

SOUTH AFRICA / JUDGMENT

Fourie v Minister of Justice and Correctional Services - Appeal (39/2023)

[2024] ZAECKMHC 2 (16 January 2024)

[2024] ZAECKMHC 2

COURT

Eastern Cape High Court, Makhanda

BEFORE

N Cengani-Mbakaza, N Beshe

CASE / FILE NUMBER

39/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

APPEAL CASE NO: 39 /2023

REPORTABLE: YES/NO

In the matter between: ANTONIA NOLAN FOURIE APPELLANT and MINISTER OF JUSTICE AND CORRECTIONAL SERVICES RESPONDENT

APPEAL JUDGMENT

CENGANI-MBAKAZA AJ:

Introduction

[1] The appellant is a sentenced prisoner, serving his sentence at Waainek Correctional Facility in Makhanda. The appeal arises from the judgment of the Magistrate in Makhanda (the trial court), dismissing the appellant's claim for damages. The claim is premised on an alleged assault by the members of the respondent upon the appellant whilst they were performing their duties.

[2] I will refer to the parties as they were in the trial court.

Grounds of appeal

[3] The plaintiff appeals against the trial court's findings which are, inter alia, as follows:

(a) There was no evidence that the plaintiff had been treated in a cruel or inhuman fashion;

- (b) The extent of the injuries was uncertain and exaggerated;
- (c) His version was riddled with inconsistencies, improbabilities and material contradictions; and
- (d) The plaintiff failed to discharge the onus of proving on a balance of probabilities that the injuries he sustained were as a result of being assaulted by the members of the defendant.

The Pleadings

[4] The plaintiff alleged that on 13 January 2019, he was viciously assaulted by correctional officials. He claimed to have sustained injuries for which he received medical treatment. He also claimed to have experienced emotional trauma, pain and suffering and further averred that the damages he had suffered amounted to R150 000 (One hundred and fifty thousand rand) which is set out as follows:

(i) R50 000 (Fifty thousand rand), for contumelia, that is, humiliation, pain and suffering, shock, scarring and disfigurement.

(ii) R100 000 for loss of amenities of life and temporary disability.

(iii) Additionally, the plaintiff claimed interest tempore morae to the amount of R150 000 (One hundred and fifty thousand rands) calculated at the prevailing prescribed mora interest rate of 10.25% per annum, from the date of service of summons to date of final payment.

[5] In his amended plea, the defendant alleged that on the aforementioned date, the members searched A-Unit cell 27. During the search, the correctional officials found unauthorised items under the plaintiff's bed. He became aggressive and a tussle between him and one of the Correctional Officials, Sergeant Xothovu (Sgt Xothovu), ensued. The

defendant denied the allegations of assault and the injuries suffered by the plaintiff.

Factual background

[6] It is common cause that on 13 January 2019, the correctional officials conducted a routine check at cell number 27. They seized contraband items which were described as knives and cell phones. In the process of a routine check, a scuffle ensued between the plaintiff and Sgt Xothovu.

[7] In his testimony, the plaintiff alleged that Sgt Xothovu asked who the owner of the items was. He denied the knowledge of the said items. Sgt Xothovu pressed him on his shoulder forcing him to sit down. Persistently, he asked who the owner of the contraband items was. At that moment he pushed him down and struck him repeatedly with open hands on his back all the while hurling insults at him.

[8] When the plaintiff stood up, he forcefully pushed him down and gave him an open-handed slap. When the plaintiff tried to flee, Sgt Xothovu hit him with a baton on his head and shoulders repeatedly.

[9] The plaintiff jumped over one of the beds, and Sgt Xothovu struck him with a baton on his back. Another member came from the front and hit the plaintiff in the face. In an attempt to defend himself, the plaintiff tried to block the blows while Sgt Xothovu together with this member struck the plaintiff with batons. Subsequently, the plaintiff moved towards the corner of the cell but one of the members trapped his feet and he fell on top of the cupboard. At that moment

they all proceeded to trample on him and strike him with batons.

[10] While seeking refuge by hiding under the bed, one of the members forcibly pulled his leg and the assault continued. The plaintiff testified that they assaulted him until he became momentarily unconscious. Subsequently, he was transported to the hospital inside the prison facility. After an hour and a half, he was discharged. Upon returning to his cell he took photographs of all the injuries he sustained due to the assault. The photographs were admitted in the trial proceedings by consent between the parties.

