

SOUTH AFRICA / JUDGMENT

Bam obo R.H.T v Road Accident Fund (7762/17) [2019] ZAGPPHC 1056 (21 November 2019)

[2019] ZAGPPHC 1056

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

7762/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 7762/17

In the matter between:

ADV
JACO BAM obo R H
T
PLAINTIFF
v
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

NEUKIRCHER J

Background

1. On 8 December 2014 at approximately 11h45 near the KG Mall in Mathews Phosa Road, Witbank, a motor vehicle collision occurred between the patient (Mr T)[1] who was a pedestrian and busy regulating the flow of traffic within the course and scope of his employment at Loco Torre Civils CC[2], and two vehicles both white Toyota Quantum minibus taxis (the taxis).

2. The collision occurred when the one the one taxi failed to come to a stop and drove into the rear of the other (which was stationery)

which then knocked the plaintiff over.

3. The plaintiff sustained the following injuries:

3.1 a severe[3] concussive head injury;

3.2 severe focal injuries to both temporal lobes and to the right frontal and right parietal lobes of his brain;

3.3 injuries to his back and neck;

3.4 severe depression and anxiety.

4. Adv Barn was appointed as curator ad litem to Mr T on 18 August 2017 and he has been substituted as plaintiff in terms of Rule 15.

5. On 12 November 2019, the defendant finally conceded liability 100% in favour of the plaintiff and on 14 November 2019[4] the defendant made an offer in respect of plaintiff loss of earnings of R1 553 576.00 which was accepted and Mr Barn has endorsed that. The issue of loss of earnings is thus settled and I am also satisfied that the offer is fair and reasonable.

6. The plaintiff also claimed an amount of R117 394.37 for past hospital, medical and related expenses. Defendant made an offer of R109 000.00 which plaintiff accepted. As an amount of R126 463.87 was paid by FEM as part of the final award in terms of COIDA benefits, an amount of R17 384.05 remains to be paid by Defendant.

7. Thus the only outstanding issue is that of the quantum of general damages to be awarded.

8. Neither party called any witnesses and the matter was argued on the content of the documents filed and the joint minutes, which were accepted by both parties, and filed by:

8.1 the neurosurgeons[5];

8.2 the psychiatrists;[6]

8.3 the occupational therapists;[7]

8.4 the clinical psychologists;[8] and

8.5 the industrial psychologist[9]

The Experts and Joint Minutes

9. The neurosurgeons joint minutes is dated 7 November 2017. Dr du Plessis was appointed by plaintiff and Dr Ntimbani by defendant.

10. According to this joint minute:

10.1. Dr Ntimbani stated that Mr T sustained a complicated mild traumatic brain injury due to an associated skull fracture;

10.2. Dr du Plessis is of the view that Mr T sustained a moderate to severe concussive brain injury. He states that "he sustained severe focal injuries to both temporal lobes and the right frontal and the right parietal lobes of the brain. These injuries have not resulted in an objective neurophysical deficit but have further compounded the effect of the moderate to severe concussive brain injury which makes this a very significant brain injury. He displays neurobehavioral features of a person with a frontal lobe syndrome."

and

"he has lost his sense of smell and aromatic taste. He has suffered severe neurocognitive and neuropsychiatric sequelae as a result of the brain injury. He has been rendered unemployable. "

11. The psychiatrists met on 18 July 2019. Dr Vester was appointed by plaintiff and Dr Mazibuko was appointed by defendant.

12. According to their joint minute:

12.1. they agree that Mr T sustained a "serious" head injury and that he suffers from an Organic Brain Syndrome and personality changes secondary to this traumatic brain injury;

12.2. they agree that psychiatric treatment will be of limited value;

12.3. they agree that Mr T is no longer capable of working in the open labour market and that he is a "vulnerable individual and requires assistance with his legal and financial affairs."

13. The neuropsychologists met on 29 October 2019. Dr Mazibuko was appointed by plaintiff and Ms Tromp by defendant.

14. They agree that:

14.1 Mr T sustained a "severe traumatic brain injury, comprising diffuse and multi focal damage (including to both temporal lobes and both parietal

lobes";

14.2 significant neurocognitive, neurobehavioral and neuroaffective deficits are present and that these are in keeping with a severe traumatic brain injury, including the frontal and temporal lobes pathology seen radiologically;

14.3 a severe, chronic depressive disorder is present due to the effects of the accident and that an organic component is present;

14.4 Mr T's neurocognitive and neurobehavioral deficits are permanent;

14.5 the prognosis for the depression is poor, given that organic component and given his cognitive impairments.

