

SOUTH AFRICA / JUDGMENT

Bright Light Solar PTA1 (Pty) Ltd and Others v Village Mall Investments (Pty) Ltd and Others (2024/140583) [2024] ZAGPJHC 1295 (19 December 2024) [2024] ZAGPJHC 1295

COURT

South Gauteng High Court, Johannesburg

BEFORE

PG Louw

CASE / FILE NUMBER

2024/140583

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THE REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
JOHANNESBURG

Case Number: 2024-140583

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In the reconsideration

application of:

BRIGHT
LIGHT SOLAR PTA1 (PTY) LTD
(Registration
Number: 2017/444392/07)
First
Applicant
BRIGHT
LIGHT SOLAR PTA2 (PTY) LTD
(Registration
Number: 2020/099723/07)
Second
Applicant
BRIGHT
LIGHT SOLAR BLM1 (PTY) LTD
(Registration
Number: 2017/310177/07)
Third
Applicant
BRIGHT
LIGHT SOLAR JHB1 (PTY) LTD
(Registration
Number: 2017/444357/07)
Fourth
Applicant
and
THE
VILLAGE MALL INVESTMENTS (PTY) LTD
(Registration
Number: 2004/030240/07)
First
Respondent
TARENTAAL
CENTRE INVESTMENTS (PTY) LTD
(Registration
Number: 2005/000028/07)
Second
Respondent
FLORA
CENTRE INVESTMENTS (PTY) LTD
(Registration
Number: 2004/030198/07)
Third
Respondent
WATERGLEN
SHOPPING CENTRE INVESTMENTS (PTY) LTD
(Registration
Number: 2005/000076/07)
Fourth
Respondent
CARLETONVILLE
CENTRE INVESTMENTS (PTY) LTD

parte, in camera
application of:

(Registration
Number: 2005/037661/07)
Fifth
Respondent
WITBANK
HIGHVELD INVESTMENTS (PTY) LTD
(Registration
Number: 2004/013979/07)
Sixth
Respondent
GEO
SPHERE DEVELOPMENTS (PTY) LTD
(Registration
Number: 2013/126393/07)
Seventh
Respondent
In
re: the ex

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Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date and time for hand-down is deemed to be 10:00 on 19 December 2024.

JUDGMENT

PG LOUW, AJ

Introduction

[1] I refer to the parties as cited in the main application. The respondents seek a reconsideration of the order granted by me on 2 December 2024 in the urgent court. The order was sought and granted on an ex parte basis.[1]
The ex parte application

[2] On 2 December 2024, the applicants approached the urgent court as a result of a threat made by the respondents on 25 November 2024 to institute liquidation proceedings against the applicants, unless payment of certain amounts is made to the respondents by no later than 2 December 2024. The applicants sought interim injunctive relief against the respondents, interdicting them from instituting liquidation proceedings against the applicants pending finalisation of various actions which have been instituted by the applicants against the respondents out of the Gauteng Division, Pretoria, subject to the respondents' right to set the matter down for reconsideration of the order.

[3] It was submitted on behalf of the applicants, inter alia, that:

[3.1] The threatened liquidation proceedings constitute an abuse of process.

[3.2] The threatened liquidation proceedings are primarily intended as an instrument to embarrass the applicants under circumstances where the applicants are solvent; the alleged debts relied upon by the respondents are bona fide disputed on reasonable grounds; and disputed questions of fact and law are involved in the pending action proceedings instituted by the applicants.

[3.3] The threatened liquidation proceedings are designed as a tactical device to compel payment of disputed debts.

[3.4] Relying on *Soundcraft (Pty) Ltd t/a Advanced Audio v Daan Jacobs t/a Radio Spares and TV*[2] and *Kalley Flooring Co (Pty) Ltd v President Carpeting Manufacturers Ltd*,[3] the applicants are entitled to an order interdicting the respondents from persisting with their threatened abuse of process.

