

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 13347/2007

In the matter between:-

LEVESHAN CHETTY

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

VAN ZYL, J.:-

1. The plaintiff claims damages for personal injuries sustained in a motor collision which occurred on 1 September 2004 at or near Ridley Park Road, Malvern in the Durban area. At the time the plaintiff was riding a motorbike when he was involved in a collision with a motor vehicle.
2. The issue of liability was resolved between the parties and by agreement the defendant accepted liability for eighty percent (80%) of the plaintiff's proven damages. In the result the trial proceeded in respect of quantum

only.

3. The plaintiff was born on 1 January 1985. In the collision he suffered what was described by Dr Nadvi, the neurosurgeon who treated him from the outset, as severe poly trauma signifying injuries to many parts of the body. Dr Nadvi, in giving evidence, broadly described these injuries.
4. The nature of the injuries are not seriously disputed. They include an injury to the left side of the chest with the intrusion of air into the pleural cavity between the lungs and his ribcage (a left *haemothorax*). This had to be drained by a cardiothoracic surgeon and healed with permanent scarring. The plaintiff further suffered abdominal injuries which required surgery by a general surgeon and which involved also the removal of the plaintiff's ruptured spleen. The plaintiff suffered a fracture of the right femur, which required surgery by an orthopaedic surgeon involving an open reduction and internal fixation. Although healed there remains stiffness in rotation of the right lower limb and surgical removal of the fixation device will likely be required at some stage.
5. Dr Nadvi's main involvement with the injuries sustained by the plaintiff concerned a brain injury which, whilst not requiring surgery, was cared for in the intensive care unit (ICU) of the St Augustine's Hospital where the plaintiff was treated for a period of approximately sixteen days in all. The witness explained that the plaintiff had not suffered any fracture of the skull and that the injury was in the nature of a high velocity injury,

causing the brain to impact inside the skull causing what is commonly referred to as a diffuse brain injury.

6. The assessment of the severity of the plaintiff's brain injury was complicated by the treatment which the plaintiff received for his other injuries at the same time. According to Dr Nadvi the severity of brain injuries are generally classified as being mild, moderate or severe and in order to make such an assessment three criteria are employed. The first of these relate to the level of consciousness of the patient following the injury. In this regard the Glasgow Coma Scale (GCS) is used. This is a [neurological scale](#) that provides a reliable objective recording of the level of consciousness of the patient for assessment. A patient is assessed against the criteria on a scale of fifteen (15), where a score of three(3) signifies deep unconsciousness and a score of fifteen(15) signifies full consciousness. In the present instance the GCS was not useful as a diagnostic tool because the plaintiff, due also to his extensive other injuries, was kept under sedation whilst in ICU.
7. The second criteria used to assess the severity of a brain injury is the degree of post traumatic amnesia. That is, the extent to which the patient is unable to recall events following upon the event giving rise to the brain injury. This Dr Nadvi stressed is a more subjective test, but is nevertheless used in determining the extent of an injury. Generally, according to the witness, any period of post traumatic amnesia exceeding one week is regarded as indicative of a severe brain injury. In the case of

the plaintiff the period of post traumatic amnesia extended to approximately two and a half (2 1/2) weeks in that the plaintiff only started recalling events after his transfer from ICU to the general hospital ward. Of course, logically the extent of the plaintiff's ability to recall and thus the reliability of this test, would also be adversely affected by the fact that he was kept under sedation whilst in ICU.

8. Finally, the third measure used to determine the severity of a brain injury is a computerised tomography (CT or CAT) scan which uses X-rays and a computer to create detailed images of the inside of the patient's body. In the case of the plaintiff the CT scan was done on the day of the collision and the result indicated an abnormality in the form of a cerebral oedema, or cerebral swelling, which was indicative of a severe brain injury.
9. One of the unfortunate results of the brain injury in the case of the plaintiff included excessive ossification of the left elbow. Dr Nadvi explained that the severity of the plaintiff's brain injury resulted in, what he described as an outpouring of adrenalin and other chemical agents. Where, at the same time, the patient in such a case has also suffered a fracture and in particular if the patient is rendered immobile, this causes excessive bony formation at the locality of the fracture site which can even penetrate the surrounding muscle resulting in a condition called *myocitis ossificans*. That is what occurred in the case of the plaintiff, with the result that he is left with permanent impaired movement or stiffness

of the left elbow, with loss of function of the left upper limb. In addition there also occurred a degree of myocitis ossification at the fracture site in the right thigh, with some pressure symptoms suggesting the possible future need for surgical intervention.

