started the truck with difficulty, he pressed the clutch and tried to engage the gear. When he tried to release the clutch pedal he could not. He had to give up the effort.

38.He also tried to do supervising work at Barrier Place factory premises but he failed because in order to get to the workers he had to walk through an area that had pot holes with cardboard, plastic and paper lying around throughout the yard. He did not try again.

39.Regarding the claim for travelling expenses to R.K. Khan Hospital and King George V Hospital he confirmed what appears in schedule at page 16 of exhibit C. he said the distance from his house to King George V Hospital is approximately 50 kilometres return and to R.K.Khan Hospital is five kilometers each way. He travelled to hospital in his

vehicle. He said he is not pursuing his claim for a domestic helper because of the agreement reached between the occupational therapists.

40. Before the accident he did his own gardening but since the accident he had to hire services of a gardener twice a month at R40,00 each time. The gardener also does some handiwork around the house.

41. Round about April 1999 he applied for a disability grant. He was referred to exhibit H, "Application For Social Assistance" and he was asked to explain. He was also referred to exhibit C30 relating to purchase of goods which he said were for his daughter Zakira who was working in Johannesburg and is a minor. He was also asked about goods purchased in his name from Giddy's which is alleged were purchased by his daughter Farmina. He said he signed the documents for those purchase's because Farmina was also a minor working at Babs Waste Paper.

42.He was also referred to particulars at top of page 31 of exhibit C where it is stated that he is employed as assistant manager at Babs Waste Paper and that he earns a salary R4000.00. He denied that he supplied those details to the salesman, he said what he explained to the salesman was that he was a driver and supervisor at Babs Waste Paper which was his previous job.

43.He agreed that it was wrong for him to have signed the document with that information. He said Zakira paid for the TV and DVD that was purchased on that occasion.

44.He further was asked by his counsel if the date, that he underwent an operation for spinal injury in 1998 is correct, he said that date is not correct it was in 1997 when he underwent that operation.

45.Regarding M/s Kisten's report he said it is not correct that:-

1. He did not have his drivers licenses at the consultation with her, his attorney who was there had his code 10

license.

2. He also said that it is not correct that the consultation with M/s Kisten was for six hours he said it took 4 to 4 ½ hours.
3. Further it was put to him that M/s Kisten in her report says she did not have sight of his driver's licenses. He said he had his code 8 drivers license which he handed to M/s Kisten, his code 10 license was with his attorney who was present at the time of the evaluation.
4. His attention was also drawn to page 82 of exh A where M/s Kisten's report seems to suggest that Babs four sons work for Babs wastepaper, he said he did not say this, Babs eldest son is four years.
5. He also said it is not correct that he drove a 2 ton and 3 ton truck, he said he drove a four ton, eight ton and 10 ton truck. He also said that Fahim Kassim was present at the factory on day of his interview by M/s Kisten he said he even introduced Fahim to her.

46. He said he did visit Babs Waste Paper at night the purpose

was to visit his friend Norman, he would sit with him and have a cup of tea for about 30 minutes and then leave. While there he did make reports to Norman. On one occasion it was about a security guard who was sleeping. On another occasion it was regarding a security guard who was drinking with his friends. After he made these reports he did not see these security guards at work again.

47. Arthar Razack testified that he is a brother of the Plaintiff and the sole member of Babs Waste Paper. Plaintiff started employment with Babs Waste Paper in 1995.

48. On 13 April 1997, Plaintiff was involved in a motor vehicle collision. He was hospitalised for about 4 to 6 weeks. He was then unable to walk. After discharge from hospital their mother died. Plaintiff had to be carried on a mattress in order to attend the funeral of his mother.

49. In or about August 1997 Plaintiff was re-admitted to hospital where he underwent an operation and a spinal cage was



fitted around his spine.

50. Two years after the accident Plaintiff tried to go back to work.

He (the witness) and his assistants assisted Plaintiff to try to get into a truck, to try and resume work. When he tried to engage the gear of the truck he could not engage the gear quick enough for the truck to move.

51. Later he tried to supervise the workers but they were spread out through out the yard. It became hard for Plaintiff to do that having to move on an uneven surface. After those endeavours to resume work Plaintiff did not ever try to do something else at the former place of work.

52. One of Plaintiff's duties was that when a truck comes to his place of work, was to sort out or supervise the sorting out of the waste. To do this he had to get onto the back of the truck, this was important so that the waste brought in was correctly priced. If this was not done it might result in a loss to the company.

53. The witness after going through the photographs in exhibit D and describing the various duties of a supervisor in relation to what appears in the photographs and stating that his premises is approximately 2500,00 square meters he said it would not be safe for the Plaintiff to work there. He said the type of work that is performed in his factory requires a person to be in good health, flexible, mobile and fast moving because the heavy trucks that move in and out of the premises. There is also piles of waste all over to be bailed. He said it is not possible for a person with the type of injuries as Plaintiff has to be working in the conditions he had described.

54. In regard to Plaintiff's employment he said he commenced his employment with his (witness's) company in January 1995 and terminated on 13 April 1997.

55. When Plaintiff was involved in a motor vehicle accident, he (the witness), said when completing the claim form, he stated

that the Plaintiff's employment was that of a code 10 driver. At the time of the accident Plaintiff's duties were driving and also included supervising. Regarding Plaintiff's likely progression in the company and what his approximate wages would have been, he said:-

- i) In 2000 he would have been a supervisor with an approximate salary of R4000,00;
- ii) In 2005 he would have been a foreman with an approximate salary of R75000,00;
- iii) In 2010 he would have been a manager with an approximate salary of R10,000.00.

56. When asked how he assessed that Plaintiff would have progressed to supervisor, then to a foreman then to a manager he said, Plaintiff had worked for him for two years without any problems and he was a trustworthy person on whom he could rely on to do work and he (witness) would have been able to expand his business and have other branches. At the time of the accident he did not have the

branches but at the time he completed the employment certificate exhibit C2 he had branches in East London and Lusikisiki. As a result of the Plaintiff not being able to resume work he had to close down those branches because he did not have anyone trust worthy in his factory in Durban. His plans were that he would expand to those branches while Plaintiff ran the business in Durban.

57. He said he has also set out in the employment certificate the Plaintiff's gross income at time of the accident as R24,000.00 annually plus R2000,00 thirteenth cheque or bonus. The year preceding that Plaintiff's gross annual income was R18,000.00 plus R1500,00 thirteenth cheque.

58. He was not contributing to a pension or provident fund. His retirement age would have been 65 years.

59. In the place of the Plaintiff he employed his (witness's) nephew Fahim Kassim as from June 1997. He said exhibit C11 is Fahim Kassim's employment certificate for the period

June 1997 to June 2004. He said the certificate was completed by his (witness's) assistant Priya Naidoo, he and Fahim Kassim (Fahim) supplied her with the information for the completion of the certificate. He said the information on the employment certificate was actual earnings of Fahim not estimates. He said Fahim was also entitled to the following:-

- i) 13<sup>th</sup> cheque;
- ii) Three weeks holiday pay;
- iii) A company car which is presently valued at R40,000.00.

60. Fahim's future prospects he said were:-

- i) In 2005 he would have been a foreman with a salary of approximately R8500,00 to R10,000.00 per month.
- ii) In 2010 he would have been a manager at the salary of approximately R15,000.00 per month.
- iii) Petrol allowance.

61. He said that the purpose of setting out Fahim's salary and benefits is to show that had Plaintiff

not been injured he would be earning the same amount if not more. He said it could have been more because Plaintiff would have been more experienced, than Fahim and because he is his brother and has more dependents than Fahim. Asked by Plaintiff's counsel which of the two employment certificate is more reliable he said it is the document which is Fahim's employment certificate.

62. He agreed that up to 2003 his employees were not registered because he was then operating a small business which was managed by him, he did not have the knowledge until he formed a close corporation when he received advice.

63. In 2003 he had all his workers registered. He was referred to page 14 of exhibit I which shows Fahim's gross monthly salary for the period ending 25 March 2006 as R7637.52. He stated

that he plans to go on pilgrimage and leave Fahim in charge of the business, he is presently assessing him and has given him a bonus of R2000,00 for April. Fahim's gross monthly salary as at the end of April will be R9248,00 the total of his deductions will be R1607.08 which will leave him with a nett monthly salary of R7641.15. This payment will be due to Fahim on 25 April 2006.

64. He denied that Plaintiff ever worked for him at his business after the accident. If he (the witness) did that, employing Plaintiff without being registered he would be personally responsible if he gets injured and will be liable to be prosecuted, he would also be risking Plaintiff's life as his place has a lot of dangers with trucks moving up and down, dangers of stacked bales, these would be dangerous for someone who is not totally mobile. He also has to pay the unemployment insurance fund and workmens

compensation contributions for his workers. He said none of these and other contributions are paid for the Plaintiff.

65. In this regard he referred to a visit to him at his place of business by two Indian males who introduced themselves as investigators from the Road Accident Fund. He said these two persons arrived unannounced on a Friday afternoon while he was busy preparing wages for his workers. They asked him whether Plaintiff was working for him at the time, he told them that he does not. He showed them the clock cards and schedules of his workers for several months which he used to fax to his accountant to prepare wages for the workers. He signed a statement prepared by the two men. They also interviewed his cashier Priya Naidoo and prepared a statement which she signed. He never heard from them again. He could not remember whether they took copies of



his records.

66. Mrs Colleen Kisten an occupational therapist retained by the Defendant also testified and confirmed her report. She initially stated that she assessed the Plaintiff from 9.30 am to 3.30 pm. She later qualified this by saying that during that period Plaintiff had two toilet breaks and one hour lunch break when he went home and came back.

67. She confirmed that Plaintiff reported his present complaints which appear from page 71 of her report. From her report the following complaints she said were made by Plaintiff:-

1. Burning sensation over the left and right feet.
2. Numbness extending from left side of the trunk to the left hip, left thigh up to the left knee.
3. Generalised weakness of the left lower limb

which impacts on walking tolerance and has also resulted in reduced balance reaction that he apparently is unable to run and reported several falls.

4. Constant pain in the left hip, associated with a “clicking sound”.
5. Lower back pain and pain in the thoracic spine. This is constant and severe, especially worse during cold weather, and is relieved minimally with the use of medication.
6. Burning and painful micturition, as well as difficulty passing urine freely.
7. Erectile difficulties and bowel dysfunction, as outlined above.
8. Headaches, which are severe and occur intermittently. This arises from the scarred area over the occipital region.
9. According to the claimant, he lost the lower four front teeth in the motor vehicle accident.

This requires investigation.

68. She further stated that in her report she mentioned under the heading “Balance and Equilibrium” that the Plaintiff sat for a duration of approximately two hours, however with reports of marked discomfort and pain. She confirmed that that was her observation. She did not think Plaintiff was over emphasising his discomfort.

She was referred to aspects of her report which were disputed by the Plaintiff in his evidence.

1. In regard to whether Plaintiff produced his driver’s licence, she confirmed that he did not provide the drivers licence. She said her practice is if it was produced she would make a photocopy of the licence. She was referred to page 82 of her report where she reports that:-

“According to the claimant, the company, i.e. Babs Waste Paper,

provides employment for many family member's including, the owner's four sons, the claimant (prior to the accident), the claimant's daughter and his wife; with the latter two being employed at the branch in Sunset Avenue, Woodhurst, Chatsworth. On specific enquiry, Mr Razack initially stated that he had never worked at that branch; however, in later conversation regarding the individuals who pick up cardboard from the roadsides in the Chatsworth area, the claimant stated "they come to me" (at Sunset Avenue branch). He immediately retracted this statement."

