

SOUTH AFRICA / JUDGMENT

Janse van Rensburg and Others v WAD Holdings (Pty) Ltd and Others (29458/2022)

[2022] ZAGPPHC 974 (5 December 2022)

[2022] ZAGPPHC 974

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

29458/2022

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 29458/2022

REPORTABLE:

NO.
OF
INTEREST TO OTHER JUDGES: YES
REVISED.
05
DECEMBER 2022
In

the matter between:

DANIEL
THEODORUS JANSE VAN RENSBURG First Applicant
AFRI
GOAL (PTY) LTD Second
Applicant
INEXMA
114 CC Third
Applicant
and
WAD
HOLDINGS (PTY) LTD First
Respondent
RQ
INVESTMENTS (PTY) LTD Second

Respondent
WHB
HOLDINGS (PTY) LTD Third
Respondent
XTR
INVESTMENTS
CAPITAL
(PTY)
LTD Fourth
Respondent
WILLEM
HERMANUS BRITZ Fifth
Respondent
ANTOINE
VORSTER
VAN
BUUREN Sixth
Respondent
AFROCENTRIC
INVESTMENT
CORPORATION
LTD Seven
Respondent
JOHANNESBURG
STOCK EXCHANGE LTD
Eighth
Respondent
ARC
HEALTH (PTY) LTD Ninth
Respondent
ROYAL
QUEENS HOLDINGS (PTY) LTD Tenth
Respondent
SANLAM
LIMITED Eleventh
Respondent

Summary:

urgent application -
undue delay resulting in self-created
urgency - first applicant embroiled in extensive litigation with a
company to which he had
sold shares in yet another company, WAD
Holdings (Pty) Ltd (WAD) in 2017. WAD had distributed some of its own
assets, notably shares
in a listed company, Afrocentric Investment
corporation Ltd, as dividends in specie to its current shareholders
who now received
an offer from Sanlam to purchase those share - the
applicant sought to prevent that sale on an urgent basis -
undue delay in launching the urgent
application - no

other compelling reason to indulge the self- created
urgency resulting from the undue delay-
application struck off the roll - punitive
costs
awarded.

ORDER

1.
The application is struck off the roll.
2.
The applicants
are ordered
to pay the costs of the opposing
respondents, on the scale
as between
attorney
and client,
which cost
shall
include the
costs of two counsel, where employed.

JUDGMENT

DAVIS, J

Introduction

- [1] This is the judgment in an application whereby the applicants sought to have a substantive sale and purchase of shares in a listed company stayed pending the finalisation of previously instituted pending litigation.
- [2] Despite the fact that references had been made in extensive papers to the merits of the prior litigation the point was taken that any perceived urgency in the intended sale had been self-created and that the applicants should therefore be non-suited from proceeding on an urgent basis.

Background

and nature of the urgent application

- [3] During 2015 WAD Holdings (Pty) Ltd (WAD) sold an existing healthcare related business to Afrocentric Investment Corporation Ltd (Afrocentric), a company listed on the Johannesburg Stock Exchange (JSE) and became a 16% shareholder in Afrocentric (WAD's percentage shareholding in Afrocentric has since then changed from time to time).

[4] According to the first applicant in the current application (Van Rensburg) he sold his ½ shareholding in WAD to ARC Health Investments (Pty) Ltd (ARCID), now known as RQI Investments (Pty) Ltd (RQI) in what he called a "written asset for share and subscription agreement". According to Van Rensburg "the purchase price would be discharged by ARCHIRQI by issuing [to him] JOO A-class ordinary shares at a price of R 3 million per share in ARCHI/RQI". Van Rensburg would then sell the A-class "consideration shares" to a company in which he became the 100% shareholder, Afrigoal (Pty) Ltd (Afrigoal). This was all purportedly done as part of an "internal restructuring" as contemplated in section 42 of the Income Tax Act 58 of 1962 (the ITA). At the time Van Rensburg's co-shareholders and co-directors in WAD, Messrs Britz and Van Buuren, who feature as the fifth and sixth

respondents in the current urgent application, were unaware of this sale and restructuring. Part of Van Rensburg's sale of shares was that a further R50 million be paid to him or his nominee. There was also a possibility of two further tranches of payments.