10. In the course of his evidence Dr Nadvi observed that the period of recovery of brain injuries lasted approximately one year, after which no further improvement would be expected. In the case of the plaintiff he considered him fortunate in not being left with significant paralysis or speech impediment, but stressed that generally the problems patients such as the plaintiff would be likely to be left with would include those related to cognition, memory, behaviour, attention span, concentration and mood. However, he stressed that these deficits fell within the field of expertise of the neuropsychologists.

11. In this regard the plaintiff called Professor T. Lazarus and the defendant Dr B. A. Bosch. At the end of the day their conclusions were largely consistent. In argument the defendant did not seriously dispute the injuries sustained by the plaintiff as a result of the collision, but the *sequellae* or extent of the impairment resulting from the brain injury was the subject of debate and differences of opinion and emphasis. The defendant's main line of attack centred upon the plaintiff's drug usage, both before and after the collision.

12. At the time of the collision on 1 September 2004 the plaintiff was a

second year student at the Durban Institute of Technology studying for a diploma in quantity surveying. In his first year he had passed five out of seven subjects but did not sit for examinations at the end of 2004 due to the injuries sustained in the collision. He resumed his studies during 2005 and passed four out of six subjects. During 2006 he attempted four subject courses, but failed three and passed only one (Quantity Surveying II). During 2007 the plaintiff again enrolled for a repetition of the previous year's courses, but was again unsuccessful and then abandoned his studies.

13. The picture of the plaintiff which emerged pre-accident was of a young man who was an average student and who may have taken an extra year, or even two, to complete his diploma studies. Post accident he rallied and achieved initial limited success, but in circumstances where he enjoyed strong family and peer support. However, as the support of friends and fellow students waned, so did his academic successes. His sister Aneshree in particular gave graphic evidence of his impairments at the time following his discharge from hospital and how he eventually resumed his studies. Her evidence also cast light upon the discovery of the plaintiff's drug usage and the decisive steps immediately taken to address the problem.

14. The essential issue in the debate about drugs was not the nature and extent of the neuropsychological deficits which the plaintiff suffered from after the collision, but rather whether such deficits were attributable to

the brain injury sustained during the collision, or to his drug usage and if the latter, then to what extent. Dr Bosch in particular sought to highlight the use of drugs in this regard.

15. Having heard to the evidence I am not persuaded that the plaintiff, prior to the collision, had developed any serious or sustained drug usage habit. My impression is rather that of a young male student who, in company of others, experimented with drug usage, probably in a social context. The subsequent discovery of drug usage by the plaintiff came at a stage where he was suffering the complex after effects of the injuries sustained in the collision and his apparently successful treatment thereafter, coupled with the strong family support he enjoyed, suggests that his neuropsychological deficits are primarily attributable to the brain injury sustained in the collision.

16. It remains, however, to consider the nature and extent of these neuropsychological deficits in order to determine the issues which are in dispute between the parties. The parties reached agreement in respect of the past medical expenses in the sum of R177 027-82 and with regard to future medical expenses the defendant will provide for 80% of the plaintiff's needs in terms of an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996. The contentious areas relate to the determination of the extent of the general damages suffered by the plaintiff, as well as of his future loss of income.

17.Pre-accident the plaintiff was an energetic young man, particularly fond of swimming and fastidious about his appearance. He also achieved a degree of success in competitive swimming. Whilst at school doing grade 8 he obtained Natal Colours in swimming and then obtained his South African Development Colours during Grades 9 and 10. He apparently competed in several provinces and obtained a number of prizes and awards for swimming, including endurance events. Other sporting activities included water polo and life saving.

18.A significant number of family members such as uncles, aunts and cousins embarked upon tertiary studies, are employed in management or executive positions, or are in business for their own account. His father attended a diploma course in building science at the M L Sultan College, but at the time of the trial was the general manager of a shipping agency. His mother worked as a part-time saleslady at a department store during December holiday periods only, but was otherwise a housewife. His younger sister Aneshree attended a yearlong course in computer science after completing her schooling and at the time of the trial was employed as a technical sales representative by a company marketing civil engineering products. As such she interacts on construction sites with professionals, such as civil engineers and architects, where she also does some on-site training.

