

SOUTH AFRICA / JUDGMENT

Durascaff CC v Essilfie-Appiah (3330/2019) [2022] ZAECMHC 43 (18 October 2022) [2022] ZAECMHC 43

COURT

Eastern Cape High Court, Mthatha

BEFORE

Govindjee

CASE / FILE NUMBER

3330/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, MTHATHA

NOT

REPORTABLE

Case

No: 3330/2019

In

the matter between:

DURASCAFF

CC

Applicant

and

GEORGE

ESSILFIE – APPIAH

Respondent

JUDGMENT

Govindjee J

Background

- [1] The applicant instituted action against the respondent claiming payment for hired goods. Summons was served on 19 September 2019 and was defended. When the respondent failed to plead, a notice of bar was served. This was met with a notice in terms of Uniform Rule 30, alternatively, Uniform Rule 30A, on the basis that the particulars of claim had not been properly signed and was irregular.
- [2] The applicant's attorneys at the time ('Shamla Pather Attorneys') failed to remove the irregularity or to take any other step. The matter was enrolled by the respondent and the particulars of claim were declared irregular by this Court on 10 December 2019 ('the Griffiths J order'). The applicant was afforded a period of ten days from this date to remove the irregularity, failing which the respondent was granted leave to apply on the same papers for the dismissal of the claim. The irregularity was still not removed, resulting in an application to dismiss the action ('the dismissal application') some six months later, which was granted on 9 June 2020 ('the Dukada AJ order').
- [3] The applicant claims that it was never informed of the Griffiths J order by Shamla Pather Attorneys and only became aware of this on 3 November 2021. By that time, the mandate of Shamla Pather Attorneys had been terminated. The applicant was uncertain about the status of the action. Its new legal representatives communicated with correspondent attorneys and, eventually, the representatives of the respondent (on 20 December 2021, 12 January 2022 and 18 January 2022). Only on 19 January 2022 did it become clear to the applicant that the action had been dismissed with costs. An application for rescission of judgment was launched on 16 February 2022.
- [4] The applicant lays the blame for this situation squarely on Shamla Pather Attorneys, and argues that, in these circumstances, the application for rescission has been launched timeously. It seeks to re-enter the action, amend its particulars of claim and prosecute the action to finality.
- [5] The respondent denies that he breached any contract with the applicant or that he owes any money premised on an alleged breach. He argues that the applicant had chosen its own representatives freely, that his representatives had pointed out the irregularity and that the Griffiths J order had been ignored, despite being served on Shamla Pather Attorneys. Five months later, an application to dismiss the claim was served in terms of the Uniform Rules. Again, there was no response and a judgment dismissing the action was obtained. The respondent submits that there must be limits to a litigant's ability to escape the consequences of the conduct of its legal representatives, and the applicant should not

succeed in claiming the relief sought.

Rescission: Uniform Rule 42(1)

[6] There are three ways in which a judgment taken in the absence of one of the parties may be set aside, namely in terms of Uniform Rule 31(2)(b), in terms of Uniform Rule 42(1) or in terms of the common law. Uniform Rule 31(2)(b) is irrelevant for present purposes.

[7] As to rescission in terms of Uniform Rule 42(1), courts have a discretion whether to grant an application for rescission under this

subrule, which involves a procedural step to 'correct expeditiously an obviously wrong judgment or order'. [1] Uniform Rule 42(1)(a) refers to rescission of 'an order or judgment erroneously sought or erroneously granted in the absence of any party affected

thereby'. Courts have accepted, in general terms, that a judgment is 'erroneously granted' if there existed at the time of its issue a fact of which the court is unaware, which would have precluded the granting of the judgment. In other words, had the court been aware of such a fact it would have been induced not to grant the judgment. [2]

[8] A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of

this subrule, even though the court may not have been aware of certain facts at the time of granting the judgment. [3] Importantly, the courts have consistently refused rescission in terms of this rule where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney.

[9] Put differently, an order is 'erroneously granted' if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts which, if known to it, would have precluded it from a procedural point of view from making the order. [4] What is effectively being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication, also the judgment. [5] By contrast, a judgment to which a party is procedurally entitled cannot be considered to have been erroneously granted by reason of facts of which the judge who granted the judgment, as they were entitled to do, was unaware. [6]

The Griffiths J order

[10] Counsel for the applicant, submitted in heads of argument that the Griffiths J order was unusual given that the applicant had been afforded the opportunity to remove the irregularity within ten days of the 'granting of the Order', as opposed to after service of the order. As there had been no attempt to serve the order within ten days after it had been granted, the applicant could not comply within the prescribed time period. In addition, it was argued that neither Rule 30 nor Rule 30A provide for dismissal of a claim. As a result, so the argument goes, the Dukada AJ order was erroneously sought or granted.