69. She said regarding the statement that the owner provided employment to his (the owner's) four sons she said this was information she got from the Plaintiff but later it became clear that the owner's sons were still too young to be employed. She said the statement that appears in that paragraph which was later retracted by Plaintiff gave her the impression that Plaintiff

might have been involved in some type of work at the Chatsworth branch.

She further testified that Plaintiff mentioned to her that he was initially employed as a driver but progressed to be a supervisor, driving only when there was an emergency to do pick up, she said Plaintiff volunteered that he drove a 2 or 3 ton truck.

70. She was further referred to page 91 the third bullet in her report where she said:- “ the claimant however states that he functioned primarily in the capacity of a supervisor, with intermittent driving duties when necessary.” She said she understood those to be Plaintiff’s functions.

71. At page 83 of the report the information that Plaintiff assisted with driving duties approximately ten times per month, she said this information was volunteered by the Plaintiff.

72. She then went on to talk about her visit to Babs Waste Paper in Brookland road. There she met Babs, the Plaintiff's brother, in his office in the presence of two legal representatives, Mr Debba and Ridwan Hannif, she asked where the Plaintiff was, she was told that he was in the weighbridge area. She later after some difficulty in getting there found Plaintiff at the weighbridge. She said the difficulty she referred to was because the area was cluttered with waste paper, cardboard, all sorts of scrap paper, it was also a very greasy area so it was difficult to access the place. She added that there were bales of material that were placed midway in the weighbridge area, further she said the workshop was filled to capacity and it appeared that the bales or the stacked bales which were in the weighbridge area was because that area was used in part as a storage. She said she found the Plaintiff in a place overlooks the

weighbridge area.

73. She denied Plaintiff's assertion that he introduced Fahim Kassim to her. She said she never met Fahim on that visit, she wanted to speak to him.

74. When she asked who had taken over from Plaintiff she was advised that it was Fahim, however from her observation it did not appear that there was any other person in charge.

75. She pointed out that before going to Babs Waste Paper on that day, she had previously tried to make appointment for the work visit but on two occasions she was told Mr Razack was in Johannesburg and on another occasion she was told he could not see her because he had mumps.

76. When asked by counsel how many people appeared to be doing work at that place she said she saw between eight to ten general labourers. She said she observed four bailing machines to be in operation.

77. She mentioned that she had access to the administration offices but there was no one there at the time. She also observed the labourers sorting waste material on the ground floor inside the warehouse, there was a concrete flooring there.

78. She was informed by counsel that one of the reasons Plaintiff gave for not being able to manage was that the ground at the factory is uneven with pothole, she responded by saying that if he was referring to the area outside the warehouse she would agree to that.



79. She was referred to page 84 of exhibit A where in her report she refers to salary advance of two employees which showed what Fahim Kassim and Rasool were earning. When asked if she found anything strange about this, she said she was surprised to find the salary advices of employees were still with the employer, in addition they were unopened. She said when she asked if the employees relating to these salary advices would be in agreement that he (Babs) would hand them to her for perusal, (no reply is recorded), but she said she still had these salary advices.

80. She further mentioned that she asked Mr Razack if he was prepared to accommodate his brother (Plaintiff) in terms of salary with no work performed, she says he said this would not be possible as the family owned the business and should he have retained his brother without

performing any work this would result in a family dispute, and a further contributory factor, he said was that the business was not financially viable.

81. She went on to say that Babs further said to her that at the time of the collision the business was not as viable as it is now. She was referred by counsel to page 89 of exhibit A, where in her report she mentioned the various positions and various periods and likely salaries for the said position in the business, Babs Waste Paper. She was asked why she said in her report: "The above promotion prospects require investigation, however she viewed this with speculation". She said the reason for saying that is that from discussions with Babs Razack, the managing director and owner of the business and with the Plaintiff it appeared that the duties of the supervisor, foreman and manager overlap, and that the current supervisor, Fahim Kassim, and

at the time when Plaintiff was employed, they reported directly to Babs Razack and also that at the time of the assessment there was no mention of presence of a foreman or a manager at the time of the assessment.

82. She confirmed the agreement she made with M/s Bainbridge and that she signed both documents incorporating their agreement with M/s Jane Bainbridge.

REGARDING EVIDENCE OF EXPERTS RE:INJURIES AND SEQUELAE THEREOF:

83. At this point I shall comment on the evidence of the experts whose reports I have referred to and the evidence of Professor Lazarus before dealing with the next category of evidence. This evidence is substantial to the effect that Plaintiff sustained a severe injury in the thoracic region.

Professor Goga described it as “very serious and significant dorsal spine injury”. Dr Nadvi described it as “an extremely severe spinal cord injury”. The injury included damage to the spinal cord. Plaintiff had to undergo a major operation in the thoracic region.

84. The surgery as described by Mr Osman included:-

- (i) Transthoracic decompression with excision of vertebrae bodies of T8 and T9 vertebrae.
- (ii) Decompression of the spinal cord, the intra-operation findings showed a 60% compression of the cord arterially compromised by segments of the disc on the cord. A spinal cage was inserted.

I am therefore satisfied that Plaintiff sustained a very

serious injury in the thoracic region.

85. The experts also substantially agreed that Plaintiff has been left with a sensory deficit on his left side and a weakness on his left leg. They intimate that these deficits are likely to be of a permanent nature.

86. In so far as the effects of the injuries on Plaintiff's employability the said experts substantially agree that Plaintiff's deficits are such that he is not likely to return to his previous employment of driver/ supervisor and opined that the only option is accommodation of Plaintiff in a sympathetic environment.

87. Professor Lazarus set out neuropsychological deficits which militate against the Plaintiff returning to his previous employment of driver/ supervisor even in part. He further opined that

Plaintiff is not likely to return to his employment even in a reduced capacity because of his neuro-cognitive deficits.

88. The evidence and opinions of the experts I shall consider together with other evidence in order to reach a proper finding as to prospect of future capacity of Plaintiff's employment.

89. The evidence of the occupational therapists, the Plaintiff and Mr Razack, I shall return to it after briefly summarising the other evidence which I now turn to.

#### EVIDENCE WHETHER PLAINTIFF WAS EMPLOYED AFTER THE COLLISION.

90. The other evidence in this case relates to the issue of whether the Plaintiff returned to his employment after the collision. I shall briefly summarise that evidence, not in the

sequence in which it was given. I shall for the sake of convenience deal with it according to interrelated categories in which I consider each witness's evidence falls under, which are as follows:-

1. The evidence of witnesses who were previously employed by Babs Waste Paper which will also include the evidence of Zubair Surkhoth and Ajith Ramsurup also known as Marcus.
2. Evidence of security guards including evidence of Dumisani Nkwanyana and Welcome Mzimela.
3. Evidence relating to purchases made by Plaintiff which will be evidence of Priya Naidoo, Priscilla Kuruppan and Shereen Reddy.

CATEGORY 1:

91. Zubair Sirkhoth who was called by the Plaintiff, testified that he lived in road 710, house number 129 Chatsworth. He knew Plaintiff, he lived in the same road as him. He also knew Plaintiff's sister Fazila Ally and her husband Riaz Ally. They lived directly opposite the Plaintiff, he, the witness, was in love with Samira Ally, daughter of Fazila and Riaz.

92. The relationship between Fazila, Riaz and their family on one hand were not in good terms with Plaintiff's family on the other side. One of their daughters Muenira also had a bad relationship with the Plaintiff. In or about 2003, he got to know about Plaintiff's motor vehicle accident and the claim arising from that.

93. He said during the middle or end of 2004 he was



asked by Fazila and Riaz at their house to fabricate stories about the Plaintiff to one Marcus for the Road Accident Fund, Riaz and Fazila asked him to say to Marcus that Plaintiff is working, that he is able to walk without a walking aid and is perfectly fit. All this was not true. At the time he did not know Marcus, he later came to know him. He agreed to say as requested by Fazila and Riaz because at the time he was dating their daughter Samira.

94. Shortly after this request was made he met Marcus at Riaz's house, he (Riaz) and Fazila were present when he met Marcus. At that meeting he told Marcus that Plaintiff was working, walking without a walking aid and was perfectly fit. He said it was discussed that Plaintiff is working for Babs Waste Paper. He got to know that Fazila and Riaz were asking him to make these statements against the Plaintiff

because they were afraid of being evicted out of their house because the house belonged to Plaintiff's father. If they got him (the witness) to say what they wanted him to tell Marcus, he overheard them, say that they would be compensated with the house by the Road Accident Fund.

95. The meeting ended by Marcus saying he would phone him so that he could meet him again. He asked him to gather evidence on camera phone showing that Plaintiff is walking normally. He agreed to meet him. When he met Marcus again he asked him to put what he told him in writing he promised to do that when he is ready. From then he would not take his (Marcus) calls and stopped meeting him. Riaz and Fazila got to know about his attitude, he learnt this from his girlfriend Samira.

96. He was stopped from getting to Riaz's house because he would not co-operate with Marcus.

97. He said on the Saturday preceeding the day he testified he was approached by his neighbour Nazeera, Fahim Kassim's wife. She told him not to go to Court to testify in Court about what he knows and what he has been asked to do. She said it's got nothing to do about what he knows it is all about 1998. She said in 1998 she was a wage clerk working for Babs Waste Paper, she knows that Plaintiff was working. She said if he testifies he will be charged with perjury. He told her that he will do what he thinks is the right thing.

98. Ajith Ramsurup who was Defendant's witness, testified that he said he is also known as Marcus Marshall. He said he is an investigator employed by Kia Investigators. He was instructed by the

Road Accident Fund to do investigations in this case.

99. He said he knows the witness Zubair Sirkhoth.

He said he first got into contact with him telephonically at Riaz's home, his girlfriend's home Samira. He spoke to Sirkhoth telephonically regarding Plaintiff and his daily activities.

100. He thought Sirkhoth would help him as he, Sirkhoth lived in and around the road where Plaintiff lived, he (Marcus) could not find a person who could help him, but learnt that Sirkhoth had a problem with Plaintiff.

101. He met Sirkhoth, he (the witness), was with Brendon Pillay, Sirkhoth was co-operative, Sirkhoth made and signed a statement which was written down by Brendon. He denied that he

had a discussion with Sirkhoth at Raiz's house, he however said he has been to Riaz's home once. He said he has never made any suggestion to either Riaz or to his wife Fazila that evidence be fabricated about the employment of the Plaintiff.

102. He also said he has never said anyone would be compensated with a house. He said he was informed that Riaz's family was threatened with ejection. He also agreed that he suggested to Sirkhoth that he must catch Plaintiff on cameraphone, while walking.

103. Munira Ally was also called by the Defendant. Her evidence in essence was that the Plaintiff is her uncle, she lives in the same road as the Plaintiff. Her father is Riaz and her mother is Fazila.

104. In 2003 she worked for Babs Waste Paper for 5 or 6 months. Her duties were to pay wages to the workers in the yard and to Plaintiff. The wages were paid in cash and placed in an envelope. The amount paid was written on a board and each person would acknowledge receipt of the money paid to the worker by signing next to the amount received. The workers were paid on a Thursday and Plaintiff was paid on a Friday, he was paid a sum of R900,00 which amount was determined by Babs.

105. She said there were workers who worked at the Chatsworth branch of the company, but she was not sure who worked there, their wages were given to Plaintiff. The money he paid to Plaintiff on a Friday she was told by Babs that was wages.