- [5] After the above sale had been implemented and after some changes in the shareholding of the holding company of ARCHI/RQI, being ARC Health (Pty) Ltd, which had been succeeded by Royal Queen Holdings (RQH) in December 2018, Van Rensburg in 2019 claimed that suspensive conditions in his sale of shares agreement with ARCHI/RQI had not been fulfilled.
- [6] Pursuant to this, Van Rensburg instituted an action in this court in case no 79286/19, claiming a re-transfer of his shares in WAD. This is referred to in the papers as "the first action".
- [7] The next year, on 10 June 2020, Van Rensburg instituted a second action in case no 24783/20 for rectification of the share register in WAD, to reflect him again as ½ shareholder. By that time, Britz and Van Buuren have already some nine months before sold their shares in WAD to WHB Holdings (Pty) Ltd (WHB) and XTR Investments Capital (Pty) Ltd (XTR), respectively.
- [8] On 18 June 2020 substantive arbitration proceedings were initiated by Van Rensburg against ARCHI/RQI and ARC, seeking a declaratory order that the sale of shares agreement between Van Rensburg and ARCHI/RQI "never came into existence". The return of Van Rensburg's erstwhile ½ shares in WAD was claimed or, as an alternative, payment of R300 million, being the value assigned to the shares at the time of sale.
- [9] Within the time limit permitted by the Rules of AFSA, under whose auspices the arbitration proceedings had been launched, ARCHI/RQI delivered an exception to Van Rensburg's claim.
- [10] In the meantime, Van Rensburg withdrew the first action on 26 June 2020.

- [11] On 21 July 2020 ARC launched an application in terms of section 3(2) of the Arbitration Act 42 of 1965 disputing Van Rensburg's rights to claim a retransfer of the WAD shares. Van Rensburg only delivered an answering application thereto three months later on 5 October 2020. A reply had been delivered on 26 October 2020 and ARC had delivered its heads of argument on 8 December 2020.
- [12] Yet a third action had been launched by Van Rensburg in case no 33562/2020 wherein a retransfer of the shares were also claimed. Counsel explained that his was "in case" Van Rensburg could not succeed in his claims by way of arbitration. This action was also met by an exception.
- [13] Nothing was done to advance any of the abovementioned litigation to finality until about April/May 2021 when an attempt at consolidating the litigation failed.
- [14] Thereafter, there was again a period of inaction for another six months, which Van Rensburg blames on his previous attorney, until the appointment of his current attorney in November 2021. This was followed, however, by another spell of inaction.
- [15] In May 2022, finally some life was breathed into the pending litigation. Van Rensburg delivered heads of argument in the section 3(2) Arbitration Act application on 17 May 2022, 17 months out of time.
- [16] On 25 May 2022 Afrocentric released an announcement in terms of which it announced that WAD had implemented a distribution of shares to its shareholders, then being ARCHI/RQI, WHB (the current third respondent) and XTR (the current fourth respondent). This was described by Van Rensburg's counsel as "a bombshell". This prompted Van Rensburg to launch an urgent application, subsequently referred to as the main application.
- [17] In the main application, launched on 30 May 2022, Van Rensburg (and Afrigoal and a close corporation, Inexma 114 CC, as second and third applicants) claimed, inter alia, that the distribution of Afrocentric shares by WAD as in specie dividends to ARCHI/RQI, WHB and XTR be reversed as well as that the transfers of their shares in WAD by Messrs Britz and Van Buuren to WHB and XTR respectively be set aside and also be reversed.
- [18] The basis for the above relief, as set out in the founding affidavit by Van Rensburg is that, should WAD, Britz and Van Buuren " ... be allowed to dissipate assets so as to avoid any possible liability flowing from legal proceedings ... there will be nothing left eventually to satisfy any judgment that may be obtained against them [and] it will also become impossible to obtain relief in the form of transfer of those shares I (Van Rensburg) am entitled to in WAD, if the shares in WAD and also WAD's shares in Afrocentric are being transferred to other third parties ...".

