

SOUTH AFRICA / JUDGMENT

Ademulegun v Monothendre (Pty) Ltd t/a GFT Group Fiveways Superspar (JS58/2020) [2024] ZALCJHB 123 (11 March 2024)

[2024] ZALCJHB 123

COURT

Labour Court Johannesburg

BEFORE

R Daniels

CASE / FILE NUMBER

JS58/2020

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG Not Reportable Case No: JS58/2020 In the matter between: DANIEL OLUWATOBI ADEMULEGUN Applicant and MONOTHENDRE (PTY) LTD Respondent t/a Gft Group Fiveways Superspar Heard: 1 March 2024 Delivered: This judgment was handed down electronically by emailing a copy to the parties. The 11 March 2024 is deemed to be the date of delivery of this judgment). Summary: Applicant claims unpaid remuneration from 2011 to 2019 In limine issue, prescription, raised by respondent in respect of certain claims. Prescription upheld in respect of all claims prior to 28 August 2016. JUDGMENT DANIELS J Introduction [1] On 4 February 2020, acting under section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997 as amended (hereafter the “BCEA”), the applicant instituted an action in this court in which he alleged that his former employer, the respondent, had breached his employment contract in various ways including underpayment of wages, non-payment of overtime, failing to pay him at the agreed rates for work on Sundays, refusing him family responsibility leave and refusing to pay him at agreed rates for work on public holidays. [2] In its special plea, the respondent alleged that the vast majority of the applicant’s claims (which spanned the period from 2011 until 2019) have prescribed. The respondent contends that all the applicant’s claims to August 2017 have prescribed. This judgment relates to the special plea. Material facts [3] During October 2010, the respondent engaged the applicant as an assistant manager. [4] In discussions prior to applicant’s employment, respondent was represented by Mr. Harry Giannacopoulos (its director)

and his wife, Mrs. Mariska Giannacopoulous. The applicant alleges that respondent presented him with an employment agreement, which he signed. The agreement stated that the applicant would be remunerated for his services at R20 000, 00 (twenty thousand rand) per month. The agreement also provided for overtime payments, additional pay for Sunday work, and additional pay for work on public holidays.[5] The applicant contends that, from the very start, the respondent failed to pay him in accordance with the employment agreement. Despite this, says the applicant, the respondent required him to work extremely long hours, and to endure physical and psychological abuse. The applicant was ultimately dismissed by the respondent during 2019.[6] Since then, the applicant and the respondent have engaged in litigation in the Magistrate's Court, the Commission for Conciliation, Mediation and Arbitration (hereafter "the CCMA"), the High Court, and, of course, this court.[7] The applicant referred a dispute to the CCMA on 28 August 2019, under case number KNRB1762-19, in terms of section 73A(1) of the BCEA.[1] It is readily apparent that, at the CCMA, the applicant sought the same or substantially the same relief which he seeks in this court. The employer raised a preliminary point claiming that, because the applicant earned above the threshold in section 6(3) of the BCEA,[2] the CCMA had no jurisdiction. The CCMA issued a ruling, on or about 15 December 2019, in which it found that it had no jurisdiction.[8] Shortly thereafter, as previously mentioned, on 4 February 2020, the applicant instituted an action in this court. Legal Analysis[9] The Prescription Act No. 68 of 1969 (hereafter the "Prescription Act") provides for "debts to be extinguished by prescription, as they would be by payment or performance". The Prescription Act does not define the word "debt".[10] The respondent's special plea makes it necessary to address the following issues: the application of prescription in employment disputes, the meaning of the word "debt", the prescription period, and the interruption of prescription. Prescription in employment disputes[11] The application of the Prescription Act to claims under the LRA sprouted controversy. The issue was considered in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others*[3]. Unfortunately, there was no ratio. The Constitutional Court was equally divided on the issue, with four judges holding that the Prescription Act does not apply to arbitration awards issued in terms of the LRA, and four judges holding that it did apply.[12] The prescription controversy was settled by *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[4] (hereafter "Pieman's Pantry") where the majority held that the Prescription Act and the Labour Relations Act No. 66 of 1995[5] were not inconsistent with each other, and prescription applied in respect of labour disputes.[6][13] Following *Pieman's Pantry* there can be no doubt that the Prescription Act is applicable to claims under the LRA, though there are instances such as discrimination disputes, or unfair labour practice disputes, where it is arguable that the wrong is continuous and prescription does not apply.[7] Meaning of the word "debt"[14] In *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd*[8] the court defined the word 'debt' to mean "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another".[15] Though, prior to *Pieman's Pantry* there was controversy as to whether claims for reinstatement, reemployment, and compensation

were debts under the Prescription Act, money claims were always less controversial. In *Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, KwaZulu-Natal*[9] at para 32 the LAC clarified: “A true money claim belongs to civil litigation and insofar as such a claim is covered by 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and the Prescription Act would prevail in such a context.” (Own emphasis)[16] Given *Piemans Pantry*, it is crystal clear that contractual claims for unpaid remuneration constitute debts under the Prescription Act.[10]