106. She used to see Plaintiff come to the factory in

Brookland branch, it would be at 6 or 7 in the evening. She would see him leave the factory at about 8 in the morning. In the evening she would wait until Plaintiff came but if he is late Fahim or Yusuf her uncle would wait for Plaintiff. While she was working there she said she saw Plaintiff almost every day.

107. She said she left the factory because she was not happy with the environment.

108. She denied Babs evidence that she left because she did not get on well with other members of staff, and that cash was always short.

109. She denied allegations put on behalf of Plaintiff that she was testifying as she does because there is a family feud between his family and Plaintiff's family. She denied that and said there was no feud but it was a petty dispute but just

verbal disputes. She admitted that her mother was given a place by Babs Razack where her mother ran a shop, rent free, that her mother eventually closed the shop the reason being family problems that got in the way. She admitted that at sometime her mother was asked to pay rent.

110. She said the house in which she lives belongs to Plaintiff's father. She denied that Plaintiff's father who is her grand father ever threatened to evict her family from the house, she said her grandfather does not visit his home. He, the grand father, asked them to empty the house because he said he wanted to put tenants in the outbuilding.

111. She said she knew Zubair Sirkhoth, he had problems with her parents because he ran away with her sister on three occasions, the matter was reported to the police but she does not know



if he, Sirkhoth, was charged. He also stole her mother's jewellery and her father's cell phone. She denied that Sirkhoth was stopped from visiting her home because he refused to co-operate in making stories against the Plaintiff, she knew nothing about the planning of a fabrication against Plaintiff by her parents and Sirkhoth. She said she had seen Plaintiff drive from his house. She had also seen him standing on the road chatting to other people.

112. She knew nothing of compensation to her parents as testified by Sirkhoth.

113. Nazeera Khan she was also Defendant's witness. Her evidence was to the effect that she was employed by Babs Waste Paper for a year from November 2003 as a cashier paying customers for waste, brought in and also handling payment of wages at the end of the

week. A record of the payment she made were entered on a board. She said she also gave money to drivers as a float, the drivers were drivers employed by Babs Waste Paper. When she pays the drivers they would bring a weighbridge ticket.

114. She said in respect of wages the amount to be paid to the workers was determined by Babs or by Fahim, then it was her duty to put it into envelopes and give it to the workers. She said she paid all the workers, while she was working there, Plaintiff did come to Babs Waste Paper. She was married to Plaintiff's nephew Fahim, there is a divorce action pending between them.

115. She said she handed money to Plaintiff weekly for his weekly duties, she did this from November 2003 to September 2004. She said Plaintiff did the same work that Fahim was doing, he worked

from around half past five in the afternoon to 7:30, 8 'o' clock the next morning. She said she would see Plaintiff every morning when she got to work except if he has gone to the doctors.

116. She said she paid Plaintiff as well as Fahim in cash. Asked whether there was any other method of paying wages during her time, she said they had bank accounts which they were told to sort out so that they could be paid by the bank. She said Plaintiff was not included in that arrangement because he was not registered with Babs Waste Paper.

117. She said Plaintiff was paid about R800,00 to R1200,00, the amount varied depending on the number of hours worked. She said she left work because she was going to have a baby thereafter she went to Babs several occasions who ultimately told her she could not take her as

there was no space. She denied that as alleged by Babs that she left work because she was not getting on well with other workers including Priya and that the troubles in her marriage were affecting her work. She admitted that she would phone Priya at the place of her work, but denied that she was vulgar to her but she was confrontational as she asked her whether she was having an affair with her husband.

118. She denied that she is biased against the Plaintiff because he was seen accompanying Fahim when he was attending Court on charges laid by her against Fahim. She agreed that she had seen Plaintiff accompanying Fahim when he attended Court.

119. It also emerged in her evidence that she was approached by the investigators in this case to testify for the Defendant. She also knew Zubair

Sirkhoth she denied she tried to stop him from testifying.

## CATEGORY 2: SECURITY GUARDS

120. Daniel Buthelezi was called by Defendant. He testified that he was a security guard posted to work at Babs Waste Paper from June/ July 2004. He knew the Plaintiff. He said he recalls that Plaintiff would come to the factory once a week sometimes twice a week. He would come in his car at 8 at night sometimes at 10pm. When he got to the factory he would check the staff as to how they were working. At times he would drive the hyster sometimes drive the trucks to move them if there was shortage of staff. He said Plaintiff would be there for a couple of hours sometimes he would leave in the morning at the commencement of the day shift. He said he did not see him using a walking stick. He said he never had an argument with the owner of the

company he was never found sleeping or drunk on duty.

121.Christopher Tsotetsi also Defendant's witness. In essence his evidence was that in January 2005 he was working for Maskane Security, he was posted at Babs Waste Paper for three months, he guarded the buildings and cars outside. He worked at night from 6pm to 6am. He knew the Plaintiff, he (Plaintiff) would come to Babs Waste Paper at night at 10 or 11. He would be there for one or two hours. He would speak to the supervisor Norman for some time then leave, he would come six or three times a week.

122.He came five times or 4 times whilst he (the witness) was working there. When asked what did he think Plaintiff came there for, he said he was working. He said he saw him walk with a walking stick, sometimes he would come out of

his car without a walking stick and limp outside the vehicle.

123. When he (witness) left Maskane Security in March 2005 he no longer saw the Plaintiff. He said there was a complaint made by the Plaintiff and Norman against him that he slept on duty but he could not recall when this complaint was made but that complaint did not have any repercussions.

124. Khanyise Radebe also called by the Defendant. He testified that during 2004, he was posted at Babs Waste Paper by his employers Maskane Security Service. He was working at the gate opening for trucks and other vehicles coming in and out of the premises. He also patrolled outside the business premises.

125. While working at Babs Waste Paper he saw

Plaintiff come into the premises at about 7pm, he would be there for two or three hours. He came sometimes three days a week.

126. When Plaintiff came to the premises he would go into an office and then get into the yard and speak to employees, he also spoke to him. The day when he first saw him when he was about to enter the gate he came close to him he told him that he was a brother to Babs even the employees know him. He was driving a Honda Ballad motor vehicle. The witness said he did not know what he spoke about to the employees, he assumed it was about work.

127. He said there were no complaints against him (the witness), he left the company on his own because of the salary.

128. Paulos Radebe was also called by Defendant.



He testified that he was employed by Maskane Security services, he estimated that it was during April, May and June 2004, for about two, months. During that period he was posted at Babs Waste Paper. He said he worked night shift. He said he saw Plaintiff come to Babs Waste Paper maybe three times a week at night, he would get there may be from 8pm to 10pm and then leave. He would come in a white Honda.

129. When asked what Plaintiff would do he said it appeared he was checking his (the witness) work. As to other employees he did not know what Plaintiff did but he would check his work by telling him sometimes to stand in the open where he could be seen by other people. He saw him speak to other employees.

130. He was asked how often he did this, the witness became hesitant, then said he cannot

remember. He saw him talk to night shift supervisor. He said this happened many times when he was on the side where he (the witness) was working. He said Plaintiff checked on his work for the two hours he was there.

131. Asked if there were occasions when Plaintiff stayed longer, he said there were such days he thinks it would be when the night shift supervisor was off. He said the night shift supervisor also supervised him.

132. Dumisani Nkwanyana testified called by the Plaintiff, at the time of testifying he was in the employ of Babs Waste Paper. He had previously worked there for eight years and then left.

133. The thrust of his evidence was that he knew Plaintiff when he (the witness) was employed by Babs Waste Paper. He knew that Plaintiff was

involved in an accident. After the accident Plaintiff did not work. He said he Plaintiff, used to visit at Babs Waste Paper once a week, he would engage in a conversation with one Gift who was a manager, working on night duty, he the witness said he was also working night duty.

134. He said Gift was replaced by Norman. When Norman became night duty supervisor Plaintiff did not visit. He said last year (which was 2005) he was dismissed from work. While he was dismissed he was approached by one Mzimela who told him that he was a detective but did not explain who he was working for but he thought he was working for the Government. He said this person wanted to know if Plaintiff was working. He said this person wanted to know this because there is some money Plaintiff is supposed to get he did not want him to get that money.

135.This person he said asked him to say Plaintiff was working. He agreed to that after this person promised him money for giving evidence that would favour him (Mzimela), he did not mention the amount of money he would give him. He said he accepted this man's suggestion because he was not working.

136.He next saw Mzimela when he came to fetch him and brought him to the Court last year. On that occasion he spoke to a white lady and an Indian lady through an interpreter. The ladies asked him questions and he responded on the terms he had discussed with Mzimela. After he finished answering the questions he was told he would be called again to come to Court. Mzimela did not give him money but bought him food. He was not been approached again.

137.He got re-employed by Babs Waste Paper

because he went back to plead to be re-employed.

138. Welcome Mzimela was Defendant's witness. He said he is working in Pretoria for Mongwe Assessors, prior to moving to Pretoria he was working for KIA Investigators in Durban, as an investigator in this case.

139. He traced the witness Dumisani Nkwanyana, found him where he stayed. He identified himself to him as an assessor. He questioned him about the claim in this case, he agreed to co-operate with him. He denied that:-

1. He told him(Dumisani) that he was a detective neither did he say anything that could create the impression he works for the government.
2. He denied that he told Dumisani that Plaintiff was going to get money and that he did not want him to get the money.
3. He did not tell Dumisani to tailor his evidence to say Plaintiff was still working.
4. He did not promise him money.

5. He did not suggest that he should give evidence to favour the Defendant.

140. He said it is too long ago he could not remember whether he took Dumisani to a place where he consulted with him. He could not remember whether he took him to his (Dumisani's) home and bought him food. He said when he was working for KIA they were instructed by the Road Accident Fund or attorneys to assess claims, he was paid by the KIA.

CATEGORY 3:

141. Priscilla Karuppan was also Defendant's witness. Her testimony was mainly to the effect that she was employed by Giddy's Electrical Express in Chatsworth as inter alia a credit controller. She was responsible for establishing credit worthiness of a customer who wishes to make purchases from their business by inter alia obtaining full personal and employment particulars of the customer, verifying his/her

employment, confirming references given by the customer and other particulars.

142. Her evidence related further to particulars that appear on the form in exhibit C from page 30 – 32 which was a customer pro forma order form relating to particulars and details of the customer intending to purchase. I do not intend summarising evidence of this witness further as it turned out in cross examination that she did not personally complete all the details on the form. What is of importance appearing on the form is that she made a telephonic inquiry from Priya who was the administrative assistant, confirming that E. Razack was employed by Babs Waste Paper which was confirmed by Priya. It therefore appears from her evidence that the other particulars appearing on the form were completed by other persons from Giddys dealing with particulars required on the form.

143. Shereen Reddy also called by Defendant. She testified that she was employed by Electric Expression in Chatsworth. She was referred to form appearing in page 30 to 32 of exhibit C. She identified her hand writing on page 30. On page 31 in manuscript in her hand writing she wrote particulars of occupation, the words "assistant manager" and where name of employer she entered in manuscript "Babs Waste Paper". The name by which customer is known she wrote "Solly". Where salary per month is sought she wrote R4000,00. She said all these particulars were furnished to her by the customer who was Mr E Razack. The customer gave her other particulars including his identity number which he entered on the form.

144. In cross examination she said she does not have independent recollection of the transaction



the customer entered into, she relies on what is in the form.

