

SOUTH AFRICA / JUDGMENT

Cochrane Steel Products v Jumalu Fencing (166/2021) [2022] ZASCA 100; 2022 BIP 483 (SCA) (22 June 2022)

[2022] ZASCA 100

COURT

Supreme Court of Appeal

BEFORE

Maya, Makgoka, Gorven, Meyer, Matojane

CASE / FILE NUMBER

166/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 166/2021

In the matter between:

COCHRANE STEEL PRODUCTS (PTY) LTD

APPELLANT

and

JUMALU FENCING (PTY) LTD

RESPONDENT

Neutral citation: Cochrane Steel Products v Jumalu Fencing (166/2021)

[2022] ZASCA 100 (22 June 2022)

Coram:

Maya P, Makgoka and Gorven JJA, Meyer and Matojane AJJA

Heard:

17 May 2022

Delivered: 22 June 2022

Summary: Trade Marks Act 194 of 1993 – ss 34(1)(a),

- (c) and 34(2)(b) – trade mark infringement claims – disclaimer in relation to registered trade mark ‘CLEAR VU’ – registration of a mark shall not debar others from the bona fide descriptive use of the words ‘clear view’ – whether respondent’s use of those words in the course of trade bona fide and descriptive of its kind of goods and their characteristics – whether respondent’s conduct unlawful and amounting to passing-off.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Lombard AJ, sitting as court of first instance):

The appeal is dismissed with costs.

Meyer AJA (Maya P, Makgoka and Gorven JJA, and Matojane AJA concurring)

- [1] This is an appeal against an order of the Gauteng Division of the High Court, Johannesburg (Lombard AJ), dismissing with costs the appellant’s application in terms of ss 34(1)(a) and (c) and 34(2)(b) of the Trade Marks Act 194 of 1993 (the Act), as also, for interdictory relief based on passing-off. The appellant, Cochrane Steel Products (Pty) Ltd (Cochrane), sought an order interdicting and restraining the respondent, Jumalu Fencing (Pty) Ltd (Jumalu), from infringing its ‘CLEAR VU’ registered trade mark in two categories, one in Class 6 (in respect of non-electrical

cables and wires of common metal; metal fences; metal mesh; pipes and tubes of metal) and the other in Class 37 (in relation to building, construction, repair and installation) of the International Classification of Goods and Services.

- [2] Cochrane and Jumalu are direct competitors in manufacturing and installing physical perimeter security barriers. The basis of Jumalu’s opposition to the relief claimed by Cochrane is that the words ‘clear view’ are disclaimed elements of Cochrane’s registered trade marks. In addition its use of those words on its advertising billboards and website is bona fide and descriptive in relation to its fencing products and their characteristics. Other competitors within the security barrier industry also use the words ‘clear view’ to describe their fencing products.

- [3] Cochrane manufactures a variety of security fences that are marketed under the ‘CLEARVU’ or ‘CLEAR VU’ brand, such as:

INVISIBLE WALL, described as an architecturally inspired see-through fence;

CRITICAL INFRASTRUCTURE, a category V type fence with an anti-ram barrier, anti-cut, anti-reciprocating saw, and other high security properties;

RE-ENFORCED, a combination of high-density mesh and a category IV security fence;

SHUTTER MESH, a high security category IV type perimeter fence that includes solid shutters;

ANTI-STAMPEDE CLEAR VU, a collapsible fencing system designed to provide pitch demarcation and the like;

BALLUSTRATE, an architecturally designed transparent baluster topped with a pressed integrated hand rail;

ROCKET BARRIER, designed to prevent rocket attacks against key installations such as fuel refineries and depots; and a POOL FENCE. Below is a photographic depiction provided by Cochrane inter alia, of the fencing alongside its mark.[1]

(Refer to PDF)

[4] Jumalu's actual use of the mark 'clear view' depicted on its advertising billboards is the following:

[5] On its website, Jumalu uses the words 'Jumalu', 'Clamberprufe' and 'clear view' as follows: Clamberprufe – safeguarding people, property and assets. In addition, under the heading of 'who we are', the following is captured:

'Jumalu Fencing is a South African private company supplying specialist Clamberprufe turnkey mesh panel security fencing solutions known for its clear view aesthetic. Jumalu offers an extensive range of innovative, aesthetically pleasing, high quality clear view fencing products to secure people, property, premises and assets.'