[3.5] Because it is the launching of the threatened liquidation proceedings which is intended by the respondents to irreparably harm the applicants, the applicants cannot provide the respondents with notice of the application until such time as an interim order is granted. If the application were to be served on the respondents, they will simply launch the threatened liquidation proceedings, thereby rendering the application superfluous. Therefore, it is necessary that the application be brought ex parte.

[3.6] The respondents will, upon the granting of the interim relief sought, be entitled to enrol the matter for reconsideration whilst, in the interim, the applicants' rights will be protected.

[3.7] On 28 November 2024, the applicants wrote to the respondents, reiterating that the alleged debts relied upon by the respondents were disputed by the applicants on bona fide grounds, and seeking an undertaking from the respondents that the threatened liquidation proceedings would not be brought.

[3.8] Notwithstanding, on 29 November 2024, the respondents reiterated their intention to bring the threatened liquidation proceedings.

[3.9] Given that the respondents are intent to launch their threatened liquidation proceedings if the disputed amounts are not paid in full on or before 2 December 2024, the applicants have no alternative but to seek relief from this court on short notice. If the applicants were to have sought to enrol the application on the ordinary roll, the respondents' unilateral deadline for payment of the disputed debts would have expired by the time the application will have been heard and the abusive proceedings will have been launched.

[3.10] The spurious debt of R95 million alleged by the respondents pales into significance when compared to the asset value of the Nova Group of Companies which has an asset base which is valued in the billions of rands.

[4] I accordingly granted an order in accordance with the notice of motion, excluding the relief sought that the proceedings are to be dealt with in camera.

[5] The respondents submit that the order is a nullity because, although it invited the respondents to set the matter down for reconsideration,

it did not allow for a return day as prescribed in Rule 6(8) which may be anticipated on 24 hours' notice. The respondents rely on the judgment in *Knoop NO and Another v Gupta (execution)*[4] for this contention.

[6] The applicants submit that the reasons set out by the Supreme Court of Appeal in *Knoop* as to why the order in that matter was invalid,[5] are distinguishable from this matter because none of the issues in *Knoop* arise in this matter. The applicants, relying on *Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)*, [6] submit that the order need not contain an express provision that the respondents are entitled to apply on notice to discharge the order. In *Lourenco*, Southwood J held that:[7]

"The fact that the order does not expressly provide for the respondents to anticipate the return date or provide that they are entitled to apply on notice to discharge the order cannot be an obstacle to the Court entertaining an application on either basis ..."

In any event both rule 6(8) and rule 6(12)(c) cover the case.

In terms of rule 6(8) any person against whom an order is granted ex parte may anticipate the return day upon delivery or on not less than 24 hours' notice ...

In terms of rule 6(12)(c) a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

[7] On this basis, the applicants submit that the order is not a nullity as contended for on behalf of the respondents.

[8] My approach to the reconsideration application makes it unnecessary for me to make any finding in this regard, but I find the applicants' contention on this issue persuasive. Even though the order does not contain a rule nisi, the order specifically stated that the respondents may by notice set the matter down for reconsideration, which is exactly what

transpired.

The reconsideration application

[9] Pursuant to obtaining knowledge of the order, the respondents delivered an affidavit in support of the reconsideration on 4 December 2024 and set the matter down for hearing on 6 December 2024. The applicants delivered its replying affidavit on 6 December 2024. The reconsideration application was heard on 9 December 2024.

[10] In *The Fonarun Naree: Afgri Grain Marketing (Pty) Ltd v Trustees, Copenship Bulkiers A/S (in liquidation) and Others*, [8] the Supreme Court of Appeal stated that:-

“If an affidavit is filed in support of the application for reconsideration, then the party that obtained the order is entitled to deliver a reply thereto, subject to the usual limitations applicable to replying affidavits. When that is done, and the party

seeking reconsideration does not argue a preliminary point at the outset that the founding affidavit did not make out a case for

relief, the case must be argued on all the factual material before the judge dealing with the reconsideration proceedings. That material may be significantly more extensive and the nature of the issues may have changed as a result of the execution of the original ex parte order.” [Footnotes omitted.]