Prescription period[17] Before discussing prescription periods, it is important to bear in mind that certain disputes do not prescribe in the same manner as others – where there is a continuing wrong. The point was crisply made by Wallis AJ (as he then was) in *Makate v Vodacom*

Ltd[11] in the following terms: “In the case of a continuing wrong there can be no question of prescription, even though

the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established,

is said to be that while the original wrongful act may have occurred in the in a time past, the wrong itself continues for so long

as it is not abated.” This principle is still applicable and very much a part of our law, but there may be instances where

a provision in the LRA requires an alternative approach.[12][18] Section 11 deals with the prescription periods applicable to different types of debts. Apart from the instances contemplated in section 11(a) to 11(c), section 11(d) states that three years is the prescription period for all debts except where an Act of Parliament provides otherwise.[19] Here, the debts relating to remuneration are not contemplated in sections 11(a) to 11(c), and there is no other Act of

Parliament (besides the Prescription Act) which deals with prescription of such debts. Accordingly, the prescription period is three years.[20] Section 12, which provides for the date on which the prescription begins to run, and reads: ‘(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due. (2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from

which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising

reasonable care.’ (Own emphasis)[21] Prescription begins to run once the creditor acquires knowledge of the minimum facts necessary to institute legal proceedings.[13]

In addition, a debt becomes due, when the time arrives for performance by the debtor of the obligation.[22] Performance by the respondent (payment of the applicant’s remuneration) was due at the end of each month. The debt,

in respect of each month, could not have arisen before the respondent was obligated to perform.

Accordingly, at the end of each month,

the applicant became aware of a further default, the facts related to such default, and the extent of the default. In addition, because

of other variables (for example, the number of hours worked and overtime etcetera) the remuneration varied each month, as did the extent of the underpayment. These facts could only become known at the end of each month. Thus, each month where the respondent failed to abide by the employment agreement constituted a new debt.[23] In a matter somewhat similar on the facts, *Uitenhage Municipality v Molloy*[14] Mahommed CJ stated: “...it accordingly follows that, in respect of each of the claims of the respondent, prescription commenced to run from the end of the relevant month during which the respondent performed the work on Sunday or on overtime.”

For this reason, I believe that the respondent was correct in its approach - that each month constituted a new and separate debt. Interruption of prescription[24] Section 15 bears the title of: “Judicial interruption of prescription”. [25] Section 15(1) provides: “The running of prescription shall, subject to the provisions of subsection (2) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt”. (Own emphasis)[26] As mentioned in paragraph 7, the applicant referred a dispute to the CCMA seeking substantially the same relief which it seeks from this court. That referral was made on 28 August 2019.[27] In *Piemans Pantry* the court adopted a broad interpretation of the term “any process” in which a creditor claims payment of a debt. The court held that a referral to conciliation before the CCMA, a mandatory step before the creditor may request arbitration, constituted “judicial process” in terms of section 15.[28] There is no basis for this court to adopt a narrower view of the term “judicial process”. Thus, the term judicial process includes the process instituted by the applicant at the CCMA through section 73A of the BCEA. Accordingly, prescription was interrupted on 28 August 2019, by way of the applicant’s referral of a dispute to the CCMA. Given that the dispute was not withdrawn, I accept that the dispute referred to the CCMA, under section 73A, proceeded to finality.[15] When the CCMA dismissed the referral, for lack of jurisdiction, on 15 December 2019, prescription commenced afresh. Costs[29] The respondent did not seek costs. Neither party was wholly successful. The applicant, being unrepresented, did his best to argue a difficult and complex issue. In law and fairness, I see no reason to mulct the parties in costs. Conclusion[30] For the reasons set out above, the following order is made: 30.1 The applicant’s claims relating to the period from January 2011 to 28 August 2016 have prescribed, 30.2 The applicant’s claims relating to the period after 28 August 2016 have not prescribed, 30.3 There is no order as to costs, 30.4 The Registrar is directed to enrol the dispute for trial. R Daniels Judge of the Labour Court of South Africa Appearances: For the Applicant: Mr Daniel Ademulegun For the Respondent: Adv B Jackson Instructed by: Erlank Attorneys[1] Section 73A(1) of the BCEA inter alia entitles employees earning below the applicable threshold to refer a dispute to the CCMA about an employer’s failure to pay any amount due to the employee in terms of the BCEA, a contract of employment, or collective agreement.[2] The threshold has been adjusted from time to time by the Minister of Labour[3] (2017) 38 ILJ 527 (CC)[4] (2018) 39 ILJ 1213 (CC)[5] In the context of a dismissal claim, *Piemans Pantry* held a referral to conciliation before the CCMA was judicial process through