[11] That argument overlooks the sequence of events and the nature of the order issued by Griffiths J. The learned judge was faced with an application in terms of Uniform Rule 30 launched during November 2019. That application included, as a supporting document, a ‘notice in terms of Rule 30 alternatively Rule 30A’. There is no suggestion on the papers that the various associated notices were not served on the correspondent attorneys of the applicant’s attorneys of record. As already indicated, the Griffiths J order held that the particulars of claim were irregular and the applicant was afforded ten days ‘... from the date of grant of this order to remove the irregularity, failing which the Applicant be granted leave to make an application

on the same papers duly amplified for the dismissal of the Plaintiff’s claim’.

[12] The respondent relied upon Uniform Rule 30 in its application. Uniform Rule 30 gives a court wide power in cases where an irregular step has been taken. It may set aside such a step and grant leave to amend ‘or make any such order as to it seems meet’. In terms of subrule (3), it was open to Griffiths J, having declared the particulars of claim to be irregular, to grant the applicant an opportunity to remove the irregularity, as the learned judge did. It was within the discretion of the court to add, upon consideration of the material before court and with due regard to fairness, that the respondent was entitled to apply on the same papers duly amplified for the dismissal of the claim, in the event that the irregularity was not removed within a period of ten days. That order was clear, even though it may have been unusually crafted.[7] It cannot be said to be erroneous.[8] It has not been the subject of any appeal and remained binding in the absence of any decision to set it aside. It also does not fall within the narrow band of orders considered invalid by reason of having been made without jurisdiction.[9]

The effect of ‘dismissal’ of an action

[13] As with the application that served before Griffiths J, the dismissal application was served on the correspondent attorneys chosen by the applicant’s attorneys of record. There is no dispute in this respect. Uniform Rule 4(1)(aA) provides authority for this:[10]

‘Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.’

[14] The founding affidavit to the dismissal application summarised the events leading up to the Griffiths J order. It added that the respondent had taken the additional step, on 6 March 2020, of addressing correspondence to the applicant’s legal representatives bringing the existence of the Griffiths J order to their attention and enclosing a copy. It was emphasised that Griffiths J had granted leave to the respondent to approach the court in the event that the particulars of claim remained unamended, and that the respondent was suffering prejudice by the applicant’s persistent non-compliance. On the strength of these papers, Dukada AJ

granted the order dismissing the applicant's action, including the costs of the main action and of the dismissal application.

[15] What is the effect of a judgment dismissing an action? At the conclusion of a trial, a court may grant judgment outright in favour of either party, or it may give absolution from the instance.[11] Dismissal of an action has been equated with the latter:[12]

‘Thus a person may be discharged from the instance, though he is not freed from the action, as when a plaintiff does not appear on the due day, and the defendant thereupon is by virtue of the default able to obtain what has already been called, and will again be called “absolution from the instance”, with effect that he is discharged free of costs from the present ventilation of the claim, but can still be summoned and sued afresh.’[13]

[16] Cilliers et al suggest as follows:[14]

‘As pointed out, the right of a defendant to apply to be absolved from the instance if the plaintiff does not appear when the trial is called, is in accordance with Roman-Dutch law. Although the rule only refers to non-appearance when a trial is called, there is no reason why a respondent would not have the right to similarly apply for absolution when the applicant does not appear when an opposed application is called. It is submitted that a court, in exercising its inherent jurisdiction, would adopt such a convenient and sensible procedure.’

[17] The authorities go beyond non-appearance ‘when the trial is called’. In *Municipality of Christiana v Victor*,^[15] a magistrate had entered judgment in the following terms: ‘Case dismissed with costs’. On appeal, the court was asked to decide whether that order was equivalent to judgment of absolution or to judgment for the defendant. Innes CJ, on behalf of the full court, held that ‘... where a case is dismissed as a penalty for failure on the part of the plaintiff to comply with a discovery order, he is entitled to bring his action again, after payment of costs.’