[11] The applicants disputed that the reconsideration application is urgent. Interestingly, the applicants referred the court to *Faraday Taxi Association v Director Registration and Monitoring MEC for Roads and Transport and Others* [9] where the court referred to the matter of *LA v LW* where it was held that:

“The circumstances of each case and considerations of convenience and fairness are private when the court exercises its discretion to enrol a rule 6(12)(c) application.”

[12] In *Faraday*, Keightley J held that: [10]

“There may well be cases where resort to the urgent court is not justified. What renders this case suitable for reconsideration in the urgent court is the complaint that there were material non-disclosures by FTA when it approached Crutchfield AJ urgently. If this averment is found to be meritorious, then there should be no delay in the order obtained in such circumstances being set aside”. [Emphasis added.]

[13] This court held that the Uniform Rules of Court make provision for an urgent reconsideration of an order granted ex parte. [11]

[14] I accordingly find that the reconsideration application ought to be entertained on an urgent basis.

[15] The respondents adopted a dual approach in accordance with the principles established in *MV New Endeavor and Others v Indian Cil Corporation Ltd*[12] and *Mazetti Management Services (Pty) Ltd and Another v Amabhungana Centre for Investigative Journalism NPC and Others*,[13] namely that the founding affidavit in the ex parte application does not justify the order granted and, having regard to the merits of the matter with reference also to the answering and replying affidavits, the application for interdictory relief should be dismissed.

[16] Because of the view I adopt in respect of the latter approach, it is not necessary to deal comprehensively with the first. However, in my view, the applicants made out a case for the interdictory relief sought in the founding affidavit (considered in isolation). The applicants' founding affidavit appropriately canvasses all of the necessary elements required for the relief sought, namely:

[16.1] That various electricity services and supply agreements (ESSA agreements) were entered into between the applicants and the respondents.

[16.2] That in essence, the arrangement between the parties was that the respondents would install solar and the requisite batteries at the various shopping centres.

[16.3] That the respondents failed to perform insofar as the installation of batteries were concerned.

[16.4] As a result of the respondents not having installed the batteries the shopping centres ended-up consuming unnecessary electricity from the various municipalities in large and unnecessary amounts for the period between June 2022 to July 2024.

[16.5] As a result of the respondents' breach of their contractual obligations, the applicants suffered damages in the region of R84 million collectively.

[16.6] As a result of these facts, the applicants instituted six actions against the respondents on or about 24 October 2024.

[16.7] The inclusion of such additional battery components by further agreement was specifically contemplated by each of the ESSA agreements.

[16.8] In not installing these said batteries the respondents breached or repudiated the agreements, thus entitling each applicant to cancel the agreement in question.

[16.9] Upon a proper interpretation of the ESSA agreements the obligation of the applicants to make payment to the respondents for electricity used by them is reciprocal to the respondents' obligation to install the complete facility.

[16.10] Before the applicants became aware of the fact that the respondents had not entirely installed the facility – and under the false apprehension that the invoices that were being raised by the respondents were bona fide, due, owing and payable – the second, third, fourth and sixth applicants – during July 2024, entered into an arrear payment agreement with the respondents wherein the applicants acknowledged an indebtedness to the respondents for an outstanding amount to the value of almost R3.7 million (arrear payment agreement).

[16.11] Shortly after the conclusion of the arrear payment agreement the applicants started to conduct their own investigations. Pursuant to investigations the applicants realised that the respondents reneged on their obligations and only partially completed the facilities.

[16.12] The arrear payment agreement is voidable at the instance of the applicants by virtue of the respondents' failure to disclose that they had not installed the agreed battery components at their properties as undertaken.

[16.13] The founding affidavit contains a succinct summary of the grounds for disputing the respondents' claims for payment.

[16.14] In light of numerous correspondence exchanged between the parties, and having regard to the institution of the actions, a dispute between the parties materialised. In this regard, the applicants refer specifically to an email from Mr Myburgh, a director of all the respective applicants, to the respondents' attorneys on 1 October 2024. [I return to this email hereinbelow.]