19.Given the family background and support system and in the light of the close family relationship which existed pre-accident I concluded, as

already indicated, that the plaintiff is likely to have successfully completed his diploma in quantity surveying. Even after the collision the plaintiff had moderate initial success in resuming his studies, which is supportive of my conclusion in this regard.

20. Prior to the collision the plaintiff had dabbled with casual work, mainly in the promotional field, to supplement his income. After the collision and once he had sufficiently recovered, he again sought casual employment. However, he had tired of promotional works and instead tried other avenues of employment, but with limited success. During 2005 he found employment in a construction company owned by the husband of one of his maternal aunts. However, he found routine tasks and discipline annoying and left. He tried his hand at sales in a department store, but left after a few days. He did pizza deliveries, but the sustainability of this line of employment is doubtful, not least because the plaintiff's ability to drive safely, particularly for sustained periods, is doubtful.

21. Essentially the plaintiff is left with a complex combination of neuropsychological deficits, some of which are quite subtle, but all of which in combination have a devastating impact upon the plaintiff's interpersonal relationships, his ability to follow a career or even just to earn a living, as well as upon the quality and enjoyment of life.

22. The plaintiff is able to perceive some of the effects of his injuries. For instance, he acutely experiences the frustration brought about by the

limited use of his left upper arm, especially against the background of his prior sporting achievements. He would also be aware of and annoyed by certain limitations, such as lapses in his short term memory and the inability to recall events or information. A basic example referred to in evidence was his going shopping and then being unable to recall what he went there to purchase.

23. However, there are no doubt other deficits which he is unable to comprehend. He apparently still has illusions of starting his own business. Prior to the collision his intended career path included completing his diploma, then going on to complete a B.Tech degree in quantity surveying before eventually starting his own business, presumably as a practising quantity surveyor. Objectively that is no longer achievable, but the full implications of his post accident limitations are probably not yet subjectively apparent to the plaintiff.

24. From the evidence one gathers that following the collision the plaintiff has undergone behavioural, personality and emotional changes. Whereas before he was gregarious, likeable and tolerant of the views and behaviour of others, subsequently he became self absorbed, was easily angered or provoked and became intolerant and argumentative. His resilience suffered, he is easily fatigued and tends to sleep a lot. However, his sleep is of a disturbed nature, he suffers nightmares and awakens in a state of anxiety.

25. Reports that he tends to grinding his teeth during sleep are indicative of minor seizures and gives rise to a possibility of their eventual development into full blown epilepsy. There is some support for the concern in this regard to be found in the results of an electroencephalograph (EEG) performed upon the plaintiff by Dr Bhagwan, a specialist neurologist on 21 April 2009 and which demonstrated abnormalities in the left anterior as well as the right posterior quadrants. A subsequent Magnetic resonance imaging (MRI) scan on 12 May 2009 revealed hyperactivity in the white matter adjacent to the anterior aspect of the right lateral ventricle.

26. Subsequent to the collision the plaintiff suffers from feelings of frustration, as well as poor body image. The latter is brought about by the limitations imposed by the injury to his arm, the stiffness of the hip joint and the scarring resulting both from the collision, as well as subsequent operative treatment. In the result his social interaction has deteriorated. His attitude, ill temper and argumentative nature has given rise to tension and it would appear that the initial tolerance of his behaviour, engendered by loyalty and sympathy amongst his friends and acquaintances, eventually dwindled thus eroding his support base. He has also demonstrated a sustained inability to take instructions and to submit to the discipline involved in an employment situation.

27. The plaintiff's change of mood is echoed, also in apparently unrelated activities, such as the enjoyment of food. Subsequent to the collision the

plaintiff is alleged to have lost his appetite and enjoyment of food. He now only eats because he has to. It is also alleged that his sense of smell has been adversely affected, but this has not been properly verified. However, the lack of interest in food also correlates with a general lethargy and lack of volition now attributed to the plaintiff.