Furthermore, in relation to the product quality, it is stated that-

'Jumalu fencing offers an extensive range of innovative, aesthetically pleasing, high quality Clamberprufe clear view fencing products that are manufactured locally'.

Also, under the heading titled 'SOME COOL FACTS ABOUT JUMALU', it is stated that the total metres of clear view fencing installed so far is 28709. Moreover, under the heading for services offered, it is stated that the company-

'supplies Clamberprufe security fencing solutions known for its clear view aesthetic'.

Alongside this, Clamberprufe clear view fences series has been engineered to provide customers with the best qualities of mesh panel fencing with high security, anti-climb, anti-cut properties due to fence apertures and clear view aesthetics. In the remainder of its website, Jumalu uses the words 'Clamberprufe clear view fencing' or 'clear view aesthetics' within the same context.

[6] In dismissing Cochrane's infringement claims under ss 34(1)(a) and (c) of the Act, the high court held that the words 'clear view' are commonly used descriptively in relation to products

in the fencing industry, and it rejected Cochrane's contention that the use of those words by Jumalu was not bona fide descriptive use. In dismissing its common law passing-off claim, it held that Cochrane has not established that 'the public

identifies the clear view feature concerned as distinctive of the source of the Applicant's fencing' nor did it establish

'that the Respondent's use of the words CLEAR VIEW, was calculated or likely to deceive or confuse the ordinary customer, and thus to cause confusion and damage to the alleged goodwill of the Applicant's business'. It should be noted at the outset that no facts were set out in the founding affidavit to support the Class 6 services trade mark infringement claim under ss 34(1)(a) and (c) of the Act and the services passing-off claim. It follows that those claims must fail.

The trade mark infringement claims

[7] Sections 9, 10(2), 15, 34(1)(a) and (c) and 2(b) of the Act are pertinent. Section 9 deals with registrable trade marks as follows:

'(1) In order to be registrable, a trade mark shall be capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered from the goods or services of another person either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within those limitations.

(2) A mark shall be considered to be capable of distinguishing within the meaning of subsection (1) if, at the date of application for registration, it is inherently capable of so distinguishing or it is capable of distinguishing by reason of prior use thereof.'

[8] Section 10 deals with unregistrable trade marks. Specific in this regard is s 10(2) which provides that:

'The following marks shall not be registered as trade marks or, if registered, shall, subject to the provisions of sections 3 and 70, be liable to be removed from the register:

(2) a mark which—

(a) is not capable of distinguishing within the meaning of section 9; or

(b) consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services; or

(c) consists exclusively of a sign or indication which has become customary in the current language or in the bona fide and established practices of the trade.'

[9] Section 15 provides for trade mark registration subject to a disclaimer:

'If a trade mark contains matter which is not capable of distinguishing within the meaning of section 9, the registrar or the court, in deciding whether the trade mark shall be entered in or shall remain on the register, may require, as a condition of its being entered in or remaining on the register—

- (a) that the proprietor shall disclaim any right to the exclusive use of all or any portion of any such matter to the exclusive use of which the registrar or the court holds him not to be entitled; or
- (b) that the proprietor shall make such other disclaimer or memorandum as the registrar or the court may consider necessary for the purpose of defining his rights under the registration:

Provided that no disclaimer or memorandum on the register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.'

[10] Sections 34(1)(a) and (c), and (2)(b) read as follows:

'(1) The rights acquired by registration of a trade mark shall be infringed by—

- (a) the unauthorized use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion;

...

- (c) the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception: Provided that the provisions of this paragraph shall not apply to a trade mark referred to in section 70(2).