[16.15] The respondents were aware of the fact that the applicants had an asset base which is valued in billions of rands.

[16.16] The only reasonable inference to be drawn from the respondents' threatened liquidation proceedings is not that the respondents subjectively believe that they will not be able to recoup the alleged amount of R95 million from the applicants if action proceedings are instituted, but rather that the respondents are using the threat of liquidation proceedings as a weapon in terrorem.

[16.17] The applicants dealt with their prima facie right, which included the right not to face liquidation proceedings which will be launched merely as an instrument to embarrass them and would constitute a clear and flagrant abuse of process.

[16.18] The issue of irreparable harm is dealt with, being the harm that will eventuate as soon as the applicants appear as respondents in liquidation proceedings.

[16.19] The issue of balance of convenience is addressed inter alia on the basis that the purpose of the ex parte application is not to bar the respondents from pursuing legitimate liquidation proceedings, but rather to facilitate a process for determining the legitimacy of those proceedings before any lasting harm is inflicted on the applicants through abusive liquidation proceedings.

[16.20] The applicants dealt with its lack of alternative remedies to avoid the institution of abusive liquidation proceedings.

[17] However, and even if I am wrong in respect of the respondents' point in limine, the reconsideration application ought to succeed on the second leg of the respondents' approach.

[18] It is trite that in an ex parte application, an applicant has a duty to disclose all material facts which might influence a court in coming to a decision. The non-disclosure or suppression of facts may be met with the penalty of rescission, even if it is not wilful or mala fide. The court, apprised of the true facts, has a discretion to set aside its order or to preserve it.[14] In Schlesinger, Le Roux J held that:[15]

"It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant."

[19] In an ex parte application, the applicant is required to observe the uberrima fides (utmost good faith) rule.[16]

[20] This rule requires that: –

[20.1] in ex parte applications all material facts must be disclosed which might influence a court in coming to a decision;

[20.2] the non-disclosure or suppression of facts, whether wilfully, mala fide or negligently, may incur the penalty of the order being set aside with costs; and

[20.3] the court, apprised of the true facts, has a discretion to set aside the former order with costs or to preserve it.[17]

[21] In exercising its discretion, the court will have regard to: –

[21.1] the extent of the non-disclosure;

[21.2] the question whether the first court might have been influenced by proper disclosure;

[21.3] the reasons for non-disclosure; and

[21.4] the consequences of setting the interim order aside.[18]

[22] The applicants are adamant that it made a full disclosure of all the material facts and correspondence that transpired between the parties, the most obvious material fact being that an arrear payment agreement was entered into.

[23] Counsel for the respondents pointed out numerous correspondence that were not attached to the founding affidavit. According to the respondents, the history of the debt clearly establishes that the dispute is a belated and vexatious attempt to avoid payment and that this is apparent from the complete correspondence between the parties. I do not intend to

belabour this judgment with references to all of the correspondence relied upon by the respondents in this regard, but point out a few items which are of some significance in my view.