28. The plaintiff's history of employment since the collision is indicative of an inability to sustain a competitive edge in the employment market, including relatively mundane activities, such as retail sales or product deliveries. His employment is likely to be terminated, either by reason of inter personal conflict, or because the plaintiff loses interest, becomes bored and leaves. Whilst he appears to find an occupation involving driving a motor vehicle more stimulating than the monotony of a repetitive task, he appears to have lost his ability to do so with safety. As a result he has been involved in a number of minor collisions and there appears to be little future for him in driving.

29. Part of the difficulty in the circumstances in which the plaintiff finds himself is that with the passage of time and as he gets older, employment opportunities are likely to progressively diminish so that, at some stage, if not already so, he will effectively become unemployable in the open market. It was suggested by the evidence, *inter alia* by Ms Hill, that the practical solution would be for the plaintiff to be employed in a situation of structured sympathetic employment. However, the likelihood of finding such an employer and sustaining the plaintiff's employment in that

situation, particularly given the plaintiff's tendency towards annoyance, impatience and aversion to boredom, would appear to be relatively remote. The situation is further complicated by the plaintiff's tendency towards socially inappropriate behaviour, such as was related by the educational psychologist Ms Talbot.

30.It remains to consider how these deficits are to be applied to the plaintiff's claims for general damages and loss of income. In this regard it is relevant that the injuries suffered by the plaintiff are not expected to adversely affect his life expectancy.

31.On behalf of the plaintiff it was submitted that an award of R700 000-00 in respect of general damages would be appropriate in all the circumstances of this case. Counsel for the defendant submitted that an award under this heading should more properly be in the region of between R350 000-00 and R400 000-00.

32.In developing their respective arguments counsel for the plaintiff and defendant each relied upon a number of previously reported decisions. It must, however, be remembered that each matter needs to be considered in the light of its own peculiar facts and circumstances and that general damages cannot, by the very nature thereof, be calculated to compensate a plaintiff for her or his exact losses.

33.The assessment of such damages also needs to strike a balance between

the entitlement of the plaintiff on the one hand to adequate compensation and the entitlement of the defendant on the other hand not to be saddled with a liability which is unreasonable, or which unduly favours the plaintiff by reason of sympathy for his plight. Whilst previous decisions are therefore useful aides to arriving at a determination in the case under consideration, their importance should not be overestimated.

34. In particular the plaintiff's counsel referred for guidance to *Adlem v Road Accident Fund 2003 (5J2) QOD 41 (AF)* where the plaintiff, a 17 year old young woman, reportedly suffered physical injuries more severe than the present matter, but cognitive deficits arguably of lesser severity. In the Arbitration Forum the plaintiff was awarded general damages of R400 000-00. Counsel also drew attention to *Smit NO v The Road Accident Fund 2006 (5) QOD B4-251 (T)* where a 12 year old schoolgirl suffered physical and cognitive deficits arguably more severe than the present plaintiff and where the award for general damages was one of R600 000-00. Counsel also referred to *Myhill NO v Road Accident Fund (5B4) QOD 271 (T)* where an award of R750 000-00 was made to a plaintiff who, as a result of a focal and diffuse brain injury, was described as suffering disorientation and gross cognitive malfunction and who would remain grossly malfunctional for the remainder of his life. In addition counsel referred to *Torres v Road Accident Fund 2010 (6A4) QOD 1 (GSJ)* where a 24 year old male (20 at the time of the collision) suffered a severe diffuse brain injury with resultant cognitive and behavioural deficits limiting him to sympathetic employment. Willis, J

awarded him general damages of R600 000-00 in the circumstances of that matter.

35. Counsel for the defendant drew attention to the Arbitration Forum decision of *Sauerman v Road Accident Fund (QOD)* Vol. V at B190 where the plaintiff suffered a concussive injury resulting in severe impairment of his neuro-psychological and intellectual functioning, rendering him no longer employable as a policeman. The award under general damages during July 2004 was one of R200 000-00. The circumstances of the injuries in this decision, however, would appear to differ from the present matter in various respects.

36. Adopting the approach of striking a balance between the competing interests of the plaintiff and defendant and against the background of the extensive body of evidence, as well as the authorities counsel have referred me to, I have come to the conclusion that the sum of R600 000-00 would fairly compensate the plaintiff in respect of the general damages he has suffered in the present matter.