- [19] After the delivery of "preliminary" answering affidavits by RQI, WAD, XT Britz, Van Buuren and ARC (the ninth respondent), the main application came before Barn Jon 7 June 2022. The matter was then referred to the Deputy Judge President as it was envisaged that the papers would exceed 500 pages. The answering affidavits were only "preliminary" at that stage as Van Rensburg had only afforded the respondents 48 hours to deliver their affidavits.
- [20] In the meantime Van Rensburg, by way of a filing notice dated 6 June 2022, delivered a document entitled "Applicant's Actio Pauliana". It is a document more resembling heads of argument (and it was in fact signed by Van Rensburg's counsel) than a notice of motion. In it however, notice is given that action will be instituted against Britz and Van Buuren based on fraudulent transfer of property as contemplated in the common law remedy of the Acho Pauliana.
- [21] On 8 June 2022 Afrocentric published a further notice indicating a further transaction by WAD regarding its assets.
- [22] On 21 June 2022 a meeting was held with the Deputy Judge President. At this meeting, not only was the exchange of further affidavits agreed on, but the date of hearing of the main application was fixed to be 14 November 2022. Pursuant hereto, the aforementioned respondents delivered their answering and supplementary affidavits on the due date of 15 August 2022.
- [23] Van Rensburg's replying affidavit was due on 30 August 2022. He did not meet this agreed deadline, but requested (and obtained) an extension until 5 September 2022 from the opposing respondents.
- [24] On 6 September 2022, Van Rensburg's attorney wrote a letter wherein the following was conveyed to the opposing respondents: "We have considered our clients' position after having read the answering affidavits by all the parties in this matter and during the course of drafting a replying affidavit, we have advised our clients as set out below. We accept for purposes hereof and our clients explicitly rely on the correctness of the facts put forward by the auditor of WAD Holdings (Pty) Ltd, pertaining to the financial position of WAD Holdings (Pty) Ltd If such information had been provided to ourselves and our clients immediately when the urgent application was served, our clients would not have proceeded with the urgent application, nor with any proceedings thereafter. Even though Mr Britz and Mr Van Buuren have not disclosed their financial position to the court, and have not indicated their ability to satisfy any judgment that may arise from the pending legal proceedings, we have advised our clients that it is not worth the costs to continue with the application at this stage, based on the facts before the court ... without making any admissions of the truth and correctness of any facts and evidence in the answering affidavits ... our clients are willing to withdraw the application, should the parties consent thereto and our clients are prepared to tender the costs thereof on a party and party scale". On the same day Van Rensburg delivered a notice of his intention to withdraw the main application, tendering the party and party costs thereof. In the aforementioned letter, the respondents were warned that should

they not consent to this withdrawal, Van Rensburg will apply to court on 14 November for consent to effect the withdrawal.

- [25] The response from WAD was not surprising. It was contained in a letter from its attorney dated 9 September 2022 which inter alia stated the following: "The offer as to costs is not acceptable. The application was voluminous, dealt with complex legal and commercial matters, referred to events that transpired over a period of almost 5 years and attempted to seek severely prejudicial interdictory relief against our client. Our client's contention is that your clients should have foreseen that the application would have the result that more than one counsel would be employed by our client to oppose the matter and even more so to comply with your client's unilateral self-imposed short time frames in which our client had to respond to the application ...". The letter concluded with a demand of a tender to pay costs on the scale a between attorney and client, including the costs of two counsel.
- [26] The response from WHB and XTR was even more stringent. In a letter their attorneys stated: "It has been a tedious process to arrive at a point where your client realized that the "urgent" application ... was stillborn. Your client, throughout, maintained a hostile, aggressive and confrontational attitude towards our clients... Your client launched this application on an urgent basis and should have realized that the application had no merits when your client received the initial/preliminary opposing papers ...". The letter also concluded that payment costs on an attorney and client scale was justified.
- [27] Faced with the demand to pay costs on a higher scale, Van Rensburg, through his attorneys, did an about-face and responded as follows on 12 September 2022: "In the light of your clients' refusal to accept our clients' withdrawal and proposal towards costs in this matter our clients have instructed our offices to proceed as set out herein below: We confirm that we will continue with the application that is still set down for 14 November 2022 and as such we will file our clients' replying affidavit by no later than Friday the 16th of September 2022". The next day the Notice of Withdrawal of 6 September 2022 was "withdrawn" by notice.
- [28] Rather than complying with the self-imposed undertaking to deliver a replying affidavit by 16 September 2022, Van Rensburg did a further about-face and delivered a notice in terms of Rules 35(12) and (14) on 19 September 2022. In this notice for the first time since the delivery of the answering affidavits on 15 August 2022, Van Rensburg alleged that documents referred to in the answering affidavit, were "necessary ... for purposes of filing a full and comprehensive" replying affidavit. This notice elicited Rule 30(2)(6) responses from the respondents.
- [29] On 11 October 2022 Sanlam and Afrocentric announced that Sanlam has offered to acquire no less than 36% of Afrocentric shares at R6.00 per share. The offer is contained in an extensive and intricate document with many conditions precedent, including further assets for shares transactions.