which the creditor claimed payment of the debt. Thus, the referral to the CCMA interrupted prescription.[6] The majority judgment found that a claim for reinstatement, re-employment and compensation all fit neatly under the definition of debt contemplated in section 16(1) of the Prescription Act.>[7] SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2010) 31 ILJ 592 (LAC)[8] 1981 (3) SA 340 (A)[9] (2016) 37 ILJ 1839 (LAC)[10] See Potgieter v Samancor Chrome Ltd t/a Tubatse Ferrochrome (2022) 43 ILJ 2091 (LC) at para 19[11] 2016 (4) SA 121 (CC) at para 192[12] Amalungelo Workers Union on Behalf of Mayisela & Others v CCMA & others (2022) 43 ILJ 600 (LAC) at paras 18 to 25[13] See Mtokonya v Minister of Police 2018 (5) SA 22 (CC) at para 36[14] 1998 (2) SA 735 (SCA) at 740C[15] See also Piemans Pantry at paras 202 and 203

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS58/2020

In the matter between: DANIEL OLUWATOBI ADEMULEGUN Applicant
and
MONOTHENDRE (PTY) LTD
Respondent
t/a Gft Group Fiveways Superspar
Heard: 1 March 2024
Delivered: This judgment was handed down electronically by emailing a copy to the parties. The 11 March 2024 is deemed to be the date of delivery of this judgment).
Summary: Applicant claims unpaid remuneration from 2011 to 2019 In limine issue, prescription, raised by respondent in respect of certain claims. Prescription upheld in respect of all claims prior to 28 August 2016.

JUDGMENT

DANIELS J

Introduction

[1] On 4 February 2020, acting under section 77(3) of the Basic Conditions of Employment Act No. 75 of 1997 as amended (hereafter the “BCEA”), the applicant instituted an action in this court in which he alleged that his former employer, the respondent, had breached his employment contract in various ways including underpayment of wages, non-payment of overtime, failing to pay him at the agreed rates for work on Sundays, refusing him family responsibility leave and refusing to pay him at agreed rates for work on public holidays.

section 77(3)

Basic Conditions of Employment Act No. 75 of 1997

- [2] In its special plea, the respondent alleged that the vast majority of the applicant's claims (which spanned the period from 2011 until 2019) have prescribed. The respondent contends that all the applicant's claims to August 2017 have prescribed. This judgment relates to the special plea.

Material facts

- [3] During October 2010, the respondent engaged the applicant as an assistant manager.
- [4] In discussions prior to applicant's employment, respondent was represented by Mr. Harry Giannacopoulos (its director) and his wife, Mrs. Mariska Giannacopoulos. The applicant alleges that respondent presented him with an employment agreement, which he signed. The agreement stated that the applicant would be remunerated for his services at R20 000, 00 (twenty thousand rand) per month. The agreement also provided for overtime payments, additional pay for Sunday work, and additional pay for work on public holidays.
- [5] The applicant contends that, from the very start, the respondent failed to pay him in accordance with the employment agreement. Despite this, says the applicant, the respondent required him to work extremely long hours, and to endure physical and psychological abuse. The applicant was ultimately dismissed by the respondent during 2019.
- [6] Since then, the applicant and the respondent have engaged in litigation in the Magistrate's Court, the Commission for Conciliation, Mediation and Arbitration (hereafter "the CCMA"), the High Court, and, of course, this court.
- [7] The applicant referred a dispute to the CCMA on 28 August 2019, under case number KNRB1762-19, in terms of section 73A(1) of the BCEA.[1] It is readily apparent that, at the CCMA, the applicant sought the same or substantially the same relief which he seeks in this court. The employer raised a preliminary point claiming that, because the applicant earned above the threshold in section 6(3) of the BCEA,[2] the CCMA had no jurisdiction. The CCMA issued a ruling, on or about 15 December 2019, in which it found that it had no jurisdiction.

section 73A

section 6(3)

- [8] Shortly thereafter, as previously mentioned, on 4 February 2020, the applicant instituted an action in this court.