[11] After a period of four days from the date of the incident, the plaintiff sought medical attention from Doctor Dwyer (the medical expert), who examined him and compiled a medical report commonly known as a J88. The medical report was admitted as an exhibit in the trial proceedings. The medical expert documented a mixture of eleven bruises and abrasions on the plaintiff's back. In his testimony, the medical expert explained the difference between abrasions and bruises. According to the medical expert, bruises are caused by a moderate form of force and the abrasions are caused by a more severe form of force. More importantly, he observed that the abrasions were grazed, an indication that a high degree of force was used. Furthermore, he testified the tramlines or linear marks on the plaintiff's back suggested a possible baton-related assault. The medical expert noted crusted abrasions on the left eyebrow, abrasions on the cheek, a wound on the head, bruises and abrasions around both eyes, on the lower limbs and the side of the thigh. In conclusion, the medical expert testified that the plaintiff suffered multiple injuries. In medical terms multiple injuries refer to more than three injuries in one's body, so he testified. With this evidence, the plaintiff closed his case.

[12] Sgt Xothovu's account diverged from that of the plaintiff in the following respects: After he seized the contrabands, the plaintiff advanced towards him in an attempt to dispossess him of the items. The plaintiff punched him on his left jaw. Sgt Xothovu ordered the plaintiff to sit down, however, the plaintiff squatted and stood up again. He then struck Sgt Xothovu with a fist. A scuffle ensued between the plaintiff grabbed hold of his right- side of the waist area.

[13] He attempted to escape by running in between the beds where one member restrained him. Sgt Xothovu further denied that the plaintiff was assaulted by correctional officials. He testified that he witnessed the plaintiff bleeding on his head suggesting that he may have bumped against the steel beds whilst he was trying to escape.

- [14] Mr Edward Olivier's (Olivier) role within the Correctional Service Department where he worked since 2018, was primarily focused on reporting incidents of assaulted offenders and addressing various complaints. Acting on the instruction of one of the correctional officials who was involved in the scuffle, he recorded that the plaintiff sustained small cuts on the right side of the head, and his left eye and had bruises on the left arm. When questioned on whether he interviewed the plaintiff, he answered in the negative. He further testified that Sgt Xothovu refused to comment about the report because it was already compiled when he was interviewed.
- [15] When the plaintiff was transported to the hospital, he was seen by Nurse Feni (the nurse) who has been working in the prison facility since 2016. He holds an honours degree in nursing and his credentials were never placed in dispute. He observed that the plaintiff was bleeding on the right side of his head. He cut the plaintiff's hair to examine the nature of the wound. He observed that the wound was superficial and that there was no need to stitch it. He applied betadine ointment on the wound and bandaged it. He further noticed that the plaintiff had excruciating pains all over his body. Upon further examination, he noticed linear marks on his back.
- [16] Under cross-examination, the nurse gave an alternative explanation for the injuries, suggesting that the linear marks might have been caused by bumping on the beds rather than being struck with batons. When asked to explain his failure to record other injuries which were depicted in the photographs, he testified that the plaintiff might have suffered such injuries later that day. When asked to explain the multiple injuries that were noted by the medical expert, the nurse informed the court that the plaintiff might have suffered those injuries in a different incident. With this evidence, the defendant closed its case.

The impugned

judgment

- [17] The trial court found that the plaintiff's evidence was riddled with contradictions and inconsistencies. She relied on Section 32 (1)
- (c) of the Correctional Services Act and found that the defendants were acting in self-defence. She reasoned that the members could not have surrendered themselves to the lawlessness and unruly behaviour of the plaintiff. Furthermore, the trial court found that according to the J88, the medical expert and the nurse, the injuries suffered

by the plaintiff were nothing but abrasions and surface wounds which did not require any stitching. She, therefore, found that the injuries as demonstrated by the plaintiff in his evidence were exaggerated and fabricated to support his claim.

The parties 'contentions

- [18] At the commencement of the hearing, condonation was granted for the respondent's late delivery of the heads of argument. In summary, Mr Cordell, counsel for the appellant argued that the trial court erred in the manner in which it evaluated the evidence. It failed to apply the law applicable in evaluating the evidence of two irreconcilable versions. Due to this, the trial court made incorrect factual findings, so he argued.
- [19] Ms Pango, counsel for the respondent argued that the nurse who examined the plaintiff immediately after the incident correctly documented that the injuries he sustained were minimal. She argued the injuries sustained by the plaintiff were consistent to being hit or bumped against the steel beds. At no stage was the plaintiff assaulted. Therefore, the Magistrate was correct in her approach on the issues raised, so she argued.