(2) A registered trade mark is not infringed by —

- (b) the use by any person of any bona fide description or indication of the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of his goods or services, or the mode or time of production of the goods or the rendering of the services.'

[11] When Cochrane applied for the registration of the mark 'CLEAR VU' in the two categories, M-Systems Group (Pty) Ltd (M-Systems) – at the time a competitor of Cochrane in producing and installing fencing products – objected. The basis of its opposition was that the mark was not registerable since it consisted exclusively of an indication which may serve in trade to designate the kind, quality, intended purpose or other characteristics of the goods or services (s 10(2)(b) of the Act) and that it was not capable of distinguishing the goods and services for which it is to be used (ss 9(1) and 10(2)(a) of the Act).

[12] The Gauteng Division of the High Court, Pretoria (Basson J), ordered the registration of the mark subject to two disclaimers. That order was appealed against to this Court. In *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Cochrane)*,^[2] this Court dismissed the appeal, save for the deletion of certain words in the second disclaimer as ordered by Basson J. In the result, Cochrane's 'CLEAR VU' goods and services trade marks were registered subject to the following identical disclaimers:

'The Registration of this mark shall give no right to the exclusive use of the words "clear" and "view" separately and apart from the mark. The registration of this mark shall not debar others from the bona fide descriptive use in the course of trade of the words "clear view" and view.'

I refer to the second part of this entry as the 'second disclaimer'.

[13] It is to be noted that the formulation of the second disclaimer is similar to the provisions of section 34(2)(b) of the Act. But, as was said by Harms JA in *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd and Another*,^[3]

'... a disclaimer is, theoretically, never necessary since registration of a trade mark cannot give rise to any rights except those arising from the mark as a whole. It nonetheless has a function. Primarily, it is to prevent the registration of a composite

mark from operating so as to inhibit the use of the disclaimed element by others.'

It prevents traders from being-

'... put through the trouble and expense of first manufacturing and selling and then be subjected to the risk of infringement litigation

where the Legislature has given a simple remedy akin to a declaration of rights to obtain certainty'.^[4]

[14] In dismissing the appeal in *Cochrane*,^[5] Navsa ADP relied on a number of well-known trade mark law judgments and re-affirmed the principles therein enunciated. The trade mark law principles to be distilled from *Cochrane* and from the trade mark jurisprudence relied upon in that case, can briefly be summarised as follows: Trade mark law is concerned with the provision of information regarding trade origin. Its object, as reflected in s 34(1)(a) and (b), is to prevent commercial dissemination that is misleading. Trade mark registration gives a perpetual monopoly. However, the registration of trade marks is capable of creating perpetual unjustified monopolies in areas it should not. Therefore, the rights of other traders should not be constrained beyond that which is necessary for the protection of the trade mark proprietor. Trade mark law principles are not aimed at preventing or inhibiting competition. Traders should not be permitted to 'enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure'.^[6] Trade mark use that is not misleading or deceiving as to origin is protected, constitutionally and in terms of ordinary trade mark

principles. A trade mark proprietor cannot bring an action for infringement in respect of the use of a disclaimed feature. The

deliberate misspelling of ordinary descriptive words which other traders may wish to use in relation to particular goods or services

ought also to be disclaimed since the phonetic equivalent of a non-distinctive word is itself non-distinctive.

[15] In *Cochrane*, *Navsa ADP* concluded thus:

[21] Returning to the facts of the present case, the “VU” in the composite mark “CLEARVU”, is a deliberate misspelling of the ordinary word “view” and is understandable in light of the nature of the product and what it intends to convey. To state, as *Cochrane* does, that it does not embody a misspelling of the ordinary English word “view”, but that it is a coined word which just happens to be the phonetic equivalent of the ordinary English word “view” is to strain to avoid the implication that commonly, admissions are entered when there is a misspelling of a word and to seek a monopoly that extends beyond that which is acceptable. Moreover, as pointed out above in para 14, with reference to *Webster and Page*, the phonetic equivalent of a non-distinctive word is itself non-distinctive and it would seem to follow that if the word itself is one that ought to be disclaimed then its phonetic equivalent should also be disclaimed.