Legal Analysis

- [9] The Prescription Act No. 68 of 1969 (hereafter the "Prescription Act") provides for "debts to be extinguished by prescription, as they would be by payment or performance". The Prescription Act does not define the word "debt".

Prescription Act

Prescription Act does

[10] The respondent's special plea makes it necessary to address the following issues: the application of prescription in employment disputes, the meaning of the word "debt", the prescription period, and the interruption of prescription.

Prescription in employment disputes

[11] The application of the Prescription Act to claims under the LRA sprouted controversy. The issue was considered in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others*[3]. Unfortunately, there was no ratio. The Constitutional Court was equally divided on the issue, with four judges holding that the Prescription Act does not apply to arbitration awards issued in terms of the LRA, and four judges holding that it did apply.

Prescription Act to

[12] The prescription controversy was settled by *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[4] (hereafter "Pieman's Pantry") where the majority held that the Prescription Act and the Labour Relations Act No. 66 of 1995[5] were not inconsistent with each other, and prescription applied in respect of labour disputes.[6]

Prescription Act and

[13] Following *Pieman's Pantry* there can be no doubt that the Prescription Act is applicable to claims under the LRA, though there are instances such as discrimination disputes, or unfair labour practice disputes, where it is arguable that the wrong is continuous and prescription does not apply.[7]

Prescription Act is

Meaning of the word "debt"

[14] In *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd*[8] the court defined the word 'debt' to mean "that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another".

[15] Though, prior to *Pieman's Pantry* there was controversy as to whether claims for reinstatement, reemployment, and compensation were debts under the Prescription Act, money claims were always less controversial. In *Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, KwaZulu-Natal*[9] at para 32 the LAC clarified:

Prescription Act, money

A true money claim belongs to civil litigation and insofar as such a claim is covered by s 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and the Prescription Act would prevail in such a context." (Own emphasis)

s 77

Basic Conditions of Employment Act 75 of 1997

Prescription Act would

[16] Given Piemans Pantry, it is crystal clear that contractual claims for unpaid remuneration constitute debts under the Prescription Act.[10]

Prescription period

[17] Before discussing prescription periods, it is important to bear in mind that certain disputes do not prescribe in the same manner as others – where there is a continuing wrong. The point was crisply made by Wallis AJ (as he then was) in *Makate v Vodacom Ltd*[11] in the following terms: “In the case of a continuing wrong there can be no question of prescription, even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred in the in a time past, the wrong itself continues for so long as it is not abated.” This principle is still applicable and very much a part of our law, but there may be instances where a provision in the LRA requires an alternative approach.[12]

[18]Section 11deals with the prescription periods applicable to different types of debts. Apart from the instances contemplated insection 11(a)to11(c),section 11(d)states that three years is the prescription period for all debts except where an Act of Parliament provides otherwise.

Section 11

section 11(a)

11

section 11(d)

[19] Here, the debts relating to remuneration are not contemplated in sections 11(a) to 11(c), and there is no other Act of Parliament (besides thePrescription Act) whichdeals with prescription of such debts. Accordingly, the prescription period is three years.

Prescription Act) which

[20]Section 12, which provides for the date on which the prescription begins to run, and reads:

Section 12

- (1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

(Own emphasis)

- [21] Prescription begins to run once the creditor acquires knowledge of the minimum facts necessary to institute legal proceedings.[13] In addition, a debt becomes due, when the time arrives for performance by the debtor of the obligation.
- [22] Performance by the respondent (payment of the applicant's remuneration) was due at the end of each month. The debt, in respect of each month, could not have arisen before the respondent was obligated to perform. Accordingly, at the end of each month, the applicant became aware of a further default, the facts related to such default, and the extent of the default. In addition, because of other variables (for example, the number of hours worked and overtime etcetera) the remuneration varied each month, as did the extent of the underpayment. These facts could only become known at the end of each month. Thus, each month where the respondent failed to abide by the employment agreement constituted a new debt.
- [23] In a matter somewhat similar on the facts, *Uitenhage Municipality v Molloy*[14] Mahommed CJ stated: "...it accordingly follows that, in respect of each of the claims of the respondent, prescription commenced to run from the end of the relevant month during which the respondent performed the work on Sunday or on overtime." For this reason, I believe that the respondent was correct in its approach - that each month constituted a new and separate debt.