- [24] On 20 August 2024, the deponent to the applicants' affidavits, Mr Myburgh, sent an email to Mr Shames, the deponent to the respondents' affidavit, in response to emails from Mr Shames enquiring about payment from the applicants in terms of the arrear payment agreement and the ESSA agreements. Mr Myburgh's response was that he was "making arrangements to pay the amounts due towards 1 September 2024". This email is significant because the applicants allege that shortly after the conclusion of the arrear payment agreement (on 25 July
- 2024) they commenced with investigations which ultimately resulted in a realisation that, on their version, the respondents have breached the ESSA agreements by failing to complete the installations in that the batteries were not installed at the applicants' various shopping centres. Significantly, the applicants do not say when exactly these investigations commenced, how they were conducted, by whom they were conducted, precisely when the applicants realised that the respondents failed to complete the installations, and so forth. This aspect is not remedied in the replying affidavit where Mr Myburgh simply states that although he had been under the impression all along that batteries had been installed (which "formed part of the Agreement all along"), he only came to realise at a much later stage that the batteries had in fact not been installed.
- [25] The first indication of this dispute in respect of the admitted indebtedness to the respondents came to the fore in an email from Mr Myburgh to Mr Shames on 1 October 2024, which was in response to a notice of default from the respondents' attorneys of record dated 17 September 2024.
- [26] The applicants also failed to disclose in the founding affidavit that a judgment for payment of an amount exceeding R31 million was obtained by a creditor, Beneficio Developments (Pty) Ltd against one of the Nova entities (the second applicant) on 23 May 2023.[19] I agree with the respondents that in an ex parte application one would have expected the applicants to make full disclosure of the judgment and the present status of this judgment debt.
- [27] The respondents attached a copy of the audited financial statements of the Nova Group for the year ending 28 February 2023 to its affidavit. The audited annual financial statements for the year ended 28 February 2024 is not yet available. It is evident from the financial statements that the applicants are involved in litigation with the Companies and Intellectual Property Commission (CIPC) pertaining to a compliance notice issued by the CIPC. In the compliance notice, the CIPC inter alia assert that the Nova Group is unable to prove "beyond a reasonable doubt" that it has sufficient liquidity to meet its current obligations. This is also a fact (irrespective of whether or not there is merit in the CIPC's assertion) which, to my mind, ought to have been disclosed in the applicants' founding affidavit.

- [28] The applicants' failure to disclose material evidence in its founding affidavit to the ex parte application is fatal in this matter. Although I have a discretion in this regard,[20] I am of the view that if a full disclosure of the facts referred to hereinabove was made in the founding affidavit, I would not have granted the order.
- [29] The extent of the non-disclosure is severe. As I have already stated, I would have been influenced by proper disclosure, to the extent that the order would not have been granted.
- [30] The applicants do not set out the reasons for the non-disclosure; the applicants are of the view that it made a full disclosure of all the material facts and correspondence. For the reasons already mentioned, I disagree.
- [31] Insofar as the consequences of setting aside the order is concerned, the applicants will have an opportunity to oppose the threatened liquidation proceedings, if they were to be instituted. If the applicants succeed in proving that the alleged debt is bona fide disputed on reasonable grounds, the applicants will avoid liquidation.
- [32] The allegation that the respondents are using the threat of liquidation proceedings as a weapon in terrorem, the applicants' right not to face liquidation proceedings which will be launched merely as an instrument to embarrass them and would constitute a clear and flagrant abuse of process, the alleged harm that will eventuate as soon as the applicants appear as respondents in liquidation proceedings, together with the submissions that the threatened liquidation proceedings constitute an abuse of process, are primarily intended as an instrument to embarrass the applicants under circumstances where the applicants are solvent, are designed as a tactical device to compel payment of debts bona fide disputed on reasonable grounds, and that because it is the launching of the threatened liquidation proceedings which is intended by the respondents to irreparably harm the applicants, were factors that
- persuaded me to grant the order.

- [33] Having been apprised of the true facts, and having considered the applicants' non-disclosure together with these factors, I am of the view that the order ought to be set aside and the interdictory relief sought by the applicants ought to be refused.
- [34] The respondents seek a punitive cost order against the applicants, which is in my view justified as a result of the applicants' non-disclosure. Although the respondents initially sought a de bonis propriis cost order against the applicants' attorneys of record, I was informed at the onset of the hearing that the cost order against the applicants' attorneys of record is not persisted with. Nothing more needs to be said about it.

Application to strike out

- [35] The applicants delivered an application to strike out. The application to strike out is directed at two articles attached to the respondents' affidavit and all references made thereto in the affidavit. The first article, entitled "12 Nova Companies face winding up applications", which

according to the respondents was published last year on various online platforms, is dealt with in paragraph 16 of the respondents' affidavit and attached as KS2. The second article, which according to the respondents made headlines, is dealt with in paragraph 17 of the answering affidavit and attached as KS3. The second article pertains to an allegation that the Nova Group breached the Companies Act by not publishing its annual financial statements within the prescribed six months following the financial year end.