[22] In my view, neither *Cochrane*, nor any other trader, is entitled to appropriate exclusively the ordinary English words “clear”

and “view”, which, in effect, constitute the composite mark. Furthermore, those words are commonly used descriptively in relation to fencing products. The registration of the mark should not operate to inhibit the use by others of the disclaimed elements.’

[16] The words ‘clear’ and ‘view’ are ordinary and well-known words to be found in any dictionary, and so is the phrase ‘clear view’. As a noun, the word ‘view’ ordinarily connotes ‘the ability to see something . . . from a particular place’ and as a verb ‘look at or inspect’. As an adjective the word ‘view’ ordinarily connotes ‘transparent’, ‘having good visibility’ and ‘free of any obstruction’.[7] Therefore, when the word ‘clear’ is adjectively used with the noun ‘view’ in a mark in relation to goods, they normally laud a characteristic of those goods. They are non-distinctive words and, also on the evidence before us, commonly used descriptively in relation to fencing products.

[17] *Jumalu’s* billboard depiction reveals that ‘ClamberPrufe’ is the dominant mark used in the sense of ‘any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned’ as defined in s 1 of the Act. The words ‘CLEAR VIEW FENCING’ below the mark ‘ClamberPrufe’ in a much smaller font is clearly used in a descriptive sense; a key characteristic of the fence is that whilst it serves as a barrier, it does not obstruct sight. ‘JUMALU’ is the company that manufactures and installs the ‘ClamberPrufe’ fencing, and its telephone number and e-mail address are provided at

the bottom of the billboard.

[18] On its website, Jumalu uses the words 'Jumalu', 'Clamberprufe' and 'clear view' in proper context. The words 'clear view' are used exclusively together with the words 'Clamberprufe' or as 'clear view aesthetics'. Both are descriptive use. In conjunction with the word 'Clamberprufe', it describes what type of fence 'Clamberprufe' is - a clear view fence – or it describes the aesthetics of the fence – it has a clear view aesthetic. The use of the words 'clear view' by Jumalu on its billboards and website is therefore undoubtedly descriptive use when considered in the proper context of the billboard or the website.

[19] Cochrane's last arrow in its bow in its attempt at obtaining infringement relief under ss 34(1) (a) and (c) of the Act, was its contention that Jumalu's use of the words 'clear view', even if descriptive, is not bona fide as contemplated in the second endorsement. I do not propose to attempt a comprehensive definition of what the expression 'bona fide description' of goods or services in s 34(2)(b) or 'bona fide descriptive' use in the second disclaimer means. It seems to me that some assistance may be derived, by analogy, from the meaning our courts have attributed to the concept of bona fide use in the context of the statutory defences to trade mark infringement. For example, it has been held that-

'user for an ulterior purpose, unassociated with a genuine intention of pursuing the object for which the Act allows the registration of a trade mark and protects its use, cannot pass as a bona fide user.'[8]

In this regard, what the Legislature intended to safeguard was-

'the use by a trader, in relation to his goods, of words, which are fairly descriptive of his goods, genuinely for the purpose of describing the character or quality of the goods: the use of the words must not be a mere device to secure some ulterior object, as for example where the words are used in order to take advantage of the goodwill attaching to the registered trade mark of another'.[9]

[20] In essence, what Cochrane contends is that Jumalu is not using the words 'clear view' to describe its ClamberPrufe fence and its unobstructed view characteristic but rather to capitalise on the reputation of the Cochrane's 'CLEAR VU' mark. The only factual basis upon which it seeks such an inference to be drawn is that in 2015 Jumalu had on its website used Cochrane's mark by using the words 'CLEARVU' and 'INVISIBLE WALL' (which were at that stage not registered trade marks) to describe its fencing products. As a result, Cochrane had to address a cease and desist demand to Jumalu. However, Jumalu complied with Cochrane's demand, altered its website and never used the marks 'CLEARVU'

and 'INVISIBLE WALL' again. An inference that Jumalu's use of the words 'clear view', even if descriptive, is not bona fide as contemplated in the second endorsement and in s 34(2)(b) of the Act, can therefore not reasonably be drawn. The words 'clear view' were disclaimed when Cochrane's trade marks under consideration were registered. By not disbarring others from using those words, the entry in effect disclaims Cochrane's right to the exclusive use thereof.