[30] Ten days later, Van Rensburg launched an interlocutory application, claiming a declarator confirming the withdrawal of the withdrawal of the main application, alternatively its reinstatement, compliance with the notice in terms of Rule 35(12) and an interdict, preventing RQI, WHB and XTR from selling their Afrocentric shares to Sanlam "or any other person or entity"

pending finalization of the main application.

[31] Almost two weeks later, Van Rensburg launched the urgent application which was the one serving before court and which is the subject of this judgment. In terms of the Notice of Motion, yet again an interdict was sought prohibiting RQI, WHB and XTR from selling their Afrocentric shares to Sanlam "or anyone else", this time pending the interlocutory application and the main application being "finalised". As before, the respondents delivered their answering affidavit within the truncated time period dictated by Van Rensburg, while the replying affidavit was, yet again, delivered late.

[32] The Notice of Motion in this urgent application informed the respondents that the matter will be heard "on a date to be determined" by Khumalo J, who had been appointed as case management judge in the main application. Khumalo J had however informed the parties on 13 October 2022 at a case management meeting that she would not be available from 30 October 2022 until the first term in 2023 as she would be on long leave. The trigger event on which Van Rensburg relied for purposes of the present urgent application, was the posting or distribution of a date for the convening of a general meeting of Afrocentric shareholders by no later than 8 December 2022, also referred to as the distribution of the "Sanlam offer circular". This resulted in frantic arrangements via the Acting Judge President for the hearing of this matter on 30 November 2022 and 1 December 2022, with further consequential juggling of the hearing due to non-availability of counsel.

[33] A final procedural step by Van Rensburg, save for the delivery of heads of argument, was the withdrawal of prayer 5 of the interlocutory application which, as indicated in para 30 above corresponds to the relief sought in the present urgent application.

[34] In total to date, three actions, a set of arbitration proceedings, the "Actio Pauliana notice", two urgent applications and one interlocutory application have been launched or instituted by Van Rensburg. In the only application not launched by him, the application in terms of section 3(2) of the Arbitration Act, he delivered his heads of argument in May of this year, that is almost a year and a half out of time.

Undue delay and evaluation thereof

[35] The respondents contended that, had Van Rensburg prosecuted any of the pending litigation with any sense of diligence, there would not have been any need for the present application and, insofar as the date of 8 December 2022 represents a "cut-off" date, the urgency in now having to deal with the issue of the purchase of Afrocentric shares by Sanlam, is self-created.