The applicable law and evaluation of evidence

- [20] The correct approach to be adopted in analysing and assessing the evidence in a civil case is as follows: where there are two mutually destructive versions, as in the present case, in order to succeed, the plaintiff, should satisfy the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is false or mistaken and falls to be rejected[1].
- [21] As early as 1974, our courts emphasized that when one talks about a plaintiff having discharged the burden of proof that was placed upon him, one truly means that the court must be satisfied on a balance of probabilities that the plaintiff was telling the truth, and as such, his version was therefore accepted.[2]
- [22] In determining the veracity of the evidence, the court should weigh and test the plaintiff's allegations against the general probabilities. As a result, evaluating a witness's credibility will inevitably involve taking the case's probabilities into account. If the balance of probabilities favours the plaintiff, then the court should accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false[3].
- [23] It is impermissible to evaluate the evidence in a compartmentalised approach, the law requires that evidence should be evaluated as a whole.
- [24] It is by now, axiomatic, that the powers of the appeal court in resolving factual disputes are limited. The Constitutional Court in *Makate v Vodacom (Pty)(Ltd)*[4] referred to *R v Dhlumayo and Another* [5] and made the following judicial remarks: per Jafta J (with Mogoeng CJ, Moseneke DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J concurring:

"[37] Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by the trial courts, more particularly if the factual finding is depended on the credibility of the witnesses who testified at the trial."

[25] At paragraph 40 of Makate's case, the Constitutional Court reiterated that the esteem afforded to a trial court's credibility findings cannot be overstated. The court held,

"[40] If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In Bernert this court affirmed:

'What must be stressed here is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by the trial court is not an inflexible rule. It is recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from the observing and hearing the witnesses as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of the appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'[6](my underlining)

[26] With these legal principles in mind, I now turn to consider whether the trial court misdirected itself in resolving the factual disputes before it. Upon evaluation of the trial court's findings, it appears from the record that the trial Magistrate failed to recognize the traditional principles applicable to the evaluation of two mutually destructive versions. The trial court isolated the version of the plaintiff and made credibility findings with no proper evaluation of the totality of the evidence.

[27] On the probabilities, the scuffle that occurred between the plaintiff and the correctional officials led to a situation where the plaintiff had to be immediately seen by the nurse. Because of the nature of the pain and injuries he sustained, after approximately four days from the date of the incident, he had to be examined by a medical expert. Concerning the nature of the injuries, the evidence demonstrates the following common cause facts: that the plaintiff had a wound that was

bleeding on the right side of his head; he had multiple bruises and abrasions on his back; he had linear marks on his back and arms; he was experiencing excruciating pain all over his body. Despite the fact that the medical expert and the nurse differ in the number of injuries they observed, both confirmed that the plaintiff suffered multiple injuries. In medical terms, multiple injuries refer to more than three injuries in one's body.

[28] Considering the corroborative evidence of the two medical practitioners, the finding by the trial court that the injuries were exaggerated was a misdirection on her part. This notwithstanding, the cause of the plaintiff's injuries needs a thorough scrutiny, in that, Sgt Xothovu denied that the plaintiff was assaulted by the correctional officials.

[29] The definition of assault in both criminal and civil law is the same. CR Snyman: Criminal law 7th Edition (Chapter XV) defines assault as an offence consisting of an unlawful and intentional act or omission which results in another's bodily integrity being directly or indirectly impaired; or inspiring a belief in another person that such impairment of her bodily integrity is immediately to take place. According to JC Van der Walt and JR Middley; Principles of Delict at page 111; paragraph 78; the infringement of one's bodily integrity can be physical and psychological.

[30] In an attempt to justify the conduct of the correctional officials, the trial court placed too much emphasis on the principles of self-defence. Additionally, the court invoked Section 31(c) of the Correctional Services Act[7] (the Correctional Services Act) which authorises correctional officials to use minimal force against an inmate for self-defence in certain circumstances. It is worth noting that the principles of self-defence are universally applicable in both civil and criminal

law. In this regard, I borrow the words by Chaskalson P, in *S v Makwanyane*, where he stated, 'self-defence is recognised by all legal systems'.[8]

[31] CR Snyman in CRIMINAL LAW 7th ed states the following, at page 85,

"A person acts in private defence and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property of other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack." (my underlining)

[32] In the case under consideration, Sgt Xothovu testified that the plaintiff attacked him, and he used no force to repel the imminent attack. Although he felt threatened, no force was used by any of the correctional officials except that the plaintiff was restricted to remain in one area and to seat down due to his unruly behaviour. He explained that the plaintiff might have injured himself by bumping against the steel beds. It therefore stands to reason that, under the circumstances, the application of the principles of self-defence was misplaced.