15. They also agree that the implications of all the above are that:

15.1 Mr T's functionality is functioning below the level required for the effective employment on the open labour market, as a result of his neuropsychological impairments;

15.2 the severity of his T is functioning below the level required for the effective employment on the open labour market, as a result of his neuropsychological impairments;

neuropsych neuropsychological place him above 30 % Whole Person Impairment.

16. It was argued today that defendant disputes the severity of plaintiff brain injury and this is the basis of the general damages

- Mr du Plessis argues that an amount of R1.4m is fair and reasonable given all the injuries and sequelae. and Mr Netshisaulu argues that an award of R750 000,00 will adequately compensate Mr T.

17. Mr du Plessis pointed out that:

17.1 in his RAF 4 Serious Injury Assessment Report, Dr Ntimbani confirmed that Mr T's brain injury is a serious injury in terms of the Narrative Test on the basis of "severe long-term mental or severe long-term behavioural disturbance or disorder. "

17.2 On B December 2014 Mr T's scan recorded

"Poor circumscribed cortical low density lesion right posterior parietal region as well as possible meningeal calcification/cortical calcification anterior superior right parietal lobe."[10]

18. Mr T's scan on 14 January 2015 record:

"There is a dilated sylvian fissure on the right and there is hypodensity seen in the right temporoparietal area suggestive of previous trauma and newly developed gliosis."

"There is a fracture seen in the right occipital bone extending superior to the protuberance occipital interna."

19. And the MRI scan of 19 October 2016 revealed:

19.1 a generalised brain atrophy with increase in basal cisterna;

19.2 cortical high density signal on FLAIR[11] sequence of both anterior temporal lobes with no restriction of signal on the right lateral ventricle comparing large to the left

side;

19.3 multiple micro angiopathy ischaemic lesions in both cerebral lobes.

20. As a result, the radiologist's comment reads:

"Generalized brain atrophy. Previous infarct right parietal lobe as well as more chronic/previous cortical infarcts anterior of both frontal lobes, as well as anterior aspects of both temporal lobes."

21. In my view, given the extent of Mr T's brain injury, its sequelae and the apparent progressive deterioration of this injury, his injury cannot be described as a "mild" concussive brain injury. I am of the view that given the joint minutes of the psychologists and neuropsychologists who agree that Mr T sustained a "severe" traumatic brain injury and as confirmed by Dr du Plessis, this is the correct diagnosis of Mr T's injury.

General Damages

22. This being so, the question to be determined is the amount to be awarded to Mr T as compensation for his injuries.

23. It is trite that in determining an award for general damages a court has a wide discretion. All the facts and circumstances of the case must be considered to determine an award that is fair and adequate compensation to both parties.[12]

24. Although previous decisions, where similar injuries were suffered, may be used as guidelines, no hard and fast rule may be laid down to determine quantum and each case must be decided on its own facts.[13]

25. Mr du Plessis submitted that there is a general tendency in more recent decisions to award more liberal amounts for general damages but that the amount is still subject to the principles set out supra.[14]

26. In:

26.1 *T Pele & Another v Road Accident Fund*[15] the plaintiff was self-employed and suffered a severe injury with multiple orthopaedic injuries. She was awarded R1.4m which in 2019 has a value of R1 805 804.00;

26.2 *Seme v Road Accident Fund*[16] a 36 year old male sustained a severe head and brain injury together with fractures of the tibia, fibula and knee, fracture of the maxilla, bilateral pulmonary contusion, multiple loss of teeth, facial lacerations, a dislocated right elbow and injury to the lumbar spine. Plaintiff was awarded R1 000 000 in general damages which, in 2019, is worth R1 793 000.00;

26.3 Zarrabi v Road Accident Fund[17] the plaintiff was a 30 year old trainee medical specialist. She sustained a severe diffuse axonal brain injury with neurophysical,

neurocognitive and neuropsychiatric consequences. She also sustained facial injuries, injuries to the lungs, liver and kidneys and multiple orthopaedic injuries and was left completely unemployable as a medical doctor. She was awarded R800 000.00 which, in 2019, is worth R1 714 000.00;

26.4 Gilbanks v Sigournay[18] the plaintiff sustained a severe brain injury resulting in a loss of movement of the right side of the body, speech hesitation, the loss of an eye, as well as a fractured collar bone and other orthopaedic injuries. His eventual award of €8500 today is worth R1 663 000.00;

26.5 SC McKay v Road Accident Fund[19] the plaintiff was a 27 year old qualified beautician who sustained a severe brain injury but continued to work for a period after the accident. She was awarded R1 500 000.00 which in 2019 is worth R1 934 790.00

27. Mr du Plessis referred to several other authorities where the plaintiff sustained moderately severe to severe brain injuries and

other orthopaedic injuries[20]. In all, the awards for general damages had a 2019 value of between R1284000.00 and R1 934 000.00.