145. She could not recall whether when the customer (Plaintiff) came to the shop he was walking with the aid of a walking stick.

146. She was also unable to say whether prior to the transaction in question Plaintiff's daughter came to the shop and wanted to buy some items but was told she could not buy the items because she was a minor. She (the witness) said when a person is a minor and needs to purchase and is working he/she is normally told to bring one of his/her parents but there has to be a surety who is employed.

147. She acknowledged that on the form at page 30 where particulars as to how payment is to be made, the particulars there were entered as

“Fourways Mall branch”, the “account of Z. Razack” would be debited and the account number is reflected and the bank as “FNB branch at Fourways Mall”. She said that is not in her handwriting, that aspect is dealt with at the office at the back.

148. She also acknowledged that the delivery address of the goods purchased is reflected on the form exhibit C as “Randurg in Johannesburg”. She said she was not told by the customer that the goods were purchased for the daughter. However on several occasions during cross examination she said she can’t recall this.

149. She agreed that Plaintiff stood a better chance than the daughter of having the account being opened by him because he had a credit record. In regard to “employment” she said the

customer was asked for his current employment, they do not ask for previous employment.

150. Under re-examination she said when she refers to the back she means the credit office where they do confirming and faxing the deal through for approval.

#### ASSESSMENT OF EVIDENCE RELATING TO WHETHER PLAINTIFF HAS RESIDUAL CAPACITY TO ASSUME WORK.

151. In determining this issue I consider:-

1. The opinions and conclusions of the experts who submitted their reports including the report and evidence of Professor Lazarus.
2. The effect of the agreement of the two occupational

therapists and their evidence.

3. The evidence led under the categories I have indicated above which deal with whether Plaintiff was employed after he had been involved in the collision.

152. The opinions and conclusions of the expert doctors I have already commented on them. The opinions and conclusions of these witnesses as appear in their reports have not been seriously attacked or disputed. As appears from the extracts from passages quoted from their reports and the evidence of Professor Lazarus, their opinions are that because of the seriousness and the sequelae of Plaintiff's injuries and the neuro-cognitive

deficits resulting from those injuries Plaintiff is not likely to return and work in his previous employment of driver/supervisor. They all agree that the possible option open for Plaintiff's employment is in a sympathetic environment.

153. Professor Goga said:- "I believe that Mr Razack will need significant retraining and sheltered employment. If this cannot be arranged then he needs to be medically boarded." Mr Osman said "He requires a sheltered employment mainly sedentary in nature, for which unfortunately, he is presently not qualified."

154. Mr Maharaj in his submission argued that Plaintiff has residual earning capacity he referred to Professor Lazarus where he states, "I think he is capable of working in what we call generally a sympathetic setting". This in my view, must be considered together with the

neuro-cognitive deficits which Professor Lazarus said Plaintiff has also Professor Goga's view that he requires training and Mr Osman who said that although, he was of the opinion that Plaintiff requires sheltered employment mainly sedentary in nature, he however is not presently qualified. In this regard, in my view, it is important to bear in mind that Professor Lazarus found that Plaintiff had impaired ability to learn new information and this would negatively impact on his retrainability.

155. In considering Plaintiff's prospects of being accommodated even within a sympathetic environment, as many experts have indicated, other than the effects of his injuries and psychological deficits, I also take into account that Plaintiff is a man of 48 years with minimal education of standard 6 or 7. These factors, in my opinion are pertinent in considering and

evaluating Plaintiff's prospects of being accommodated even in a sympathetic environment.

#### EVIDENCE OF OCCUPATIONAL THERAPISTS.

156. In so far as the evidence of the two occupational therapists and their opinions are concerned they are, in my view, to a great extent overshadowed by the agreement they reached as incorporated in the minutes which were handed into Court which I consider as important in assessing Plaintiff's residual earning capacity.

157. In their evidence it is also clear that they both agree that Plaintiff cannot after the accident resume his employment as a driver at Babs Waste Paper.

158. In regard to resuming his employment as a supervisor, the occupational therapists found

the situation at Babs Waste Paper as dangerous, for a man with the physical deficits, to work in, they would not recommend his re-employment at Babs Waste Paper.

159.M/s Bainbridge at page 58 to 59 of her report in exhibit A in commenting on Plaintiff's future loss of earnings says the following:-

“An on site work evaluation including the inspection of the trucks that Mr. Razack would have driven and would need to drive were he to return to work, and the nature of the warehouse in which Babs Waste is located, indicates that Mr. Razack's physical condition would preclude him from employment in such a workplace. He walks with instability; he has reduced levels of balance for dynamic and static tasks. He would constitute a liability within a busy, noisy, in places dark, very cluttered work environment in which there are potential hazards such as reversing trucks, greasy floors, uneven floors surfaces, unstable stacks of card and paper and moving parts in the baling machines. He is unable to climb into a vehicle with a step located 1 ½ metres off the ground, much less able to climb out of such a truck without doing himself serious injury. Supervisory capacity on the floor in such conditions would not be advisable either.”



160.M/s Kisten at page 86 of her report in exhibit A described the work environment at Babs Waste Paper as follows:-

“The general impression was suggestive of a large, cluttered workshop in disarray; filled to capacity with waste materials, boxes, cardboard and paper. The work layout depicted poor structure, with difficulty accessing gangways, recesses, ablution facilities; as well as necessitating stair negotiation. Hysters move back and forth, engaged in relocating bales to the despatch area. Climbing onto loaded trucks, checking waste materials prior to offloading and/or despatch; is reportedly the responsibility of the supervisor”.

161.In her evidence M/s Kisten stated that on her work visit she got to the weigh bridge with much difficulty. When describing the difficulty she said:- “The area was generally cluttered or littered with waste paper, cardboard, all sorts of scraps of paper. It’s also a very greasy area, so it was difficult to access, in addition there were bales of material that was placed midway in the

weigh bridge area.” She further said:- “The workshop itself appeared to be filled to capacity and it appeared that the bales or the staked bales were in the weigh bridge area which was utilised as storage place”.

162. In cross examination when asked if the condition in the workshop was highly dangerous she said “yes absolutely”. She agreed that she would not recommend that Plaintiff spends time in that environment. It therefore appears from the evidence of the occupational therapists considering Plaintiff’s physical deficits as described by them and by the other experts the conditions at Babs Waste Paper were not suitable for Plaintiff to resume work even on a supervisory level.

#### WETHER PLAINTIFF WORKED AFTER COLLISION.

As indicated earlier this issue I propose dealing with it under three

categories which may be inter related. I therefore start with the first category.

163.(A) Evidence by Zubair Sirkhoth, Ramsurup Marcus and two past employees of Babs Waste Paper.

Here Zubair Sirkhoth (Sirkhoth) was called by the Plaintiff to show, firstly that Marcus who was acting on behalf of the Defendant sought to entice him, (Sirkhoth) to fabricate that Plaintiff was working and walking normally without a walking aid. He was also called to show the link between the Ally family, to which witnesses Munira Ally belonged and Marcus Sirkhoth was called by Plaintiff apparently in anticipation of evidence that Defendant intended to lead particularly in respect of Munira Ally and Nazeera Khan as was put to Plaintiff's witnesses in cross examination.

164. His evidence was criticised by Mr Maharaj on the basis that on his own evidence he had conceded that he had agreed to give false evidence. While this is true his evidence has to be viewed in context. At the time, according to his evidence he was requested by the

parents of his girl friend to fabricate the evidence against the Plaintiff. According to him the parents of his girl friend were in bad terms with the Plaintiff. When he decided not to go along with what, according to him, he knew was untrue, he decided to expose what he believes to be untrue by telling the truth as to what he said happened. In this context, in my opinion, it is not a sufficient reason not to believe his evidence purely for that reason, it is however a factor to be considered in assessing his credibility.

165. From the evidence led it is clear that the Defendant had engaged investigators who were investigating whether Plaintiff had returned to work. From the evidence it is clear that Riaz and Fazila Ally were not in good terms with the Plaintiff, as is apparent from the evidence of for example Munira Ally whose evidence I shall refer to shortly and also from Sirkhoth himself. It was therefore not surprising that they would try and find someone to fabricate evidence against the Plaintiff. Sirkhoth turned to be a

convenient person to use, he knew the Plaintiff and lived close to his residence.

It was also suggested that he was being untruthful because he had been criminally charged for eloping with the Ally's daughter, he denied that he was criminally charged for this. It was also put that he stole the Ally's jewellery, he also denied this.

166. It is common cause that he was approached by Marcus regarding Plaintiff's claim and he gave Marcus information about the Plaintiff. Considering the circumstance under which this witness says he gave the information it is probable that he gave the information at the instance of the Ally's. The evidence of the bad relationship between the Ally's and the Plaintiff supports the witness's evidence.

Sirkhoth, in my opinion was a good and credible witness.

167. Ajith Ramsurup also known as Marcus endeavoured to counter the evidence given by Sirkhoth. Under cross examination, notwithstanding having submitted a report to the Defendant, he could not explain why Defendant did not contest important aspects of Sirkhoth's evidence particularly the fact that:-

- (i) According to Sirkhoth he was introduced to him by the Ally's he, (Marcus) had denied this in his evidence.
- (ii) He could not explain why Sirkhoth's evidence that he met him twice was not challenged as he said he met him once.

168. His evidence was very inconsistent, at first he said that people would not co-operate with him in his investigations even Riaz Ally and his wife Fazila, a few days thereafter he says they agreed to co-operate. He later changes and says the Ally's did not co-operate, he said they told him that Plaintiff was working but they did not want to give evidence against him. He said they still would not come

forward to assist him. He said he established this was because there was bad relationship between them and the Plaintiff. He accepted that because of their bad relationship with the Plaintiff they could colour their evidence against Plaintiff. He accepted that Sirkhoth was proposed by the Ally's but said they did not intimidate him.

Asked if Sirkhoth said he was intimidated, at first he said yes and then retracted that and said no. Sirkhoth did not say so. Asked why he said that the Ally's did not intimidate him, he said it is because he (Sirkhoth) appeared to be intimidated.

169. Marcus was a poor witness, he repeatedly asked questions to be repeated. He appeared to be making up his evidence as he went along, a number of aspects in his evidence were not put to Sirkhoth, he appeared to have close links with the Ally's. I do not believe his evidence.

170. Munira Ally is the daughter of Riaz and Fazila Ally. Her

evidence was characterised by her attempt to underplay the family tension and bad relations which existed between her family and the Plaintiff. This factor was shown in her evidence. When the family feud issue was put to her she said it was just minor disagreements. Whereas it was manifest in her evidence for example that:-

- (i) The Allys were not on talking terms with Plaintiff's family.
- (ii) She said there was jealousy between the two families.
- (iii) She said her mother had to close down a shop on the premises that belonged to Plaintiff's brother Mr Razack, which had been given to her mother rent free, now Mr Razack wanted her mother to pay rental.
- (iv) Her family occupied a property belonging to her grandfather, Plaintiff's father, who now wanted them to vacate the property.
- (v) Plaintiff's accident claim had been a matter that



was discussed at her family.

171. To me the possible reason for downplaying the extent of the bad relationship between her family and the Plaintiff was an attempt to show that she was not biased against the Plaintiff.

172. She was also an evasive witness, on a number of important aspects for example she was asked as to what was discussed by her family about the Plaintiff's claim. She said that it was only her parents and other elderly persons who spoke about it. She did not know the details of what they spoke about but it was about the amount and the claim.