[33] Despite the caution that is needed in evaluating the plaintiff's evidence as a single witness, his evidence finds corroboration in Sgt Xothovu's. It is common cause that during the physical altercation, there were more than two well-built and energetic correctional officials in the cells. During the routine search, the plaintiff was compelled to sit down forcefully because he could not explain who the owner of the contrabands was. At some point, the plaintiff sought refuge by running between the beds and hiding from the correctional officers. One of the members pulled him from where he was hiding. It is a further common cause that the correctional officials had batons in their possession.

[34] No matter how small the space in the cell was, the evidence presented by Sgt Xothovu that the plaintiff was never assaulted does not tally with the rules of logic. If the plaintiff was not under attack, as demonstrated by Sgt Xothovu, there would be no reason for him to run; no

reasonable explanation as to why he would be pulled from under the bed. Furthermore, there would be no reason for him to suffer multiple linear marks on his back; severe abrasions and bruises all over the body including eyes, cheeks and limbs and there would be no reason for immediate medical intervention. The glaring admission made by Sgt Xothovu that he wanted to take out his baton is consistent with the plaintiff's version that the correctional officials possessed batons which they used during the attack.

- [35] Gleaning from the record, the plaintiff's version finds a lot of corroboration sounds probable and is consistent. He presented a credible and reliable version, in particular on material issues, when compared with false and improbable evidence of the correctional officials. Despite the rigorous cross-examination, he stuck to the version of his story and his cross-examination bore no fruits. Immediately after the assault, he was seen by the nurse who treated the injuries. He reported to the nurse that he was assaulted. He opened a criminal case of assault. On the same day of the incident, he took photographs to keep a record of the injuries he sustained as a result of the attack. After a week he was seen by an experienced medical expert whose qualifications and credentials were never placed in dispute. The medical expert's evidence and or opinion which include the fact that severe force was used during the attack remained intact and were never rebutted by any other expert evidence.
- [36] Sgt Xothovu's claim that he was attacked by the plaintiff was false and could not have been accepted by the trial court. The plaintiff consistently maintained that he could not have endangered his life by attacking physically fit and active correctional officials. Sgt Xothovu's assertion that the plaintiff suffered the injuries from himself against the steel beds is found to contradict what the medical expert and the plaintiff presented and is therefore false. In an attempt to counter the defendant's liability to the claim, the nurse presented a defensive image as well as a highly speculative hypothesis, stating that the plaintiff must have sustained the injuries in separate incidents before the medical examination. There was, however, no evidence presented to support this proposition. Similarly, in his record of the injuries sustained by the plaintiff, Olivier relied on what he was told. His testimony did not take the case any further.
- [37] In my considered opinion, the trial Magistrate misdirected herself in the manner in which she evaluated the evidence. On the conspectus of evidence, I am convinced that the trial court's findings were wrong. In the result, the appeal must succeed.

Quantum

- [38] Both parties proposed that in the event the appeal court finds in favour of the plaintiff, it would be more convenient to deal with the issue of quantum instantaneously than to remit the matter to the trial court. In the interest of justice, I am amenable to this proposition.
- [39] It is self-evident that in determining an appropriate award, I am required to utilize a broader discretion to grant what I deem to be just and sufficient recompense.[9]

[40] Recently, our courts have made awards of a similar nature in a number of cases[10], some of which were referred to by counsel for the appellant. Counsel for the respondent made no reference to the previous cases, however, argued that the appeal court should grant whatever it deems fair and just under the circumstances of this case.

[41] The following passage which is extracted from the case of Protea Assurance Ltd v Lamb[11] per Potgieter JA finds relevance in this matter,

Headnote: In assessing general damages for bodily injuries, the process of comparison with comparable cases does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.'

[42] In determining a fair and adequate compensation, I am duty-bound to consider a broader spectrum of facts and circumstances connected to the plaintiff and the injuries suffered by him, including their nature, permanence, severity and impact on his life. Furthermore, I have to take into account that the tendency for awards now is higher than they once were as a result of changing values in our society, improvement in the standard of living and the fact that awards have traditionally been lower in this country than in many others.[12]

[43] Reverting to the facts of the present case, the plaintiff suffered grievously at the time of the assault. After about four days and upon examination by the medical expert, the injuries he sustained were still visible. The photographs that were handed in as exhibits clearly show how the assault affected him. The photograph of a bleeding wound on his head coupled with other injuries which were counted to eighty clearly explains why he suffered excruciating pain all over his body. This notwithstanding, there is no indication that the plaintiff suffered a permanent injury. As the servants of the State, the correctional officials have a responsibility to 'respect, protect, promote and fulfil'[13] all fundamental rights entrenched in the Bill of Rights. In casu, they acted contrary to what our Constitution[14] embraces.