28. Mr Netshisaulu advocated for an award of no more than R750 000.00 based on the following:

28.1 in Schaba v Road Accident Fund (unreported case no 96985/16 GP delivered on 4 July 2019) the plaintiff sustained a moderately severe head injury with multiple facial fracture with bilateral maxillary fracture of the jaw, neck and both zygomatic bones and multiple facial lacerations and was awarded R850 000.00;

28.2 in Vakata v Road Accident Fund[21] the plaintiff suffered a moderately severe brain injury with a skull fracture and probable diffuse injury resulting in fronto-limbic

dementia and post traumatic epilepsy. She suffered cognitive deficits in the form of limited ability to learn new information, impairment of executive functioning disinhibition and lack of control of emotions, limited insight and behavioural difficulties. She was 3 years old at the date of collision and her injury left her with an intellectual capacity falling within the range of mild retardation. She was awarded R650 000.00 which in 2019 is worth R845 000.00;

28.3 in S.,R.S.A v Road Accident Fund[22] an amount of R600 000 was awarded to a 14 year old plaintiff who suffered a moderate traumatic brain fracture, injury to the left ear. Lacerations of the left elbow and distal left arm and an injury to the left leg;

28.4 In Killian NO obo Theron v Road Accident Fund[23] the plaintiff suffered a severe traumatic multifocal brain injury with primary diffuse and secondary diffuse components and probable

focal brain injury. She also suffered a soft-tissue neck injury and blunt soft-tissue injuries to the left arm/ shoulder, right forearm, chest, abdomen and both shins. She was awarded R500 000.00 which is today worth R794 000.00

29. Mr Bam, the curator ad litem, has submitted that a reasonable award is R1.4m. he submits that given the extent of Mr T's injuries, the fact that the sequelae of the injuries are severe and that the Occupational Therapists have stated that Mr T will need a carer from time to time (his wife is presently fulfilling that role but may need assistance) this amount is fair and reasonable.[24]
30. I am of the view that, given all the facts, the extent of Mr T's injuries and their sequelae an amount of R1 250 000.00 should be awarded in general damages. The authorities referred to, whilst similar as regards the extent of plaintiff's brain injury, in almost all plaintiff suffered from more extensive orthopaedic injuries and more severe neurocognitive and neuropsychological and neurobehavioral fall-out.

Re protection of the funds

31. The clinical psychologists[25] and the psychologists[26] all recommend that all funds awarded to Mr T should be protected.
32. Mr Barn and Mr du Plessis have informed me that they have discussed that with Mr T and he has consented to the establishment of a Trust and they have submitted that this is in his interests. The defendant has also agreed that this is appropriate given the extent of Mr T's brain injury and expert recommendations. Mr Netshisaulu has submitted that the Trustee's fees should be limited to those of a curator as provided for in the Administration of Estates Act No 66 of 1968 and Mr du Plessis submitted that this is not in dispute.[27]
33. As to the issue of whether the defendant should pay a) the insurance premium taken out by the Trustee to serve as security in terms of the Trust Deed; and b) the costs of a yearly trust audit, my view is that it should:

33.1 the defendant has consented to the necessity of the establishment of the Trust and has not taken issue with the following the provisions of paragraph 3 of the draft order handed up by Mr du Plessis:

"The Defendant is liable for payment of 100% of the reasonable costs of the Trustee... in respect of the establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his fees..." (my emphasis);

33.2 Section 6 (1) and 6

(2) of the Trust Property Control Act No 57 of 1988 specifically provides that:

33.2.1. any person who is appointed as trustee may act in that capacity only if authorized in writing by the Master; and

33.2.2. the Master does not grant this authority unless the trustee has furnished the security to the satisfaction of the Master for performance of his duties or has been exempted from doing so by a court order of by the Master in terms of subsection (3)(a) or 3 (d) in terms of the Trust instrument;

33.2.3. no exemption is provided for in the Trust instrument - paragraph 3. 2 of the Trust Deeds provides:

"3.2 THE TRUSTEE is required to furnish security to the Master...for the assets of the Trust...";

33.2.4. the Trust Deed also provides that

"9 BOOKEEPING

9.1 The TRUSTEE must keep a complete set of accounting records with regard to the affairs of the Trust;

9.2 The TRUSTEE will ensure that the accounting records of the Trust are audited by a chartered accountant ... "

34. Given the broad terms of paragraph 3 of the Trust Deed and the fact that defendant has consented to the establishment of a Trust, in my view. there is no reason to depart from the usual order that these provisions must apply and the defendant's liability for payment of the costs associated therewith be included.[28]

35. The remainder of the terms of the Draft Order are not in dispute.

36. Thus the following order is made:

The Draft Order "X", as amended, is made an order of court.