[21] I conclude, therefore, that Jumalu's use of the words 'clear view' to describe the kind of its security steel fencing and its characteristic of having a clear view aesthetic does not infringe Cochrane's registered trade mark 'CLEAR VU'. Jumalu's use is not likely to mislead or deceive as to the origin and is thus protected. It follows that the high court correctly dismissed Cochrane's infringement claims under ss 34(1)(a) and (c) of the Act.

The passing-off claim

[22] This leaves the passing off-claim, a reputational cause of action under the common law. A disclaimer, however, does not affect a trade mark proprietor's right at common law if it establishes that the use by the defendant of the disclaimed feature is likely to result in the defendant's goods or services being passed off as its goods or services.[10] The law of passing-off is well established as a species of unlawful competition. There are various ways in which a trader can pass off the goods of a rival trader. But in essence, passing-off concerns a misrepresentation. There is no closed list as to how the

misrepresentation can be effected.

[23] In *Policansky Bros. Ltd v L&H Policansky*,[11] Wessels CJ said this:

'In most of the cases which occur it is the get-up of a manufacturer's goods by a rival which gives rise to passing-off actions. Here as a rule the element of *dolus* prevails, for the get-up is seldom, if ever, accidental: it is generally the result of calculated imitation. In order, however, to judge whether there has or has not been a passing-off, the get-up of the goods, even if there has not been dishonest imitation, is often an element in determining whether the defendant's acts are or are not calculated to deceive the ordinary reasonable man to believe that when buying the goods of A he is buying those of B. There are various ways in which the defendant can pass off the goods of the plaintiff. The mass of reported cases show how numerous the devices are by which a manufacturer can attempt to identify his goods and therefore how varied the circumstances are in passing-off cases. Each case must necessarily depend on its own circumstances but if we examine the decided cases we find that many of them fall into definite classes which have common features.'

[24] In *Williams t/a Jenifer Williams & Associates and Another v Life Line Southern Transvaal*, [12] Corbett CJ said the following:

'Passing-off is a species of wrongful competition in trade or business. In its classic form it usually consists in A representing, either expressly or impliedly (but almost invariably by the latter means), that the goods or services marketed by him emanate in the course of business from B or that there is an association between such goods or services and the business conducted by B. Such conduct is treated by the law as being wrongful because it results, or is calculated to result, in the improper filching of another's trade and/or in an improper infringement of his goodwill and/or in causing injury to that other's trade reputation. Such a representation may be made impliedly by A adopting a trade name or a get-up or mark for his goods which so resembles B's name or get-up or mark as to lead the public to be confused or to be deceived into thinking that

A's goods or services emanate from B or that there is the association between them referred to above. Thus, in order to succeed in a passing-off action based upon an implied representation it is generally incumbent upon the plaintiff to establish, inter alia: firstly, that the name, get-up or mark used by him has become distinctive of his goods or services, in the sense that the public associate the name, get-up or mark with the goods or services marketed by him (this is often referred to as the acquisition of reputation); and, secondly, that the name, get-up or mark used by the defendant is such or is so used as to cause the public to be confused or deceived in the manner described above. These principles are trite and require no citation of authority.'