Her evidence was that Plaintiff worked night shift almost every day. She said he was supposed to start at 5:30 in the afternoon but sometimes he came at 6 or 7 pm, and knocked off at 8 'o' clock in the morning.

173. She said she normally waited for him until he came in the

afternoon but if he is late Fahim and Yunus would wait for him. If it was so it would not have been possible for her to know whether Plaintiff worked every day. Her evidence about the time when Plaintiff came to work is in conflict with the evidence of the security guards which I shall refer to later.

174. It is also significant how she came to Court. She said Marcus contacted her father and asked if she would consider coming to Court, she said she thought about the matter for a day or two then Marcus came and picked her up two weeks before the trial.

175. Munera was overall an unsatisfactory and evasive witness. She was not an unbiased witness, from her evidence I gained the impression that the bad relations between her family and the Plaintiff did not play an insignificant part on her. In the circumstances I find that her evidence was unreliable.

176. Turning to the evidence of Nazeera Khan, she also, to me, did not appear to be untainted by what was happening to her and the family of the Plaintiff. She was married to Fahim who was Plaintiff's nephew, employed at Babs Waste Paper. She was undergoing divorce proceedings. Her relationship with Fahim was not good, she had laid no less than nine Court proceedings against Fahim which included a number of criminal charges, and domestic violence interdicts. She admitted that there were instances when Plaintiff accompanied Fahim when he attended Court regarding the Court proceedings she had instituted against him. Although she said this did not have an effect on her it is more than likely that it at least must have created an impression in her that Plaintiff was taking sides.

177. It also appears that when she left Babs Waste Paper she had a rather acrimonious relationship with Priya who was employed there, and had a relationship with Fahim, and was still employed there.

178. In my view, her evidence has to be considered in this context in addition her contact with the Ally's whom she

admitted she visited them from time to time and they would discuss as they were her relatives because of her marriage to Fahim. When asked about family feuds between the Ally's and the Plaintiff's family she said all she knows is that there were disagreements between the families. There is therefore a likelihood that she also could be inclined to take sides in that situation.

179. I am conscious that her evidence may not be rejected just because of the factors I have referred to but in my opinion they cannot be ignored in considering whether she is an unbiased witness.

180. Her evidence was that she worked at Babs Waste Paper for a year from November 2003. During that period Plaintiff worked on a regular basis except when he had gone to the doctor. She said he worked at night from 5:30 pm or 6pm to 8am, he did the same work as Fahim. She said she used to pay Plaintiff R800.00 to R1200.00 per week for wages depending on the hours he had worked.

She also paid Fahim R1200.00 and some change a week.

181. She totally contradicted her evidence as to when she started working at Babs Waste Paper and when she left. Initially her evidence was that she started working there in November 2003 and left in September / October 2004, because she was going to have a baby who she said was born on 30 June 2005. But when she was cross examined relating to the period when she said her baby was born, as against the period when she had said she left work, she contradicted herself and ultimately changed her evidence and said she started working for Babs Waste Paper towards the end of 2002 and left at the end of November 2003.

182. In her evidence she said she paid the wages of all the workers in cash including the Plaintiff. When, in cross examination she was confronted with Mr Babs Razack's evidence that from after about April 2003 all wages were paid to all employees by depositing them into their bank

accounts, she acknowledge that this is so.

Later during the cross examination she said even after the bank transfer arrangements regarding wage she still paid some casual workers who had no bank accounts.

183. In reply to a question by me she said ultimately all the causal workers opened bank accounts and she stopped paying wages in cash but there were odd one or two people including the Plaintiff whom she paid in cash. This contradicted her earlier evidence when she accepted that all employee's wages were paid into their bank accounts after about April 2003.

184. She was unable to explain why Sirkhoth said that she told him not to give evidence because she knew what happened in 1998. Sirkhoth's evidence in this regard was not far fetched in view of her relationship with the Allys.

185. She was vague in a number of respects including what work was performed by Plaintiff when he worked. Her evidence in regard to the regularity of Plaintiff at work and the hours when he started work was also at variance with the security guards

evidence which as stated I shall shortly be referring to. Miss Khan's evidence was not satisfactory in a number of material respects.

186(B). Evidence of security guards, Dumisani Nkwanyana and

Welcome Mzimela:

Regarding Daniel Buthelezi's evidence what emerged from his evidence is that:-

(1) Plaintiff would come to Babs

Waste Paper at 8pm or 10pm.

(2) His coming was occasional,

sometimes he would come once

or twice a week, some weeks he

would not come. When he came

he would speak to some workers

sometimes drive the hyster,

sometimes move the trucks if

there was a shortage.

(3) When he came he would be

there for a few hours and then

left, sometimes he left in the

morning.

(4) He could not dispute Plaintiff's version that when he went there he would be visiting. It is clear that from his evidence that there was no regularity, it was occasional coming of the Plaintiff to this place. This is a far cry from what is expected from a person who is in employment.

187. Christopher Tsotetsis's evidence was very scanty. What emerged from his evidence is that he said:-

- i) That he was caught sleeping and was reported by Plaintiff and Norman, there were no repercussions but he was not happy about the complaint although it was true.
- ii) Plaintiff came to Babs Waste Paper four or five times during the period of three months that he was there.
- iii) Plaintiff would come at 10 or 11pm and would be



there for one or two hours and then leave. While there he would go and speak to Norman he does not know what he spoke about.

- iv) He saw him walk with the aid of a stick, sometimes he would walk without a stick limping.
- v) He thought Plaintiff came there to work but did not say why he thought so.

188. The main aspects from Khanyise Radebe's evidence is:-

- i) That he saw Plaintiff coming to Babs Waste Paper at 7pm, he would be there for two or three hours. He came sometimes three days a week.
- ii) When Plaintiff came he would go into the office and then go into the yard and speak to employees he also spoke to him. He did not know what Plaintiff spoke about to the workers he assumed it was about work.
- iii) He accepted that he was just relying

on his memory there was no regularity in Plaintiff's coming there, what he said was an estimate.

- iv) In cross examination he said he was estimating that Plaintiff came twice or once a week, there were instances when the supervisor is not there when he would stay until morning. He had not mentioned this in his evidence in chief. When asked why he was only mentioning this in cross examination, he became evasive and started saying the question was not clear he had understood that he was asked how many times Plaintiff came. He turned out to be a poor witness.

189. According to Paulos Radebe:-

- i) Plaintiff came to Babs Waste Paper three times a week at 8pm to 10pm and then leave.

- ii) That Plaintiff appeared to be checking his work, on one occasion he told him to stand in the open where he can be seen, he could not remember how many times this happened. In cross examination he thought it was once or more.
- iii) He saw him speak to others.
- iv) He would see him talk to the night supervisor Norman at times saw him drinking tea with him.
- v) He disagreed that Plaintiff and Norman were friends but said he could not dispute it.

His evidence was in many respects evasive. The only suggestion that Plaintiff was working was that he told him to stand in an open place and that he spoke to other workers, he did not indicate what he spoke about.

190. It was argued by Mr Maharaj that the security guards had no motive to lie. This is not the only test upon which their credibility and value of their evidence can be evaluated. It is important to look at their evidence whether it can be

relied on. The evidence of these witnesses varies from one witness to the other. A number of them say Plaintiff spoke to the workers, none says what he spoke about to the workers. As stated Daniel Buthelezi says Plaintiff drove a hyster and moved trucks, none of the other witness's talks about this.

191. But even if their evidence were true, from the conduct of the Plaintiff as described, in my view, no conclusion can be made that he was employed, a man who came occasionally, came to work at irregular hours, spends two to three hours then leaves cannot be construed as an employee in absence of conditions to that effect. If on some days he left in the morning, in my opinion, that still does not assist in concluding he was an employee, bearing in mind that from the evidence of Nazeera Khan, he was supposed to do the same work as Fahim and was paid R800.00 or R1200.00 a week. It is highly improbable that an employer would be so generous to pay the amount mentioned to an employee, who came to work

occasionally, spends a few hours, occasionally drives a hyster and moves trucks and then leaves.

192. I therefore, on this evidence led, make a finding that Plaintiff did not go back as an employee of Babs Waste Paper. Because of the finding I have made above I do not intend making a detailed assessment of the evidence of Dumisani Nkwanyana save to say that this witness was a simple unsophisticated witness. In my view because of his circumstances being without a job he was vulnerable to agreeing to give false information to Welcome Mzimela hoping to get monetary remuneration. I found his evidence that he gave that information probable. I am satisfied that Nkwanyana's evidence is probable.

193. It was submitted that he on his own evidence he initially told an untruth to Mzimela. As already indicated above, it is necessary to look at the circumstances under which the witness told the untruth. Further, according to Nkwanyana, Mzimela told him he is a detective looking for

evidence which could assist him to prevent Plaintiff from getting the money. Nkwanyana who was an illiterate and unsophisticated person says he accepted Mzimela to be a detective. In my view Nkwanyana had nothing to gain by saying Mzimela was a detective and he promised to give him money if he agreed to assist him.

194. Mr Maharaj also submitted that Nkwanyana did not see Plaintiff visit Norman. He argued that this is in direct contradiction of Plaintiff's evidence that his reason to go to Babs Waste Paper was to visit Norman. In my view, the fact that Mr Nkwanyana did not see Plaintiff visit Norman does not necessarily make his evidence false or that it contradicts Plaintiff's evidence. It is common cause that Norman was the night shift supervisor, according to evidence he succeeded Gift Ndlovu. There were other witness's like Paulose and Tsotetsi who agreed that they saw Plaintiff with Norman drinking tea.

I therefore can find no merit in that submission. Upon

consideration of Mr Nkwanyana's evidence and the circumstances that have emerged in this case I find that he was a truthful witness.

195. I found Welcome Mzimela a poor and unsatisfactory witness. I gained the impression he came to testify just to deny Dumisani Nkwanyana's evidence. In many instances he was evasive. Although he knew that he was called to testify in this matter he either by design or as cover up failed to acquaint himself with the report or notes he made during his investigation in this matter, he was unable to answer some questions because he said it was a long time since the events in question occurred, he could no longer recall what happened, however he remembered some aspects. To me he appeared to have a selective memory, much more can be said about the reliability of his evidence. In my view no reliance can be placed on his evidence.

196(C). I turn to evidence of employees from Giddy Electrical

relating to purchases by Plaintiff and the evidence of Samantha Naidu referred to as Priya;

197. I shall firstly briefly refer to submission made regarding the evidence in regard to this evidence. The two witnesses from Electrical Express / Giddy's Chatsworth as indicated in the summary of witness's evidence were Priscilla Karappan (Priscilla) and Shireen Reddy (Shireen).

198. It was submitted by Mr Maharaj that the thrust of Plaintiff's evidence is that he had not returned to work after the collision and that he had no residual earning capacity but it was submitted that there are numerous factors that militate against his evidence.

1. That Plaintiff  
concluded certain  
credit transactions  
with Electric  
Express/ Giddys'  
Chatsworth



(Giddy's) during  
October 2004.

- 1.1 These transactions are recorded at page 31 of Exhibit C and Plaintiff explained that these transactions were concluded by his wife and by him on behalf of his minor daughter.
- 1.2 Exhibit C page 31 records Plaintiff's details as "Assistant Manager Babs Waste Paper" and the salary being R4000.00 per month. This was confirmed by telephonic discussion with Priya who was administrative assistant.
- 1.3 The Plaintiff was cross examined on the employment status reflected on page 31 of exhibit C, and that Priscilla telephoned Priya and confirmed this. Plaintiff's response to this was "Priya will be able to answer".
- 1.4 It was also submitted that Plaintiff testified that he indicated to the Giddy's salesperson that he was in receipt of a social grant. The salesperson Shereen testified that in that event

the credit would have been approved on different terms.