JUDGE OF THE HIGH COURT

For Plaintiff: Adv PJ du Plessis SC

Instructed by: Adams & Adams

For Defendant: Adv Netshisaulu

Instructed by: Diale Mogashoa Attorneys

Date of hearing: 14 November 2019

Date of judgment: 21 November 2019

(GAUTENG DIVISION. PRETORIA)

HELD AT PRETORIA ON THIS THE 21st DAY OF NOVEMBER 2019 AT COURT SA BEFORE THE HONOURABLE MADAM JUSTICE NEUKIRCHER (J)

CASE NO: 7762/2017

In the matter between:

ADV JACO BAM. obo R H T

Plaintiff

(in his representative as the duly appointed Curator ad litem)

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and the Defendant and by agreement between the parties.

THE COURT GRANTS AN ORDER in favour of the Plaintiff against the Defendant in the following terms:-

1.1 The Defendant shall pay the following amounts to the Plaintiffs attorneys, Adams & Adams, in settlement of the Plaintiff's claim:

1.1.1 Loss of Earnings:

R1 553 576.00;

1.1.2 General Damages:

R1 250 000.00

SUB-TOTAL:

R2 803 576.00

Less balance of COIDA award:

R 17 384.05

TOTAL

R2 820 960.00

1.2 The aforesaid total amount in the sum of R2 820 960.00 shall be payable by direct transfer into their trust account, details of which are as follows:

Nedbank

Account number: 160 431 8902

Branch number: 198765

Pretoria

Ref: JPR/JLR/P2187

2. The Defendant shall furnish the patient with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the patient, after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 8 December 2014.
3. The Defendant is liable for payment of 100% of the reasonable costs of the Trustee appointed in terms of paragraph 4 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his fees in this regard, which shall be recoverable in terms of the Undertaking issued in terms of Section 17(4)(a), and which costs shall also include and be subject to the following:-
 - 3.1 The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time, and shall include but not be limited to disbursements incurred and collection commission calculated at 6% on all amounts recovered from the Defendant in terms of the Section 17(4)(a) Undertaking;
 - 3.2 The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;
 - 3.3 All the abovementioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding appointment, remuneration and disbursements had the Trustee been appointed as a curator bonis;
 - 3.4 The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed;
 - 3.5 The appointment and reasonable costs of a case manager.
4. That the net proceeds of the payments referred to above as well as the Plaintiff's taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff's attorney and own client legal costs (the "capital security in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time, and shall include but not be limited to disbursements incurred and collection commission calculated at 6% on all amounts recovered from the Defendant in terms of the Section 17(4)(a) Undertaking;
 - 4.1 contain the provisions as more fully set out in the draft Trust Deed attached hereto marked Annexure "A";

4.2 have as its main objective to control and administer the capital amount on behalf of the patient;

4.3 CONSTANT WILSNACH, will be the first trustee with powers and abilities as set out in the draft Trust Deed attached hereto marked Annexure 11A";

4.4 The trustee(s) will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust.

5. Should the aforementioned Trust be established within the twelve month period, the Trustee thereof is authorised to pay the Plaintiff's attorney and own client costs out of the Trust funds in so far as any payments in that regard are still outstanding at that stage.

6. Should the aforementioned Trust not be established within the SH< month period after date of this order:-

6.1 The Plaintiffs attorneys are directed to approach the court within twelve months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the patient;

6.2 The Plaintiff's attorneys are authorised to invest the capital amount in an interest bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of the patient with a registered banking institution pending the finalization of the directives referred to in paragraph 6.1 above;

6.3 The Plaintiff's attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 4 to 7 hereof.

7. Until such time as the Trustee is able to take control of the capital sum and to deal with same in terms of the trust deed, the Plaintiffs attorneys are authorised and ordered to pay from the capital amount:

7.1 Any reasonable payments to satisfy any of the patient's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim;

7.2 The attorney and own client costs of the Plaintiffs attorneys;

7.3 Such other amount(s) as may reasonably be indicated and/or required for the well being of the patient and/or in his interest which a diligent curator bonis would have paid had such curator been appointed

8. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include, but not be limited to, the following:-

8.1 The fees of Senior Counsel on the High Court Scale, inclusive of counsel's full reasonable day fee for 14 November 2019 and the

reasonable costs in respect of the preparation of the Heads of Argument;