[25] Cochrane has failed to establish any conduct by Jumalu which is treated by our law as wrongful. It failed to establish the acquisition of reputation element and the misrepresentation element of its passing-off claim. As I have demonstrated, Jumalu's trade mark for its goods and its get-up do not resemble Cochrane's. It uses the words 'clear view' exclusively together with the words 'Clamberprufe' or 'clear view aesthetics' to describe the kind of its security steel fencing and its characteristic of having a clear view aesthetic. A representation that the security steel fencing marketed by Jumalu emanates in the course of business from Cochrane or that there is an association between such goods and the business conducted by Cochrane has not been established. The name, get-up or mark used by Jumalu is not such or is not used to likely cause the public to be confused or deceived as to origin or association.

[26] Equally apposite to Cochrane's alternative passing-off claim is the caution re-affirmed in this Court recently in the case of *Open Horizon Ltd v Carnilinx (Pty) Ltd*, [13] where Ponnann JA held that:

'[25] In any event, the appellant relies for its unlawful competition claim on the identical trade marks relied on for its trade mark infringement relief. The unlawful competition relief that the appellant seeks is premised on the factual assertion that the

respondent is using 'confusingly similar infringing marks', thereby imitating the appellant's PACIFIC range of products. Having determined that the marks are not confusingly similar for the purposes of trade mark infringement, how, it must be asked, can they be confusingly similar for the purposes of the alternative claim based on unlawful competition.

[26] In *Blue Lion Schutz* JA had occasion to repeat the caution sounded by him some 16-years earlier in *Payen Components*. He did so in these terms.

"... concerning the illegitimacy of using some general notion of unlawful competition to create an ersatz passing off with requirements (in the alternative) less exacting than those required by the common law. . . ."

He added;

“ . . . Some of the restraints that the common law places on the passing off action (the one relevant to this case is the need to prove the likelihood of deception and confusion) are important in preventing the creation of impermissible monopolies. . . .”

I daresay, this is precisely the kind of matter that Schutz JA cautioned against.’

[27] It follows that, like the trade mark infringement claims under subsections 34(1)(a) and (c) of the Act, the passing-off claim must also fail.

[28] As a result, the appeal is dismissed with costs.

P A MEYER

ACTING JUDGE OF APPEAL

Appearances

For appellant: O Salmon SC

Instructed by: Rademeyer Attorneys, Randburg, Johannesburg

C/o Honey Attorneys, Bloemfontein

For respondent: G Kairinos SC

Instructed by: Jurgens Bekker Attorneys, Alberton, Johannesburg

C/o Rossouws Attorneys, Bloemfontein

- [1] For more pictorial depictions of some other of the steel fencing products manufactured by Cochrane, together with descriptions employed by it in relation thereto, see *Cochrane Steel Products (Pty) Ltd v M-Systems Group* [2017] ZASCA 189 para 7.
- [2] *Cochrane Steel Products (Pty) Ltd v M-Systems Group* [2017] ZASCA 189.
- [3] *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd and Another* [2000] ZASCA 2; 2000 (2) SA 771 (SCA); [2000] 2 All SA 1 (A) para 13 relying on *Philip Morris Inc's Trade Mark Application* [1980] RPC 527 at 532-533.
- [4] *Cadbury* para 14.
- [5] *Cochrane* paras 9-20.
- [6] *In Re: Joseph Crossfield & Sons, Limited* [1910] 1 Ch 13 (CA).
- [7] *Concise Oxford English Dictionary* 12 ed (Oxford University Press) at 1621 and 266.
- [8] *Rembrandt Fabrikante en Handelaars (Edms) Bpk v Gulf Oil Corporation* 1963 (3) SA 341 (A) at 351E-F.
- [9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

(3) SA 623 (A) at 645F-G.

[10] Webster and Page South African Law of Trade Marks: Service Issue 19 (2015), para 9.19 at 9-16.

[11] Policansky Bros Ltd v L & H Policansky 1935 AD 89 at 98.

[12] Williams t/a Jenifer Williams & Associates and Another v Life Line Southern Transvaal [1996] ZASCA 46; 1996

(3) SA 408 (SCA) paras 22-24.

[13] Open Horizon Ltd v Carnilinx (Pty) Ltd [2022] ZASCA 75. (References omitted.)

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