37. I turn now to consider the remaining issue of the plaintiff's lost income.

It would appear that the parties, whilst differing as to the causes of the plaintiff's incapacity, are nevertheless largely *ad idem* that he has limited earning capacity and would ultimately be reliant for any employment opportunity upon the goodwill of a sympathetic employer.

38. Counsel for the plaintiff conceded that, when considering the plaintiff's losses in respect of his earning capacity had he not been injured in the collision, a conservative approach was called for. The plaintiff had not pre-accident demonstrated academic excellence of a high order and counsel conceded that the probabilities militated against him achieving a B.Tech degree in quantity surveying, after completion of his diploma. That is a concession fairly made in the circumstances of the matter.

39. Counsel for the plaintiff contended, however, that on the probabilities the plaintiff would have completed his diploma studies, but submitted in the circumstances that conservatively an extra year of study should be assumed against the plaintiff. Thereafter, so counsel submitted, a further six(6) years service as a candidate quantity surveyor should be allowed before it was assumed that he would have sought admission as a fully fledged quantity surveyor.

40. Counsel for the plaintiff, in addition and pursuant to the conservative approach to which he referred in the circumstances, indicated that he was content to adopt the approach and remuneration figures as set out in Table 5 of the Supplementary Report of the defendant's witness Ms Couperthwaite relevant to technikon students, together with Table 3 relevant to public sector employees and to accept a 20% likelihood of the plaintiff securing public service employment.

41. Counsel submitted that on this approach the plaintiff would have

completed his diploma studies at the end of 2006, would have commenced employment as a candidate quantity surveyor at the beginning of 2007, would have progressed as per Table 5 of the supplementary Report of Ms Couperthwaite and would have retired at age 65.

42. Counsel for the plaintiff further contended for contingency deductions of 2,5% in respect of past uninjured earnings and of 10% to 15% in respect of future uninjured earnings. Counsel contended that any earnings of the plaintiff in his injured state were so negligible, that they should be discounted in their entirety.

43. Counsel for the defendant submitted that although contingencies are in the discretion of the court, the plaintiff's approach to them were overly generous. Counsel suggested that usually a proper approach would require a contingency deduction calculated roughly at one half of a percent per annum over the expected working life of the plaintiff, thus arriving at a contingency of 20%.

44. But, so counsel for the defendant submitted, there were additional uncertainties relevant to the position of the plaintiff which rendered such a "normal" contingency allowance unsuitable and which called for a much higher contingency to be applied to the plaintiff's notional lost earning capacity. In this regard counsel proposed that a contingency of between 35% and 40% should be applied to future earnings.

45. In developing his argument counsel referred to various factors. These included the uncertainty that the plaintiff would have qualified as a quantity surveyor at all, particularly in view of his incidents of drug taking and, assuming he qualified, then that the demand for the services of quantity surveyors fluctuated with the fortunes of the building industry, so that constant employment could not be assured. Counsel further submitted that plaintiff was not such a hopeless case that his actual future earning capacity should be discounted, as contended for by counsel for the plaintiff. Accordingly, so the argument ran, the possibility of the plaintiff earning not inconsiderable income in the future should be provided for by means of an increased contingency allowance.

46. In my view a contingency as high as 20% is already calculated to provide for many of the uncertainties arising from long-term projections, such as where assumptions have to be made about career paths spanning several decades. What counsel for the defendant proposes in effect doubles his “normal” contingency and duplicates many of the considerations already built into such a contingency.

47. In my view counsel for the plaintiff is overly optimistic in his submissions regarding the determination of a balanced contingency allowance. In the present matter there are some substance in the submissions of counsel for the defence, except that I believe he errs on the side of conservatism. Factors such as the average student epithet and the incidents of drug

taking tend to detract from the likelihood of the plaintiff qualifying as a quantity surveyor. On the other hand, as already discussed, the probabilities suggest that he would have qualified in the end. In fairness to the defendant, on balance I therefore tend to agree that in this instance the allowance of 20% is probably not sufficient. I am, however, not persuaded that a contingency as high as 40 to 45% is called for. In considering an increased contingency I have in mind that such contingency also takes account of the fact that the plaintiff may have taken longer to qualify than the table of progression postulated by his counsel.