[18] In *Becker v Wertheim, Becker & Leveson*,^[16] a judgment dismissing a plaintiff's claim was held to be a judgment of absolution from the instance. Similarly, in *Eldred v Van Aardt & Bell*,^[17] the court held as follows:

‘It is clear that the dismissal of an action cannot as a general rule be regarded as a final judgment on which a defence of *res judicata* might be based, but that it is equivalent to a decree of absolution from the instance.’

[19] The upshot of this is that the respondent was only ‘discharged free of costs from the present ventilation of the claim’. The respondent was not completely freed from the action and could still have been summoned and sued afresh.^[18] This tempers the seemingly drastic consequence of a court exercising its discretion to bring a matter to finality in the absence of one of the parties, with potential implications for the constitutional right to have access to the courts.^[19]

[20] It cannot be said that the Dukada AJ order was obviously wrong or that there was a fact of which that court was unaware which resulted in an erroneous order being issued. The respondent was procedurally entitled to approach the court in terms of Uniform Rule 30 and, having secured the Griffiths J order, was procedurally entitled to request an order dismissing the plaintiff's action. There were no irregularities in the procedure and it was not legally incompetent for Dukada AJ to dismiss the action. The respondent was procedurally entitled to that judgment and the fact that the court would have been unaware that the applicant's legal representatives had not conducted themselves properly, and that they would not take steps to apply to rescind that order timeously,

cannot change that position.

[21] A good illustration of the application of these principles is evident in *Athmaram v Singh*. [20] In this case the applicant's failure to respond to an interlocutory application to compel compliance with a previous court

order justified the judgment that was subsequently granted. An attorney's clerk had erred by filing correspondence from the

applicant without any response. When the respondent brought an application for dismissal of the applicant's defence, the clerk again filed the document without more. The applicant's defence had been dismissed and judgment entered against him. That judgment could not be labelled 'erroneously granted' and could not be rescinded in terms of Uniform Rule 42(1). The same conclusion was reached in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*, [21] where a filing error in attorneys' offices was held not to amount to a mistake in the proceedings. The same rationale applies in this instance and there is no basis for this court to exercise its discretion to rescind in terms of this rule. [22]

Common law rescission

[22] In terms of the common law, a judgment can be set aside on various grounds, including where judgment has been granted by default. An application for rescission on this basis must be brought within a reasonable time and sufficient cause for rescission must be

shown. [23] The courts generally expect an applicant to show good cause (a) by giving a reasonable explanation for their default; (b) by showing that the application is made bona fide; and (c) by showing that they have a bona fide claim which prima facie has some prospect of success. [24] The court nevertheless retains a discretion which must be exercised judicially after a proper consideration of all the relevant

circumstances. [25]

A reasonable explanation

[23] The applicant's erstwhile attorneys failed to amend the particulars of claim to remove the irregularity raised in the respondent's notice dated 11 November 2019. The applicant acknowledges that they took no action at all. When the Griffiths J order was issued on 10

December 2019, the respondent's attorneys brought this to the attention of their opponents, who remained supine. The applicant was not informed of these developments by its attorneys and avers that it had no knowledge of what had transpired. The dismissal application was only heard some months later, on 19 June 2020. The applicant fails, in its founding affidavit, to explain its extent of interest and involvement in the litigation during all this time. It appears to have relied heavily on its insurer ('CGIC') to pursue the matter on its behalf, and states that 'I understand that during 2020 and 2021, CGIC experienced certain difficulty with getting updated reports from the Plaintiff's erstwhile attorneys and consequently terminated the mandate of these attorneys'. The applicant adds, without any confirmatory affidavit being filed, that CGIC requested regular

updates from Shamla Pather Attorneys, to no avail.

[24] In fact, the applicant's present legal representatives received instructions to act only on 12 October 2021, and the applicant became aware of the Griffiths J order on 3 November 2021, almost two years after the Uniform Rule 30 notice had been issued. The Dukada AJ order only came to the applicant's attention on 19 January 2022. Throughout this time '... the Plaintiff was under the impression that its erstwhile attorneys were proceeding to trial'. The applicant says that it was not in wilful default, having been '... unable to provide any instruction to its erstwhile attorneys as it was not aware of the irregularity or any application brought against it by the Defendant'. It argues that this application has been brought within a reasonable

time from the date it became aware of the Dukada AJ order.

[25] An attorney's negligence does not always constitute a 'reasonable explanation'. [26] In *Colyn v Tiger Food Industries Ltd* the SCA noted as follows: [27]

'I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (*Saloojee and Another NNO v Minister of Community Development*). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (*Melane v Santam Insurance Co Ltd*).' (Footnotes omitted.)