[44] Having considered all the factors above, I am of the view that a global amount of R100 000 (One hundred thousand rand) would be a fair and adequate award for wrongful assault.

Order

[45] Accordingly, the following order is issued:

1. The appeal succeeds.

2. The order of the trial court is set aside and replaced with the following order:

(i) Judgment is granted in favour of the plaintiff against the defendant.

(ii) The defendant is ordered to pay a global amount of R100 000 (One hundred thousand rand) for wrongful assault. The defendant shall pay Interest at 10, 25% from 14 days after the date of this judgment, to the date of payment.

(iii) The defendant is ordered to pay costs of this action

3. The respondent shall pay the appellant's costs of the appeal.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

I agree.

N BESHE

JUDGE OF THE HIGH COURT

APPEARANCES: Counsel for the appellant Adv C. Cordell Instructed by SWARTS ATTORNEYS C/o N.N. Dullabh & CO Attorneys for the Appellant 5 Bertram Street MAKHANDA Ref: Mr N Dullabh Counsel for the defendants Adv M Pango Instructed by STATE ATTORNEY (GQEBERHA) C/o AKHONA GEORGE & ASSOCIATES 118 High Street MAKHANDA Ref: Ms A George Date heard 06 October 2023 Date delivered 16 January 2024

[1] National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (ECD) at 440D-441A.

[2] Koster Ko-operative Landbounmaantskappy Bpk v Suid Afrikaanse Spoorwee 1974(4) SA 420 (W) at 426-7; see also African Eagle Assurance Co Ltd v Cainer 1980

(2) SA 324.

[3] National Employer's Insurance Co Ltd v Jagers at fn 1 (supra).

[4] (CCT52/15)[2016] ZACC13;2016(6) BCLR709 (CC);2016(4) SA 121(CC) (26 April 2016)

[5] 1948 (2) SA (A)

[6] Bernet v Absa Bank Ltd [2010] ZACC 28; 2011 (3) SA 92(CC); 2011(4)BCLR 329 (CC) at para 106

[7] Act 111 of 1998

[8] S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995(6) BCLR 665[1995] ZACC 3; ; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

[9] Peterson v Minister of Safety and Security (1173/2008) [2009] ZAECGHC65 (23 September 2009) at para 21.

[10] In Bam v Minister of Correctional Services

- [2012] ZAECPEHC 66(18 September 2012), the plaintiff was assaulted with batons and sustained bruising and swelling of arms, bruising of abdomen and back; haematoma of the head and a severe fracture of the knee. He was awarded 180 000 in general damages; In Nomboniso Plaatjies v Minister of Police
- [2022] ZAECMKHC 8 (3 May 2022), the appellant sustained bruises, scratch marks on her wrists, shock and pain in her thumb and back following an assault by police. She was awarded R50 000; In Mhlengi v Minister of Police
- [2021] ZAECGHC 59(29 June 2021), the appellant was hit and dragged to a police vehicle. He was awarded R40 000 for general damages; In Minister of Police v Heleni
- [2023] ZAECMKHC 55(11 May 2023, the court awarded general damages to a sum of R200 000. In this matter the respondent was violently pushed against the wall, grabbed on the ground and stamped on her right foot; Minister of Justice and Correctional Services v Simon [2022] JOL 53352 (ECG), in an appeal which emanated from the proceedings in the Magistrate's Court, the respondent was injured on his anklebone and leg that resulted in him struggling to walk and suffering pain for extended period; his ears became swollen; hearing was impeded; and the bruises he sustained on his back caused him associated back pain for some time. On appeal, the court confirmed an award of R30 000 in favour of the respondent.
- [11] 1971 (1) SA 530 A.
- [12] Peterson v Minister of Safety and Security fn. 9(supra) at para 21.
- [13] Chapter 2, of the Bill of Rights, with particular reference to Section 7 (2) The Constitution of the Republic of South Africa Act 108 of 1996(as adopted on 08 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. Section 7(1) provides,' The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.
- [14] Section 12(1) states,' Everyone has a right to freedom and security of the person, which includes the right-(c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; (e) not to be treated or punished in a cruel, inhuman or degrading way.

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