48. Although counsel for the plaintiff submitted that, in respect of the loss of past earnings a contingency deduction of 2,5% should be applied, no claim for such loss appears in the plaintiff's amended particulars of claim. Counsel for the defendant therefore, not surprisingly, did not address this issue at all. Lest there be the need to determine a contingency in this regard I propose to do so, but such determination will probably be of academic interest only.

49. In my view, having considered the various submissions against the backdrop of the voluminous expert reports and evidence, as well as the probabilities as I evaluate them in all the circumstances, I have come to the conclusion that an contingency allowance of twenty five percent (25%) should be made in respect of the plaintiff's future loss of earnings, or earning capacity.

50. Should there be any losses in respect of past earnings, then these too are subject to a number of uncertainties, but less so than the long term future earnings. For that reason I would apply a contingency deduction of twelve percent to such past loss of earnings (12%), if any.

51. In the course of the pre-trial conference, the minutes of which were admitted as exhibit "A", the parties agreed that actuarial evidence would be dispensed with and that instead the court would be requested to rule only on the facts and assumptions relevant to the actuarial calculations to be made, together with determining the contingency allowances. In the light of the rulings and assumptions thus made the actuary (or actuaries) would then be requested to calculate the plaintiff's future loss of earnings and the final figures would then, by implication, be formally incorporated in an order of court. However, in the event of any dispute arising with regard to the actuarial evidence, the matter would then again be enrolled for further hearing.

52. Of course, it should be borne in mind that the final damages figure would be subject also to the apportionment as earlier agreed to between the parties and in terms of which the defendant would only be liable for 80% of the plaintiff's damages.

53. I therefore make rulings in regard to the issues in dispute between the parties relevant to the determination of the plaintiff's losses of future

earnings, or earning capacity, as follows:-

a. It is assumed, for purposes hereof, that the plaintiff was born on 1 January 1985 and that he commenced his studies towards a three(3) year diploma in quantity surveying with effect from the beginning of 2003.

b. It is however assumed that the plaintiff would not have completed his diploma studies within the prescribed time and would have taken an additional two(2) years to do so. In the event it is therefore assumed that he would have completed his studies and achieved the diploma in quantity surveying as at the end of five(5) years. That is, as at the end of 2007. It is further assumed that he would not have progressed to achieving a B.Tech degree in quantity surveying.

c. It is uncertain that the plaintiff would, in those circumstances inevitably immediately have found employment as a candidate quantity surveyor. Allowance is made for a period of unemployment so that it is assumed that the plaintiff would only have commenced employment as a candidate quantity surveyor only with effect from the beginning of 2009.

d. Once so employed it is assumed that his earnings would have progressed in accordance with the incomes for technikon graduates as set out in Table 5 of the Supplementary Report of the Industrial Psychologist Ms F. Couperthwaite dated 22 February 2010.

e. I is further assumed that the plaintiff would have retired at age sixty five(65).

f. Finally, it assumed against the increased contingency allowance that the plaintiff will not actually earn any future income.

54.In conclusion it is necessary to deal with the issue of costs. On behalf of the plaintiff counsel submitted that costs should follow the result and that the matter was one of sufficient complexity to have justified the employment of two counsel by the plaintiff. Counsel for the defendant submitted that the matter was not of sufficient complexity to warrant the employment of two counsel and that it could have been dealt with by senior counsel alone. In my view the nature of the matter was such that the precaution of the plaintiff in employing two counsel cannot be faulted.

55.In the result I rule that the plaintiff would be entitled to his costs of the action, including any reserved costs, on the party and party scale, but including the costs of two counsel where actually so employed. In addition the plaintiff's costs will include the costs of all the expert witnesses whose reports are included in exhibit "B" (including the additional research by Ms S Hill and included as B105A), as well as the qualifying costs of all the expert witnesses called by the plaintiff during the course of the trial.

56. Insofar as may be relevant and pending the finalisation of the actuarial calculations, the matter is adjourned *sine die*.

VAN ZYL , J.

APPEARANCES:

For Plaintiff	:	Adv T. N. Aboobaker SC and Adv M. L. Bahadur, Instructed by Marlan Naidoo & Associates of Durban. Ref: AN/PC1232/kg
For Defendant	:	Adv M. Maharaj Instructed by Linda Mazibuko & Associates of Durban. Ref: Ms Thaker/NWN/U709.6
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