- [36] In *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* [1](Juta) Van Wyk J stated the following in regard to long delays in litigation: "If one bears in mind the long delays for which no explanation had been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely on application for an interdict pendent lite, but even if it was the appropriate procedure at the time, the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief, had it issued summons when the notice of motion proceedings were instituted, the trial could already have taken place".[2]
- [37] In the present matter, had the respondent not delayed the hearing of the Section 3(2) Arbitration Act matter, that application could have been finalised and the arbitration proceedings could have been concluded. The rights, if any, to the retransfer of the 1/3 of the shareholding in WAD could have been determined before WAD even distributed the Afrocentric shares to its shareholders as dividends in specie, which has taken place as long ago as in May of this year.
- [38] Van wky J continued as follows in *Juta*: "There is such a thing as the tyranny of litigation and a Court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict pendent lite which, from its very nature, requires the maximum expedition on the part of an applicant".
- [39] The above principles were applied in *National Council of the SPCA v Openshaw*[3] where a party's delay in instituting the "principal action to which its claimed interdictory relief was ancillary"[4] was held against it. The court a quo had refused the interdictory relief and this refusal was upheld on appeal.
- [40] It has often been held that where urgency is self-created, it will be fatal to an urgent application.[5]
- [41] I am of the view that the purported urgency, based on the distribution date of 8 December 2022 in respect of the Sanlam offer to purchase, has clearly been self-created. WAD had as long ago as the date of the institution of Van Rensburg's first action in 2019 in an attempt to obtain a retransfer of his shares, been free to either sell or distribute the Afrocentric shares. When the shares were distributed as a declaration in specie some almost three years later to WAD's shareholders, they became equally free to sell those shares. All that has happened in the meantime, is that an identified purchaser has come along, offering to buy the shares at a price higher than they have ever traded for during this whole period. Van Rensburg's delay, in all this time, to prevent this foreseeable event, over the course of more than three years' litigation and numerous processes, cannot be labelled anything else but an undue delay.

- [42] Van Rensburg's argument is as follows: he is claiming (through various avenues of litigation), retransfer of his shares in WAD and, pending this, he is entitled to ensure that the WAD shares do not diminish in value. It is important to bear in mind that the WAD shares and not the Afrocentric shares are the *res litigiosa* claimed by Van Rensburg.
- [43] I find that, having been the authors of their own misfortune, such as it may be, Van Rensburg and the other two ancillary applicants, cannot now lay claim to procedures in terms of Rule 6(12), providing for urgent applications.
- [44] Are there other compelling reasons why Van Rensburg's seventh attempt at approaching a court (or an arbitrator) should be indulged in an urgent court? I considered whether there might be interests of justice considerations which would justify indulging Van Rensburg's application, such as fraud or collusion on the part of the respondents which might "um·avel all".[6]
- [45] Our courts have however set a high threshold before countenancing allegations of fraud. In *Schierhout v Union Government*[7] the court said: "[B]aseless charges of fraud are not encouraged by courts of law. Involving as they do the honour and liberty of the person charged, they are in their nature of the greatest gravity and should not be lightly made, and when made, should not only be made expressly, but should be formulated with a precision and fullness which is demanded in a criminal case. In the application now before the court, it is a matter of the utmost difficulty to ascertain the exact charges of fraud ...".
- [46] In my view, the same applies to the present case. Van Rensburg in his papers, and his counsel in argument in court, sought to impute much improper conduct on the part of WAD, Britz, Van Buuren, WHB and XTR in either the distribution of the dividend or the proposed sale to Sanlam, but, apart from bald and unsubstantiated
- allegations, including those made in the "Actio Pauliana notice", nothing but mere speculation and alleged inferences have been placed before this court. No provisions of any Act or regulation have been contravened, no adverse consequence on WAD's solvency position could be demonstrated and, importantly, no collusion by any third party had been evinced.
- [47] At the hearing of this matter the extent of the papers exceeded the 500 pages envisaged when the main application served before court and extensive bundles of authority and heads of argument had been produced. Numerous arguments have been advanced therein by the opposing respondents, particularly on behalf of WHB and XTR, as to why Van Rensburg never has a chance to succeed with any of his actions or the main application but in my view, to make final pronouncements on matters which are still pending before other courts, particularly where oral evidence might even be led, would be improper and might unduly prejudice parties to that litigation. It has also been held that, even in urgent applications "... the attractiveness of finally disposing of the litigation, should not be allowed to govern".[8]

[48] In my view, the proper approach should be, similarly as in matters where insufficient urgency has been established to justify a hearing in an urgent court, that this matter should be struck off this court's special urgent court roll.[9]

Costs

[49] Ordinarily, when a party is unsuccessful, the customary rule is that costs should follow the event. Generally further, this entails a costs order on the scale as between party and party. These were also the costs and scale tendered by Van Rensburg in the main application before he and the other applicants changed their minds about proceeding with that application.