- [36] The applicants apply for the striking out on the basis that the articles and the references made thereto in the respondents' affidavit is either vexatious and/or scandalous and/or hearsay in nature.
- [37] Scandalous matter include allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.[21]
- [38] Vexatious matter includes allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.[22]
- [39] Inadmissible evidence, such as hearsay evidence not supported by an affidavit may also be struck out.[23] Hearsay evidence can be struck out irrespective of whether or not there is prejudice.[24]
- [40] The first article was, ex facie KS2, written by one Roy Cokayne on 30 June 2023. The writer did not depose to a confirmatory affidavit. The second article was, ex facie KS3, written by one Ryk van Niekerk on 13 September 2024. Similarly, no confirmatory affidavit was deposed to by him.
- [41] The contents of both articles constitute inadmissible hearsay evidence. In light of this finding it is not necessary for me to decide whether the articles and references made thereto in the respondents' affidavit are scandalous and/or vexatious. Similarly, the second requirement of a striking-out application, namely prejudice to the applicants if the matter concerned is not struck out,[25] need not be decided either.[26]
- [42] The application to strike out ought to succeed.
- [43] In the circumstances, I make the following order:
1. The respondents' application for reconsideration is urgent and the respondents' failure to comply with the ordinary rules related to time periods and service of the application is condoned in terms of Rule 6(12).
 2. Annexures "KS2" and "KS3" to the respondents' affidavit in support of the reconsideration and all references made to these annexures in paragraphs 16 to 18 of the respondents' affidavit, are struck out.
 3. The ex parte order granted on 2 December 2024, is set aside.
 4. The applicants' application for interdictory relief, dated 2 December 2024, is dismissed.

5. The applicants in the main application are ordered to pay the costs of the respondents' application for reconsideration, jointly and severally, the one paying the others to be absolved, on an attorney and client scale, including the costs of two counsel (one being a senior counsel).

PG LOUW

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicants (main application): Adv A M Heystek SC Adv A A R Marques Instructed by: VFV Attorneys Counsel for Respondents (main application): Adv P Stais SC Adv L Acker Instructed by: Thomson Wilks Inc Date of hearing: Date of judgment: 9 December 2024 19 December 2024

- [1] Although the case heading indicates that the application was made in camera, the applicants made an election to proceed with the ex parte application – without it being heard in camera.
- [2] 1982
- (4) SA 685 (W).
- [3] 1982
- (4) SA 681 (C).
- [4] 2021
- (3) SA 135 (SCA).
- [5] Knoop at para 27.
- [6] 1998
- (3) SA 281 (T).
- [7] At 289J to 290A.
- [8] 2024 (1) SA 373 (SCA) at para 14.
- [9] (58879/2021) [2022] ZAGPJHC 213 (5 April 2022) at para 7.
- [10] At para 7.
- [11] Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others 2023 (6) SA 578 (GJ) at para 1.
- [12] 2024
- (6) SA 64 (SCA).

[13] 2023

(6) SA 578 (GJ).

[14] Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 349A-B.

[15] Schlesinger at 350B.

[16] Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009

(1) SA 1 (CC) at para 296.

[17] Thint at para 296; Hassan and Another v Berrange NO 2012 (6) SA 329 (SCA) at para 14; Schlesinger at 349A-B.

[18] Phillips and Others v National Director of Public Prosecutions 2003

(6) SA 447 (SCA) at para 29.

[19] Beneficio Developments (Pty) Ltd v Tarentaal Centre Investments (Pty) Ltd and Another (22258/20)

[2023] ZAGPPHC 324 23 May 2023.

[20] Schlesinger at 349B.

[21] Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at para 28.

[22] Ibid.

[23] See the authorities cited by Van Loggerenberg in Erasmus: Superior Court Practice, Volume 2, Second Edition at D1 Rule 6-65 note 419.

[24] Culturia 2000 and Another v Government of the Republic of Namibia and Others 1993 (2) SA 12 (NM) at 27H.

[25] Helen Suzman Foundation at para 27.

[26] Culturia at 27H.

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