Interruption of prescription

- [24]Section 15bears the title of: "Judicial interruption of prescription".

Section 15

- [25]Section 15(1)provides: "The running of prescription shall, subject to the provisions of subsection (2) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt". (Own emphasis)

Section 15(1)

- [26] As mentioned in paragraph 7, the applicant referred a dispute to the CCMA seeking substantially the same relief which it seeks from this court. That referral was made on 28 August 2019.
- [27] In *Piemans Pantry* the court adopted a broad interpretation of the term "any process" in which a creditor claims payment of a debt. The court held that a referral to conciliation before the CCMA, a mandatory step before the creditor may request arbitration, constituted "judicial process" in terms ofsection 15.

section 15.

[28] There is no basis for this court to adopt a narrower view of the term “judicial process”. Thus, the term judicial process includes the process instituted by the applicant at the CCMA through section 73A of the BCEA. Accordingly, prescription was interrupted on 28 August 2019, by way of the applicant’s referral of a dispute to the CCMA. Given that the dispute was not withdrawn, I accept that the dispute referred to the CCMA, under section 73A, proceeded to finality.[15] When the CCMA dismissed the referral, for lack of jurisdiction, on 15 December 2019, prescription commenced afresh.

Costs

[29] The respondent did not seek costs. Neither party was wholly successful. The applicant, being unrepresented, did his best to argue a difficult and complex issue. In law and fairness, I see no reason to mulct the parties in costs.

Conclusion

[30] For the reasons set out above, the following order is made:

30.1 The applicant’s claims relating to the period from January 2011 to 28 August 2016 have prescribed,

30.2 The applicant’s claims relating to the period after 28 August 2016 have not prescribed,

30.3 There is no order as to costs,

30.4 The Registrar is directed to enrol the dispute for trial.

R Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Daniel Ademulegun

For the Respondent: Adv B Jackson

Instructed by: Erlank Attorneys

[1] Section 73A(1) of the BCEA inter alia entitles employees earning below the applicable threshold to refer a dispute to the CCMA about an employer’s failure to pay any amount due to the employee in terms of the BCEA, a contract of employment, or collective agreement.

Section 73A(1)

[2] The threshold has been adjusted from time to time by the Minister of Labour

[3] (2017) 38 ILJ 527 (CC)

[4] (2018) 39 ILJ 1213 (CC)

[5] In the context of a dismissal claim, Piemans Pantry held a referral to conciliation before the CCMA was judicial process through which the creditor claimed payment of the debt. Thus, the referral to the CCMA interrupted prescription.

[6] The majority judgment found that a claim for reinstatement, re-employment and compensation all fit neatly under the definition of debt contemplated in section 16(1) of the Prescription Act. >[7] SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2010) 31 ILJ 592 (LAC)[8] 1981 (3) SA 340 (A)[9] (2016) 37 ILJ 1839 (LAC)[10] See Potgieter v Samancor Chrome Ltd t/a Tubatse Ferrochrome (2022) 43 ILJ 2091 (LC) at para 19[11] 2016 (4) SA 121 (CC) at para 192[12] Amalungelo Workers Union on Behalf of Mayisela & Others v CCMA & others (2022) 43 ILJ 600 (LAC) at paras 18 to 25[13] See Mtokonya v Minister of Police 2018 (5) SA 22 (CC) at para 36[14] 1998 (2) SA 735 (SCA) at 740C[15] See also Piemans Pantry at paras 202 and 203

[6] The majority judgment found that a claim for reinstatement, re-employment and compensation all fit neatly under the definition of debt contemplated in section 16(1) of the Prescription Act.

section 16(1)

Prescription Act.

[7] SA Broadcasting Corporation Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2010) 31 ILJ 592 (LAC)

[8] 1981 (3) SA 340 (A)

[9] (2016) 37 ILJ 1839 (LAC)

[10] See Potgieter v Samancor Chrome Ltd t/a Tubatse Ferrochrome (2022) 43 ILJ 2091 (LC) at para 19

[11] 2016 (4) SA 121 (CC) at para 192

[12] Amalungelo Workers Union on Behalf of Mayisela & Others v CCMA & others (2022) 43 ILJ 600 (LAC) at paras 18 to 25

[13] See Mtokonya v Minister of Police 2018 (5) SA 22 (CC) at para 36

[14] 1998 (2) SA 735 (SCA) at 740C

[15] See also Piemans Pantry at paras 202 and 203

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