[50] Having come to the conclusion that the urgency relied on by Van Rensburg had been entirely self-created and that he and the other applicants cannot therefore rely on Sanlam's proposed distribution of their offer on 8 December 2022, I am of the view that this is a proper case where the opposing respondents should not have to be "out-of-pocket" for the costs beyond that of a party and party scale. Van Rensburg and the other applicants have been litigating literally for years about the same subject-matter without any of the proceedings initiated by them having been brought to finality.

[51] In addition, the list of procedural dilatoriness on the part of Van Rensburg is lengthy. In addition, the about-face regarding the main application, when faced with paying additional costs for proceedings which Van Rensburg no longer wished to pursue, but then ultimately did by way of yet another urgent application, merits censure by this court. This type of conduct falls in the category of the "tyranny of litigation" referred to in paragraph 38 above.

[52] I find the following dictum in Johannesburg City Council v Television & Electrical Distribution (Pty) Ltd[10] both instructive and applicable: "... in appropriate circumstances the conduct of a litigant may be adjudged "vexatious " within the extended meaning that has been placed on this term in a number of decisions, that is, when such conduct has resulted in "unnecessary trouble and expense which the other side ought not to bear".[11]

[53] As a consequence, the applicants should be liable for the costs of the opposing respondents, on a scale as between attorney and client, including the costs of two counsel, where employed.

[54] Order

1. The application is struck off the roll.
2. The applicants are ordered to pay the costs of the opposing respondents on the scale as between attorney and client, which costs shall include the costs of two counsel, where employed.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 30

November and 1 December 2022

Judgment

delivered: 05 December 2022

APPEARANCES:

For the Applicants:

Adv

R Du Plessis SC

Attorney for the Applicants:

JJ Jacobs Attorneys,

Pretoria

For the 1st, 3rd , 4th, 5th , & 6th

Adv

N G D Maritz SC

together with

Adv HP Wessels

Attorneys for the 1st, 3rd , 4th , 5th & 6th Respondent: Van der Merwe &

Associates, Pretoria

For the 2nd Respondent: Adv

J Vorster together

with Adv J A Booyse

Attorneys for the 2nd Respondent: WWB

Botha Attorneys,

[1] 1969 (4) SSA 443 (C).

[2] Ibid at para 16.

[3] 2008 (S) SA 339 (SCA).

[4] Ibid at para 18.

- [5] Public Servants Association of SA v Minister of Home Affairs (11673/16) (2016] SALCJHB 439 (22 November 2016) at para 17. *Golding v HC/ Managerial Services {Pty} Ltd* (2015) 1 BLLR 91 (LC) (27 October 2014) at para 24 and *Lindeque and Others v Hirsch and Others, In Re: Prepaid 24 {Pty} Ltd* (2019/8846) (2019) ZAGPJHC 122 (13 May 2019) para 10 to 19.
- [6] This principle was confirmed in *Esorfranki Pipelines (Pty) Ltd v Mopanl District Municipality* (2014] 2 All SA 493 (SCA) at para 11 with reference to Lord Denning's dictum in *Lazarus Estates v Beazley* (1956] 1 QB (CA) at 712 when he said: "No court in this land will allow a person to keep an advantage which he has obtained by fraud ... fraud unravels everything".
- [7] 1926 AD 94, with reference also to *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.
- [8] *Caledon Street Restaurants CC v D'Ariera* (1998) JOL 1832 [SE]
- [9] See *Commissioner, SARS v Hawker Air Services (Pty) Ltd* [2006] ZASCA 51; 2006 (4) SA 292 (SCA) at para 11.
- [10] 1997 (1) SA 157 (A) at 177 C- F.
- [11] In re: *Alluvial Creek Ltd* 1929 CPC 532 at 535, *Phase Electrical Co Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 918H - 9198 and *Hyperchemicals International {Pty} Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101G - 102D.

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