[26] The attorney is the chosen representative of a litigant. It has been held, in the context of an application for condonation for

non-compliance with a Uniform Rule, that a litigant should generally not be absolved from the ordinary consequences of such a relationship, irrespective of the circumstances that resulted in the failure to comply.[28] A litigant is not always excused for their own passivity when a legal representative has been briefed to attend to a matter. As the court held in *Saloojee and Another v Minister of Community Development*: [29]

‘If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney and expect to be exonerated of all blame; and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself...’ (References omitted.)

[27] A reasonable explanation for default is a self-standing requirement for rescission. Failure to satisfy this aspect may, on its own, be fatal to the application: [30]

‘[T]he circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential

requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant’s explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits...’

(References omitted.)

[28] The explanation offered by the applicant for its default suffers from serious defects. There is no accountability for the applicant’s own failure to pursue any enquiries as to the status of the matter over an excessive period. CGIC is fingered as the driving force behind the litigation, yet no details are provided regarding the steps it took during this prolonged period, and no supporting affidavit from CGIC is offered. The court is left to speculate as to the extent of the ‘regular updates’ CGIC requested from Shamla Pather Attorneys and its thought process and actions when these requests were fruitless. The negligent conduct of Shamla Pather Attorneys was, it seems, allowed to fester because of the inactivity on the part of both the applicant and its insurer. In these circumstances, the point has been reached where the applicant is unable to escape the omissions of its chosen legal representatives.

The case on the merits

- [29] Strictly speaking that is the end of the matter and a basis for refusing common law rescission.[31] Even accepting that the poor explanation might be cured by strong prospects of success does not change the outcome. This is because it cannot be said, on the papers before me, that the applicant enjoys anything beyond prima facie prospects of success.
- [30] The particulars of claim reflect that the respondent entered into a credit agreement with the applicant following the hire of goods. A deed of suretyship was signed by the respondent. The applicant avers that it has complied with its obligations and that the respondent defaulted on his payment obligations. The respondent never pleaded to the particulars of claim because of the course the matter took. He says, in his answering affidavit, that he does not owe the plaintiff any money, did not breach any agreement with the applicant and has not been unjustifiably enriched. The merits of the action are otherwise not addressed by the parties.
- [31] I have no difficulty in concluding that the applicant has made out a prima facie case on the merits, and that the application is brought bona fide. Averments are set out which, if established at trial, would have entitled the applicant to the relief sought. This might have sufficed had the explanation for the default been sufficiently full. The applicant would then have been justified in not dealing more fully with the merits of the case.[32] But where the applicant has provided a poor explanation for default, a good claim is required to compensate for this.[33]
- [32] The court in *Melane v Santam Insurance Co Ltd* in fact referred to 'strong prospects' being required in circumstances where a delay was lengthy.[34] Instead of attempting to establish this, the applicant pays almost no attention to this aspect in its application for rescission. There is no separate heading in the founding affidavit dealing with this issue and the applicant failed to reply to the respondent's answering affidavit, which refuted the merits of its claim.
- [33] As such, the applicant has failed to establish a bona fide claim which has good prospects of success, resulting in rescission in terms of the common law being unjustified.[35]

Conclusion

- [34] It remains the court's task to consider all the relevant facts and circumstances applicable, and to exercise a judicial discretion following the application of a flexible approach centred on the principles of justice and fairness.
- [35] I have considered, inter alia, the respondent's interests in bringing finality to the matter and the consequences of this application being unsuccessful,[36] together with the other factors highlighted above. In essence, the explanation for the applicant's default is wholly unreasonable.

While it may be accepted that the applicant's claim is brought bona fide and establishes a prima facie case on the merits, the applicant has not succeeded in demonstrating good prospects. In the circumstances there is no basis to rescind the order of Dukada AJ, either in terms of Uniform Rule 42 or the common law.

Order

[36] The following order will issue:

1. The application is dismissed with costs.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:15 September 2022

Delivered:18 October 2022

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[1] See Bakoven Ltd v GJ Howes (Pty) Ltd 1992

(2) SA 466 (E) at 471E-F.