- 1.5 It was further submitted that Plaintiff was asked to explain why he was described as an “Assistant Manager at Babs Waste Paper” when he was not at all employed in that position. That his evidence that the information was taken from previous applications filled, it was submitted was false.

199. Mr Gajoo submitted that Plaintiff had admitted the contents of the pro-forma order form that contained the information that he was employed at Babs Waste Paper at a salary of R4000.00. He explained that his daughter Zakira who is a minor had approached Giddy’s wanting to make purchase of a television set and a DVD machine described at page 31 of exhibit C. She was unable to do so because she was a minor and she requested her father the Plaintiff to sign the necessary documents for such purchases. The Plaintiff then proceeded to the store

where the pro-forma order was completed, and he was requested to sign it. He was asked to provide details of his former employers and did so. It was submitted that it was under those circumstances the details of Babs Waste Paper and his earnings were reflected on the form. That Plaintiff was currently employed and the document is incorrect to that extent.

It was further submitted that: the fact that Zakira required the goods in question was borne out by the fact that her bank account was to be debited with the amount of the instalments and the goods would be delivered to her place of residence. That the Plaintiff further explained there were previous purchases which his daughter, Farmina employed at Babs Waste Paper, wanted to make purchases but because she was a minor he, Plaintiff, was requested by the salesperson to sign the relevant documents.

It was submitted that Shereen Reddy who was the

salesperson from Giddy's who signed the forms had no independent recollection of the events. It was also submitted that Priscilla obtained confirmation from a person who said she was an admin assistant, that assertion is not based on her independent recollection but on the endorsement to that effect on the document.

200. Regarding this issue relating to these purchases from Giddy I am satisfied Priya's evidence was fairly scanty on this issue. She confirmed that she received a number of enquiries as to whether the Plaintiff was employed by Babs Waste Paper, but could not remember who those people were. She says she told them that Plaintiff was not employed by Babs Waste Paper. When it was put to her in cross examination that Priscilla testified that she spoke to a person at Babs Waste Paper by the name of Priya who said she was an admin clerk she was asked whether it is likely that she is the person Priscilla spoke to, she said it is possible.

201. Regarding the purchases made at Giddy's it is not in dispute that:-

1. Plaintiff went to Giddy's regarding the purchases.
2. He signed the pro forma form regarding these purchases.
3. That the pro forma form reflected that Plaintiff was an assistant manager employed by Babs Waste Paper with a salary of

R4000,00.

4. The form showed that instalments were to be paid by Z. Razack and the account to be debited was one at a Johannesburg branch.

5. The delivery address was a Johannesburg address.

202. It is disputed that on the day the purchases were made Plaintiff furnished his current employment details and income as "Assistant manager employed at Babs Waste Paper at a salary of R4000.00". Plaintiff's version is that on the occasion of this purchase he told the salesman that he

used to be a driver and supervisor at Babs Waste Paper. He said the employment details appearing on the form might have been transferred from a previous account. He also said before he signed the form he was asked by the salesperson for his former employment details.

203. Both Priscilla and Shereen Reddy were employees at Giddy's, their evidence establishes that their interaction with the Plaintiff was purely as a customer relationship. Shareen stated that she completed some of the particulars on the pro forma form including Plaintiff's employment particulars as assistant manager at Babs Waste Paper and the salary as R4000.00 per month. She said they do not ask a customer for his previous employment particulars but require the current employment particular, she denied that the particular on the form were uplifted from a previous transaction.

204. Priscilla said she telephoned Babs Waste Paper to confirm Plaintiff's employment particulars. In my opinion she could

only have done so if the particulars were current particulars which were furnished. Whether it was Priya, Priscilla spoke to is not clear, but the probabilities are that it was Priya. Priya herself says a number of people had telephoned her seeking confirmation of Plaintiff's employment details, she conceded that it is possible that Priscilla spoke to her.

205. I am satisfied that Priscilla and Shareen Reddy were truthful witnesses. As stated their relationship with Plaintiff was a customer relationship. Their evidence is based on documentary evidence.

206. Plaintiff's explanation as to how it came about the pro forma form bore his employment details on it is improbable. It is unlikely that the saleslady instead of reflecting his current employment details, she would uplift details from a previous transaction. Even according to his evidence Plaintiff was never an assistant manager at Babs Waste Paper earning R4000.00 per month, it is therefore unlikely that even the previous transaction would have the



employment details in question unless he had furnished inaccurate particulars on that occasion.

I do accept that it is likely that he purchased the goods in his name for his daughter. This is supported by the particulars of the account from which instalments were to be paid and the delivery address which is shown as being Johannesburg. The question is whether Plaintiff's statements at Giddy's assist to establish that Plaintiff was employed after the collision. To me what Plaintiff said to Giddys employees were statements made to enable him to open an account in order to make purchase's. To me there is no link between these statements and establishing that at the time in fact Plaintiff was employed at Babs Waste Paper.

207. Mr Maharaj also referred to particulars appearing on exhibit H which is a form for social assistant which was completed when Plaintiff applied for a social grant. He referred to page 3 of this form where under Income Earnings are indicated

'Pension' and in the column next to Pension R500.00 appears. Plaintiff's evidence was that the sum of R500.00 was an amount that was given to him for him to meet his living expenses.

208.Mr Maharaj also referred to exhibit H, where the form required any other information he may supply. The following appears: "He was a casual worker and never received any benefits." Plaintiff's evidence was that he told the clerk who was completing the form that he was working at Babs Waste Paper but he was not registered, he said maybe this may be why the clerk put it that he was a casual worker. In his evidence he was also referred to page 5 of exhibit H where his work history at Babs Waste Paper is shown as from 1996 to 1997. He said he told the clerk that he was working at Babs Waste Paper from 1995 and that the clerk must have made a mistake.

209.Mr Maharaj's argument was that what is shown on exhibit H is also one of the indications that was against Plaintiff's

evidence that he did not return to work.

210. In this regard there is Plaintiff's version as to what he said when the form was completed. The person who completed the form did not testify. I cannot therefore find that the form was accurately completed. The reference to casual worker does not say where he was doing casual work bearing in mind that Defendant's case is that Plaintiff returned to work at Babs Waste Paper. Here again this evidence does not show that Plaintiff was employed after the collision.

211. I now turn to whether it has been proved that Plaintiff returned to work after the collision. Mr Gajoo submitted that the onus of proof on this particular issue is on the Defendant to prove.

- a) that Plaintiff was employed subsequent to the collision.
- b) That he derived an income consequent upon such employment.
- c) The quantum of such income.

212.Mr Maharaj submitted that the onus is on the Plaintiff to prove his loss of earnings and that the onus does not shift.

213.The main issue is whether the Plaintiff suffered a loss of earnings as a result of the collision. In its plea Defendant denied this. Plaintiff in its notice in terms of Rule 37(4) of the Uniform Rules under the heading “Further Particulars” the Plaintiff sought from the Defendant whether it contends Plaintiff is capable of undertaking any form of remunerative employment if so Defendant was requested to particularise:

- a) The nature of employment that Plaintiff is capable of undertaking.
- b) The period over which the Plaintiff will be able to undertake such employment.
- c) What income which the Plaintiff is likely to derive from such employment and computation thereof.

214.Plaintiff also requested whether the Defendant contends that Plaintiff undertook such employment from the date of the collision.

215. Defendant responded that:-

1. Plaintiff

returned to  
work some  
two months  
after the  
injury and  
discontinued  
his  
employment  
with Babs  
Waste Paper  
when he  
realised that  
Defendant  
had  
discovered  
the he was  
employed.

2. That Plaintiff

did

supervisory

work before

the collision.

3. That

Defendant

could not

say what the

quantum of

Plaintiff's

earnings

was because

he secreted

this.

216. In my view Plaintiff following on Defendants denial in its plea that Plaintiff sustained loss of earnings, in its reply to Plaintiff's enquiry Defendant contended that Plaintiff started working at Babs Waste Paper from a period two

months after the injury until he was discovered that he was working.

217. The Defendant has not only contended itself with denying that Plaintiff is not entitled to loss of earning but has averred facts which are in its peculiar knowledge. It seems to me fair and reasonable that that when one party has peculiar knowledge and has the means of establishing such facts the onus should rather be on such party. See *Eskom vs First National Bank of South Africa Ltd 1995(2) SA 386(A) at 392 F*. As a matter of fairness and sound judicial policy it seems reasonable that where one party has the means of establishing a particular fact and his opponent does not the onus be on the former. See *Pillay vs Krishna and Another 1946AD 948 at 952*.

In casu the Defendant has the particulars and details that Plaintiff worked after the collision. It had the means to investigate its contention as it did by employing investigators who conducted extensive investigations. In my view Plaintiff would not have had the means to effectively conduct such investigations.

218. I therefore find that on the evidence led by the Defendant it

has not proved that Plaintiff was employed and was remunerated after the collision.

219.If I am wrong on the issues of the onus, it is evident, in my opinion, that on the evidence of the experts including the occupational therapists Plaintiff has proved that he could not undertake remunerative employment after the accident. The evidence of Nkwanyana also shows that Plaintiff did not work after the collision.

220.In the result considering all the evidence led I am satisfied that Plaintiff has proved on a balance of probabilities that:-

- a) He has no residual earning capacity.
- b) That he is entitled to payment of loss of earnings.

#### LOSS OF EARNINGS.

221.Regarding loss of past earnings from the date of the collision on 13 April 1997 to date of judgment it was submitted by Mr Gajoo that the earnings of Fahim represented the minimum amount Plaintiff would have earned had he remained with Babs Waste Paper. It was



submitted that it was common cause that Fahim took over Plaintiff's position at Babs Waste Paper.

222. Fahim's monthly salary from June 1997 to June 2004 as set out in Mr Razack's evidence and in exhibit C page 11 was as follows:-

June 1997 as driver/supervisor	R2000.00 pm
June 1998 as driver/supervisor	R2200.00 pm
June 1999 as driver/supervisor	R2500.00 pm
June 2000 as driver/supervisor	R3000.00 pm
June 2001 as driver/supervisor	R3500.00 pm
June 2002 as driver/supervisor	R4000.00 pm
June 2003 as driver/supervisor	R5112.00 pm
June 2004 as supervisor	R5918.24 pm

Benefits were as follows:-

13<sup>th</sup> cheque;

three weeks holiday pay;

company car;

petrol allowance (R200.00 per month)

223. Fahim's future prospects and monthly salary were set out as follows by Mr Razack in exhibit C at page 11:-

As foreman, 2005 R8500.00 to R10 000.00 per month.

As manager, 2010 R15 000.00 per month.

Benefits were the same as above.

224. It is common cause or is not in dispute that:-

1. Prior to the collision Plaintiff was employed by Babs Waste Paper at a salary of R2000.00 per month plus an annual 13<sup>th</sup> cheque of R2000.00.
2. In his argument Mr Maharaj conceded that Plaintiff is entitled to at least his loss of past earnings during the period of recuperation after the collision.

225. Factors Regarding past loss of earnings:

1. Mr Razack's evidence was that when Fahim's Employment Certificate relating to his earnings and future prospects was drawn in October 2004. In having the certificate drawn he was assisted by Fahim as he (Mr Razack) did not have the records relating to Fahim's earnings, Fahim brought some of his pay envelopes which assisted him to have the certificate drawn by Priya Naidoo his assistant.