8.2 The fees of the curator ad litem on the High Court Scale, inclusive of his full reasonable day fee for 14 November 2019, and the preparation of the curator ad litem's report ;

8.3 The reasonable taxable costs of obtaining all expert, medico-legal, RAF4 Serious Injury Assessment actuarial and addendum reports from the Plaintiff's experts which were furnished to the Defendant;

8.4 The reasonable taxable preparation and qualification fees in respect of the experts which furnished reports to the Defendant;

8.5 The reasonable taxable reservation fees of the following expert:

8.5.1 Ms Havenga .

8.5 The costs of a consultation between the Plaintiff and his attorney to discuss the terms of this order;

8.6 The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the patient in attending medico-legal consultations with the parties' experts, consultations with the legal representatives and the court proceedings, the quantum of which is subject to the discretion of the Taxing Master;

8.7 The above costs will also be paid into the aforementioned trust account;

8.8 It is recorded that the Plaintiff's instructing attorneys do not act in terms of a contingency fee agreement in this matter.

9. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

9.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

9.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

9.3 Should payment not be effected timeously, Plaintiff will be entitled to recover interest at applicable rate on the taxed or agreed costs from date of allocatur to date of final payment.

BY ORDER OF THE COURT

ADAMS & ADAMS

JPR/JLR/P2187

COUNSEL FOR PLAINTIFF: ADV J P J DU PLESSIS SC – 082 578 2424

ADV J BAM (Curator ad litem) – 082 828 2388

ATTORNEY FOR PLAINTIFF: JEVENNE LE ROUX: 082 906 6244

COUNSEL FOR DEFENDANT: ADV B MAGAGULA – 076 259 2263

ATTORNEY DEF: R NETSHISAULU: 083 375 0409

[1] At the time he was 57 years old and is, at the date of trial 62 years old

[2] Where he was employed as a site manager. Loco Torra Civils is a construction company

[3] The severity of this injury is in dispute with defendant contending that plaintiff had suffered a "complicated mild traumatic brain injury due to on associated skull fracture"

- per its neurosurgeon Dr Ntimbani

[4]

[5] Dr du Plessis and Dr Ntimbani

[6] Dr Voster and Dr Mazibuko

[7] Mrs Doran and Ms Mosetso

[8] Dr Mazabow and Ms Tromp

[9] Mr Wessels and Ms Maulana

[10] To which Dr du Plessis refers in the joint minutes set out in para 10 supra

[11] Fluid-attenuated inversion recovery which is an MRJ sequence with an inversion recovery which is an MRI sequence with an inversion

recovery set to null fluids - it can be used in brain imaging to suppress cerebrospinal fluid effects on the image so as to bring out the periventricular hypertense lesions

[12] Protea Assurance Company Ltd v Lamb 1971(1) SA 530 (AD) at 535 -536; Marine v Trade insurance Company Ltd v Goliath 1968 (4) SA 329 (AD) at 333-334

[13] Sandler v Wholesale Coal Supplies Ltd 1941AD 194 at 199

[14] Wright v Multilateral Motor Vehicle Accident Fund 1997 4 QOD E3 - 36 NPD as approved in Road Accident Fund v Marunga 2003 (S) SA 164 (SCA) at 170E - G

[15] Case no 31509/2014 (20/10/2017) Gauteng Division (unreported)

[16] 2008 5 QOD A4 - 33(D)

[17] 2006 5 QOD B4 - 231 (T)

[18] 1959 1 QOD 116 (N)

- [19] 1963 (1) QOD 101 (E)
- [20] Mohlaphuli NO v The South African National Road Agency Ltd & Another 2013 (6) QOD A4 -146 (WCC); M Anthony v Road Accident Fund (unreported: case no 27454/2013; GP on 15 February 2017)
- [21] 2014 (7A4) QOD 1 (ECP)
- [22] Unreported case no 11024/16 (GSJ) delivered 28 June 2018
- [23] 2017 (7B4) QOD 48 (GSJ)
- [24] Also see Dlamini v Road Accident Fund (2015] ZAGPPHC 646 (3 September 2015) where an amount of R1 350 000 was awarded to a plaintiff who suffered a severe brain injury and other orthopedic injuries and was rendered dependent on others and in need of care and supervision
- [25] Dr Mazabow and Ms Tromp
- [26] Dr Voster and Dr Mazibuko
- [27] And was already conceded by plaintiff in par 19 of the Pre-Trial Minute dated 8 November 2019
- [28] As was done in, for example, NH v Road Accident Fund 2019 JOR0856 (GP)

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