- [2] See *Nyingwa v Moolman* NO 1993
- (2) SA 508 (Tk) at 510D-G.
- [3] *Lodhi 2 Properties Investment CC v Bondev Developments (Pty) Ltd* 2007
- (6) SA 87 (SCA) ('Lodhi') at 94E.
- [4] See *Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C).
- [5] *National Pride Trading 452 v Media 24* 2010
- (6) SA 587 (ECP) para 27.
- [6] *Lodhi* op cit fn 3 paras 25, 27.
- [7] See the comments of Plasket J, on behalf of a full bench, in *Ikamva Architects CC v MEC for the Department of Public Works and Another*
- [2014] ZAECGHC 70 paras 23, 24.
- [8] See *Athmaram v Singh* 1989
- (3) SA 953 (D) at 956I-957B.
- [9] See *MEC for the Department of Public Works and Others v Ikamva Architects and Others*
- [2022] ZAECBHC 13; [2022] 3 All SA 760 (ECB) para 16.
- [10] See *Athmaram v Singh* op cit fn 8 at 956G-H.
- [11] Uniform Rule 39(3) provides: 'If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment'.
- [12] AC Cilliers, C Loots and H C Nel Herbstein and Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th Ed) (2009) (Juta) p 924. Also see *Makayiseni v Musarurgwa* 1947 S.R. 160 at p162 as cited in *Bulford v Bob White's Service Station (Pvt) Ltd* 1973 (1) SA 188 (RA).
- [13] *Huber's Jurisprudence of my Time* vol 2 ch 16 s 3 (translated by P Gane) as quoted in Cilliers et al op cit fn 12 at 918-919, fn 41.
- [14] Cilliers et al op cit fn 12 p 920.
- [15] *Municipality of Christiana v Victor* 1908 TS 1117 at 1118-1119.
- [16] *Becker v Wertheim, Becker & Leveson* 1943
- (1) PH F.34 (A).

- [17] Eldred v Van Aardt & Bell 1924 SWA 79 at 82.
- [18] Huber op cit fn 13 s 4; Corbidge v Welch
- (1892) 9 SC 277 at 279. Also see the remarks of Jones J in Vena and Another v Vena and Others
- [2009] ZAECPEHC 26; 2010 (2) SA 248 (ECP) para 8.
- [19] Cf MEC for the Department of Public Works and Others v Ikamva Architects and Others
- [2022] ZAECBHC 13; [2022] 3 All SA 760 (ECB) paras 17, 18.
- [20] Athmaram v Singh op cit fn 8. Cf Standard Bank of SA Ltd v Van Dyk 2016 (5) SA 510 (GP), dealing with exceptions and Uniform Rule 26.
- [21] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003
- (6) SA 1 (SCA) ('Colyn') para 9.
- [22] See Chetty v Law Society, Transvaal 1985
- (2) SA 756 (A) ('Chetty') at 764I-J. Also see Freedom Stationery (Pty) Ltd and Others v Hassam and Others 2019 (4) SA 459 (SCA) para 19.
- [23] De Wet and Others v Western Bank Ltd 1979
- (2) SA 1031 (A) at 1042.
- [24] Colyn op cit fn 21 para 11; Ferris and Another v Firststrand Bank Ltd 2014 (3) SA 39 (CC) para 24. In Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowitz and Others op cit fn 4 at 418A-D, the court had no difficulty in assuming that, in the case of dismissal of an action, as opposed to the dismissal of a defence, the second element would be satisfied if it was shown that the applicant had a bona fide claim carrying prima facie prospects of success.
- [25] See HDS Construction (Pty) Ltd v Wait 1979
- (2) SA 298 (E) at 300–301B.
- [26] Ferris v Firststrand Bank Ltd op cit fn 24 para 25.
- [27] Colyn op cit fn 21 para 12.
- [28] Saloojee & Another v Minister of Community Development 1965
- (2) SA 135 (A) at 141D-F.
- [29] Ibid at 141F-H.
- [30] Chetty op cit fn 22 at 767J-768C; Government of the Republic of Zimbabwe v Fick and Others 2013 (5) SA 325 (CC) at 350D.
- [31] Chetty op cit fn 22 at 765D-E; 768C-D.

[32] See *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W) at 895H-J.

[33] *Carolus v Saambou Bank Ltd; Smith v Saambou Bank Ltd* 2002

(6) SA 346 (SE) at 349B-C.

[34] *Melane v Santam Insurance Co Ltd* 1962

(4) SA 531 (A) at 532E: 'Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.'

[35] *Colyn op cit* fn 21 at para 13. Also see *Government of the Republic of South Africa v Fick op cit* fn 30 at para 89.

[36] See *Liberty Group Limited t/a Liberty Life v K&D Telemarketing and Others*

[2020] ZASCA 41 paras 14-15.

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