2. It is therefore apparent that Fahim supplied some of the information contained in the certificate. The contents of the certificate were challenged by counsel for the Defendant. Fahim was not called as a witness to confirm that the information he supplied is correct. I am therefore unable to determine what proportion of the information was furnished by Fahim, I do bear in mind that some of the information, according to Mr Razack, was obtained from Fahim's pay envelopes which he (Fahim) brought to Mr Razack.
3. In determining the amount Plaintiff would have earned after the collision I take into account that Mr Razack's evidence was that the annual salary increases varied from 10% to 15%. The annual increases

which Fahim received from June 1997 to June 2003 are more or less within the range of the percentage set out by Mr Razack in his evidence.

4. I accept that at the time of the collision Plaintiff earned a monthly salary of R2000.00 and for purpose of calculation of past loss of earning I accept that Plaintiff would have received an annual increase of at least 10% which I consider would be reasonable.
5. I therefore find that past loss of earning from the 13 April 1997 to October 2007, (by which time it is anticipated that judgment will be handed down) should be calculated on the basis that Plaintiff earned a sum of R2000.00 on 13 April 1997 which would have increased annually at the rate of 10%.

6. In so far as benefits relating to past loss of earning, Mr Razack's evidence is that as at 2000 or 2001 when Babs Waste Paper moved to Brookland road Fahim was not receiving the benefit of a company car nor a petrol allowance, he was unable to remember when Fahim started receiving these benefits. I find this rather strange in the face of his evidence that in October 2004, when Fahim's employment certificate was drawn, he was assisted by Fahim in completing the certificate in all likelihood Fahim would have remembered that and this information would have been recorded by Priya. These benefits were not available to the Defendant when the claim form was submitted. I am therefore not satisfied that Plaintiff has proved that he would be entitled to a company car and petrol

allowance.

7. I have already stated that I accept that before the collision Plaintiff was paid an annual 13<sup>th</sup> cheque or bonus of R2000.00 which should be taken into account for calculation of past loss and future earnings.

8. In regard to the three weeks holiday pay, I am of the view that this is a benefit which it would be legitimate, fair and reasonable to take into account for calculation of past and future loss of earning.

226. Deduction from past loss of earning:

It is common cause that Plaintiff was in receipt of a social grant from January 1999. This has been calculated by Plaintiff's legal representatives up to September 2006 to an amount of R67 430.00. To this amount should be added the amount received from October 2006 to October

2007 at R820.00 X 13 months which will amount to R10 666.00 making a total of R78 090.00 to be deducted from Plaintiff's total amount of loss of past earning.

227. Future loss of earnings:

As indicated counsel for the Plaintiff submitted that Plaintiff's loss of earnings should be based on the amount reflected in Fahim's Employment Certificate as it appears at page 11 of exhibit C.

It has been submitted by Plaintiff's counsel that Mr Razack's undisputed evidence is that Fahim took over Plaintiff's position after the collision. It is significant to note that Plaintiff's Employment Certificate which was completed by Mr Razack on 30 August 1999, appearing at page 11 of exhibit C, shows that:-

(i) Plaintiff's salary at the time of the collision was R2000.00 a month and he received an annual bonus of R2000.00.

(ii) His prospects of promotion and salary is shown at page 8 of exhibit C as follows:-

- a. In 2000 as supervisor he would earn a monthly salary of R4000.00.
- b. In 2005 he would have been a foreman at a monthly salary of R7 500.00.
- c. In 2010 he would have been a manager with a monthly salary of R10 000.00.

No benefits are indicated other than the annual bonus of R2000.00.

228. At page 11 of exhibit C Fahim's monthly salary in June 2004 as supervisor was R5915.54. His future prospects of promotion are shown as:

- (i) Foreman/2005 with a salary of R8500.00 to R10 000.00 pm
- (ii) Manager/2010 with a salary of R15 000.00 pm

His benefits are:-

- a. 13<sup>th</sup> cheque;
- b. 3 weeks holiday pay;
- c. Company car;
- d. Petrol allowance (R200.00 per month).



229. The purpose of setting out Fahim's Employment Certificate according to Mr Razack is to show that as Fahim got into Plaintiff's position, if Plaintiff was not injured, he would be in the same position and paid a salary as Fahim if not earning more. Mr Razack's evidence is further that Fahim's Employment Certificate is more accurate and realistic than Plaintiff's certificate.

230. Plaintiff's Employment Certificate was drawn more than two years after the collision, when it was drawn Fahim had been in Plaintiff's position at Babs Waste Paper for more than two years. There is no reasonable explanation given why when Plaintiff's Employment Certificate was drawn it did not reflect proper and accurate information of his future prospects and salary and why it took seven years after Fahim had taken over from Plaintiff to compile Fahim's Employment Certificate.

231. Mr Razack was evasive and contradictory as to whether the

figures appearing in Fahim's Employment Certificate were actual figures or were estimates, at one stage he said they were estimates, immediately thereafter he corrected that and said they were actual. In cross examination when he was cross examined about Fahim's salary reflected at page 14 of exhibit G, which was lower than that in the certificate, he said the figures were estimates. He also in cross examination conceded that Fahim's Employment Certificate had some inaccuracies such as that the company car reflected as a benefit for Fahim was only available to Fahim only after the company had moved to Brookland road not while the company was at Barrier place as shown on the certificate.

232. Further the reason given by Mr Razack why Plaintiff would have been appointed as manager was that he would be manager of his Durban main branch of Babs Waste Paper and that this was in order to give him (Mr Razack) an opportunity to attend to the running of branches at East London and Lusikisiki. At the time Plaintiff was involved in

the collision, according to his (Mr Razack) evidence, these branches did not exist, they were opened two or three years after Plaintiff had been involved in the collision. When asked to explain why he opened the branches when he knew that Plaintiff was disabled, he said the East London branch had been planned some time back, it belonged to a Black Empowerment Group and he was due to take it over in 1994 but that did not happen, but that does not explain why he took over the branch in 1999/2000 when he knew as far back as in June 1997 that Plaintiff was disabled.

233. When he appointed Fahim to take over Plaintiff's position he already knew that he (Plaintiff) was disabled, he therefore could not return to his work. He further said he closed the two branches because Plaintiff could not take the management of the Durban branch. When asked why Fahim could not take over he said Plaintiff was trustworthy, this was strange because Fahim was there, he trusted him enough as he would entrust him with his business for six weeks while he (Mr Razack) went to his planned

pilgrimage.

234. There are a number of other unsatisfactory aspects in Mr Razack's evidence which militate against the acceptance of his version that Plaintiff's loss of earnings should be calculated on the basis of what is set out in Fahim's Employment Certificate.

235. As indicated above the evidence shows that there was no position for a foreman or a manager, before Plaintiff was injured. From the evidence of Mr Razack, which I have found unsatisfactory, the elevation of the Plaintiff was linked to the establishment of the branches at East London and Lusikisiki.

236. I am therefore satisfied that for purpose of calculation of Plaintiff's future loss of earning a sum of R5000.00 per month would be fair and reasonable plus an annual bonus in a sum equal to one month's salary in respect of each particular year plus three weeks holiday pay based on the

salary applicable in that particular year.

## CONTINGENCIES.

### 237. PAST LOSS OF EARNINGS:

In considering this aspect I consider that the period for which an assessment is to be made is much shorter than that for future loss of earnings, the uncertain factors are over a shorter period. In this regard I consider and weigh Plaintiff's age, his physical and psychological deficits against his chances of possibly working under a sympathetic employment or working in a reduced capacity. I therefore assess contingencies under this heading at 5%.

### 238.FUTURE LOSS OF EARNINGS:

In considering contingencies under this heading the Court is faced with a greater number of imponderables than in the case of past loss of earnings. The period over which the Court has to consider the effect of these factors is much longer, as is the case in this case.

In this regard I take into account the specialists' views that he may be accommodated in a sympathetic environment, even though Dr Goga has indicated that he may require training, Professor Lazarus has indicated that there are some factors that may adversely affect Plaintiff's trainability. I take into account also the Plaintiff's rather remote chances of being able to work in a reduced capacity. Considering these factors I assess contingencies at 15%.

#### COMPUTATION OF LOSS OF EARNINGS

239. Having considered the evidence and other factors I gave the following directions for actuarial calculation of past and future loss of earnings which were sent to the respective legal representatives of the parties.

The directions for actuarial calculation were as follows:-

1. Plaintiff is Ebnasyed Razack born on 2 February 1956.
2. He was employed by Babs Waste Paper from January 1995.

3. On 13 April 1997 while still employed by Babs Waste Paper he was involved in a motor vehicle collision as a result of which he suffered serious injuries.
4. As a result of the injuries Plaintiff suffered he has been left with no residual earning capacity consequently he has suffered, inter alia, a loss of past and future earnings.

#### PAST LOSS OF EARNINGS:

5. At the time of the collision Plaintiff was earning R2000.00 a month plus an annual bonus of R2000.00.
6. It is assumed that had the Plaintiff not been injured he would have:-
  - 6.1 Earned a sum of R2000.00 per month from 13 April 1997 to 31 October 2007 with an annual increase of 10% per annum.
  - 6.2 From 13 April 1997 to 31 October 2007 he would have received the following benefits:-
    - i. an annual bonus equal to one months salary;
    - (ii) three weeks holiday pay.
7. Deductions:-
  - 7.1 Disability grant from January 1998 to 31 October 2007.

( see schedule annexed)

7.2 Contingencies for past loss of earnings at 5%.

FUTURE LOSS OF EARNINGS.

8. To be calculated from 1 November 2007 to date of retirement of Plaintiff at age 65 years.
9. It is assumed that Plaintiff would earn R5000.00 per month from 1 November 2007.
10. Future income from 1 November 2007 accruing to Plaintiff will increase in accordance to inflation and to be capitalised.
11. Contingencies are assessed at 15%.
12. It is assumed that Plaintiff would have received the following benefits from 1 November 2007 to date of retirement at age 65.
  - 12.1 an annual bonus equal to his one month's salary.
  - 12.2 three weeks holiday pay.
13. It is assumed that life expectancy has not been compromised.
14. All other actuarial considerations normally taken into



account in actuarial calculations of this nature to be taken into account.

240. On or about 25 August 2007. I received from Defendant's attorneys, an actuarial calculation by Gerald Jacobson dated 23 August 2007 which is annexed hereto. I accept these calculations. I therefore find that Plaintiff suffered past loss of earning in the sum of R343,703.00 and will suffer a loss of earnings capacity in the sum of R489,314.00.

#### TRAVELLING EXPENSES TO AND FROM HOSPITAL.

241. The Plaintiff's claim in this regard is for payment of sum of R4950.00 in respect of travelling costs to and from King George V Hospital and for a sum of R638.00 for travelling to and from RK Khan Hospital.

242. The evidence of the Plaintiff is that the details of this claim are set out at page 16 of exhibit C, which details, according to Plaintiff's evidence, represent only the occasions he

went to the hospital which were extracted from the hospital records.

243. Mr Maharaj argued that this claim should be disallowed because it is not documented, in that there are no supporting document of these trips and costs thereof.

244. Plaintiff's evidence that he travelled in his or his brothers vehicle to the hospitals was not challenged neither was his evidence challenged to the effect that the trips upon which his claims are based are those linked to his attendance at the hospital as recorded in hospital records.

245. It could not have been reasonably expected that it would be practicable for the Plaintiff to record and keep a record of each trip to the hospital and the costs thereof.

246. I am satisfied that Plaintiff has proved that he incurred travelling costs on the occasions which are set out at page 16 of exhibit C.

247. The next issue is what the reasonable travelling costs of the trips to the respective hospitals as set out in exhibit C at page 16 would be. The Plaintiff relies on the evidence of M/s Jane Bainbridge whose evidence is that occupational therapists' costs would be based on the AA rate of R2.20 a kilometre. She said seeing that Plaintiff was not travelling by taxi his travelling costs could be relied on the AA rate.

248. Mr Maharaj argued that the Court cannot take judicial notice of what the AA rates are. While the Court may not take judicial notice of this, the Court, in my view, is entitled to take into account the available evidence in determining the reasonable rate of the travelling. I have before me the evidence of M/s Bainbridge regarding the costs of travelling, relating to occupational therapists. This rate was not challenged as unreasonable. Considering the available evidence I am satisfied that the travelling rate of R2.20 per kilometre is reasonable, and the Plaintiff may rely on this rate for assessment of his costs of travelling to the

respective hospitals.

249. Plaintiff's evidence was not challenged that:

- a) 45 trips were undertaken by him to King George V Hospital and the distance from his residence to the hospital and back, is 50 kilometres.
- b) 29 trips were undertaken by him to R K Khan Hospital and that the distance from his residence to hospital and back, is 10 kilometres.

250. I therefore find that Plaintiff is entitled to compensation for his costs for the travelling trips as follows:

- a) to and from King George V Hospital 50 kilometres X 45 trips at R2.20 per kilometre amount to R4950.00.
  - b) to and from R K Khan Hospital 10 kilometres X 29 trips at R2.20 per kilometre amount to R638.88
- total R5588.00

#### COSTS OF HIRE OF GARDENER:

251. Plaintiff's uncontradicted evidence was to the effect that after the collision he was unable to do his gardening work

and had to engage a gardener twice a month at a cost of R40,00 per day. The occupational therapists agreed that Plaintiff is entitled to be compensated for expenses under this heading.

252. Here again Mr Maharaj argued that this claim is also not documented. I find that Plaintiff has proved that he is entitled to be compensated for hire of a gardener. The amount claimed of R80.00 for two days a month is reasonable in my opinion.

253. Plaintiff in his Particulars of Claim has claimed compensation for two days a month in the sum of R80.00 from January 2000. I therefore find that Plaintiff is entitled to be compensated in the sum of R7510.00 made up as follows:

- i) R80.00 per month from January 2000 to 31 October 2007.

CLAIM FOR INTEREST ON AMOUNT OF GENERAL DAMAGES.

254. At the commencement of the trial on 22 June 2005 it was agreed by the parties that general damages had been agreed in the sum of R200,000.00. The Plaintiff contends that this amount notwithstanding demand for payment of the said sum of R200,000.00 Defendant failed to pay but only paid this amount on the 30 July 2006. Consequently the Plaintiff seeks for an order that Defendant be ordered to pay interest on the said amount of R200,000.00 at the rate of 15.5% per annum from 8 July 2005 until 30 July 2006. I was referred to a letter by Plaintiff's attorneys to Defendant's attorneys dated 01 July 2005 which is at page 39 of Exhibit C in which Plaintiff's attorneys confirmed a telephonic conversation they had with Defendant's attorney when the latter refused to pay the sum of R200,000.00 because the matter had not been finalise.

255. I was also referred to a letter by Plaintiff's attorneys to Defendant's attorneys dated 05 May 2006 which is at page 40 of exhibit C, wherein Plaintiff stated, inter alia, that the agreement regarding the general damages in respect of

which the Court was informed. They further stated that at the time the agreement was reached it was not anticipated that judgment would be delayed and the matter had now already been adjourned twice for further hearing. They indicated that at the end of the trial Plaintiff would argue that Defendant should pay interest on the amount of R200,000.00 at the rate of 15.5% per annum.

256. On 11 May 2006 Plaintiff's attorneys addressed another letter to Defendant's attorneys which is at page 42 of exhibit C, in which they referred to their previous letters and drew their attention to remarks by Zulman JA, in *Road Accident Fund vs Delport No (2006) all SA 468 (SCA)*, wherein, the Learned Judge made scathing remarks against the Road Accident Fund for failing to pay undisputed amounts to the Defendant.

257. Mr Maharaj argued that the judgment in Delports case differs from the present case in that:

a) In the present case there has been no judgment for

payment of the general damages.

- b) In Delport's case when the Road Accident Fund failed to pay the Plaintiff brought an application for payment of the undisputed amount.

He also argued that *in casu*, there was an agreement as to the quantum of general damages in order to curtail proceedings, there was no agreement that Defendant should pay the agreement amount.

258. In Delport's case the Road Accident Fund, (the Appellant) appealed against the amount awarded by the Court for general damages and for damages for loss of earning capacity. The Appellant appealed against the amount awarded by the *Court a quo* and it contended that the "Court should have awarded an amounts for the two claims totalling approximately R1600,000.00. Defendant who was Respondent on appeal, unsuccessful attempted to get the Appellant to pay the admitted amount. Zulman JA remarked as follows regarding the conduct of the Appellant:-

"Before concluding this judgment I believe that it is



necessary to record what can only be described as deplorable conduct on the part of the appellant notwithstanding the fact that the appellant conceded that the patient was entitled to an award of approximately R1600,000.00 in respect of loss of earning capacity and general damages, it made no payment on account of such award before December 2004 Judgment was given in favour of the respondent on 22 October 2003”

259. I am of the opinion that although in that matter there was a judgment, the judgment was not specifically in respect of the amount admitted but for a higher amount. *In casu* there was no judgment in respect of the general damages but to me the Defendant had, by agreeing the amount of damages was in fact conceding that the Plaintiff was entitled to payment of the agreed amount in respect of his general damages. I can find no reason why Defendant would be entitled to refuse to pay that amount to the Plaintiff.

260. The fact that Plaintiff in this case did not make an application, in my view, does not make it distinguishable, Plaintiff gave Defendant notice that at the conclusion of the trial it will be arguing that Defendant should pay interest on the agreed amount of R200,000.00 which he had admitted.

261. I am therefore satisfied that the Plaintiff has proved that he is entitled to payment of interest on the sum of R200,000.00 from July 2005 to 30 July 2006.

#### COSTS OF TWO COUNSEL.

262. Plaintiff's counsel asked that Defendant be ordered to pay Plaintiff's costs including costs consequent to employment of two counsel. Plaintiff set out various grounds including the importance of the case to the Plaintiff, the number of expert reports and consultation with the experts, that the case itself was not a simple and straight forward case, the number of documentary exhibits and that this was a lengthy trial heard over approximately fourteen days, I shall shortly be referring to those grounds.

263. Mr Maharaj opposed the order sought. He argued that this was a simple case involving factual issues whether Plaintiff was employed after the collision, he therefore submitted that there was no need for employment of two counsel.

264. In my opinion this was indeed an important case for the Plaintiff. According to the opinions of the experts Plaintiff sustained a very serious spinal injury which was likely to have adverse consequences to his future employability. His claim involved a substantial amount of R2677 801.00 which was later amended to R2403 013. 68. His claim for loss of earning was strongly resisted by Defendant. In my view this case was not a simple one.

1. It involved consideration of experts reports of no less than eight experts, although there were some reports in respect of which consensus was ultimately reached but some of the experts had to testify.
2. There was a substantial volume of documentary evidence which had to be collated with the evidence of some of the witnesses.

3. The trial itself lasted approximately fourteen days with eight witnesses testifying, consequently the record of the evidence was fairly voluminous.
4. The Defendant's defence was that Plaintiff was not entitled to compensation for loss of earning because after the collision he was, employed. The evidence led in this regard included evidence of alleged fraudulent statements which it was contended that those statements also showed that Plaintiff was employed after the collision and therefore he was not entitled to payment of past loss of earnings or damages for loss of future earning capacity.

265. Although it was argued for the Defendant that the case involved purely factual issues as to whether the plaintiff worked after the accident, I consider all the circumstances in this case including its importance to the Plaintiff and the issues raised by the Defendant. It seems to me that Plaintiff's precaution to engage two counsel was reasonable.

## COSTS ON ATTORNEY AND CLIENT.

266. Plaintiff's counsel sought an order that Defendant be ordered to pay costs on attorney and client scale. In essence this was based on the following:-

1. That Defendant's counsel cross examination of Professor Lazarus was unnecessarily protracted and was largely irrelevant. That counsel sought to cross examine Professor Lazarus against a back ground where Defendant did not have a neuropsychologist's report which contradicted any of the opinions or conclusions which Professor Lazarus arrived at.
2. It was further submitted that, notwithstanding, the agreement of the occupational therapists regarding Plaintiff's residual earning capacity Defendant embarked on a "self-defeating"

exercise in an endeavour to demonstrate that Plaintiff was employed after the collision and earned an income.

3. It was further submitted that Defendant originally sought to establish that Plaintiff resumed regular employment shortLY after the collision and earned an income. It was argued that it is inconceivable that the Defendant did not know or appreciate prior to the commencement of the trial, that it would not be able to establish these facts. It was argued that Defendant unduly prolonged the trial by calling the witnesses Munira and Nazeera when Defendant knew there was a family feud between the Plaintiff and Mr Razack on one hand and the Ally's and Nazeera on the other. It was also argued Defendant proceeded and led and called the security guards whom Defendant had consulted

with and these witnesses did not assist the Defendant.

267. The grounds for an order that a party pay costs on attorney and client scale, is in essence a punitive order. The Court is always loath to award such costs against a party unless for very good reasons because a party is entitled to bring its complaints before the Court or defend an action in the best way it can. See *Van Winsen Celliers v Loots The Civil Practice of the Supreme Court of South Africa 4<sup>th</sup> edition at page 715*, and cases referred to therein.

268. I am therefore not satisfied that the reasons advanced by Mr Gajoo for the order sought are sufficiently strong to warrant the granting of an order that Defendant pay costs on an attorney and client scale.

269. In the result I grant Judgment in favour of the Plaintiff against the Defendant for payment of:

1. An amount of R335,703.00 in respect of past loss of

earnings.

2. An amount of R489,314.00 in respect of future loss of earnings.

3. An amount of R5588.00 in respect of travelling costs to Hospitals for medical treatment.

4. An amount of R7510.00 for hire of a gardener.

5. Interest on the amounts in paragraphs 1,2,3, and 4 above at the rate of 15.5% per annum with effect from fifteen (15) days after the handing down of this Judgment to date of payment.

6. Interest on the amount of R2000,000.00 in respect of general damages at the rate of 15.5% per annum with effect from 8 July 2005 until 30 July 2006.

7. Defendant to pay Plaintiff's costs including:-

(a) costs consequent upon employment of two counsel.

(b) the reasonable qualifying fees and expenses of the Plaintiff's expert witnesses (whose reports and/or summaries were filed of record) including their qualifying fees, reservation and/or attendance fees and costs of consultation with Plaintiff's attorney and



counsel.

(c) all reserved costs.

Judgment reserved on: 7 September 2007.

Judgment delivered on: 19 October 2007

Counsel for Plaintiff: Adv Gajoo SC/ Adv Patel  
Instructed by: A.Debba and Associates  
REF: Mr A Debba/ R35-99

Counsel for Defendant:	Adv Maharaj
Instructed by:	Hughes Madondo Attorneys
	REF: Ms W. Hughes/JK/R178