

SOUTH AFRICA / JUDGMENT

KAF and Others (2018/5329), Ex parte [2018] ZAGPJHC 529; 2019 (2) SA 510 (GJ) (28 June 2018)

[2018] ZAGPJHC 529

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu

CASE / FILE NUMBER

2018/5329

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2018/5329

In the matter between:

K. A .F 1st Applicant

C. F 2nd Applicant

N. D 3rd Applicant

J. D 4TH Applicant

J U D G M E N T

SIWENDU J:

“If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?” Benjamin N Cardozo: The Nature of the Judicial process

- [1] Often, as in this case, a court will be called to consider the law inconjunction with and at times in contradiction with standards of justice and differing social values. ND, the third applicant in this application, together with the first and second applicants, seeks confirmation of a Surrogate Motherhood Agreement entered on 19 April 2017 in terms of 292 (1)(e) read with section 295 of the Children's Act 38 of 2005. The application was launched afresh following the dismissal of the first application on 29 June 2017.
- [2] ND was born in February 1997. She was 20 years old at the time of the first application and 21 years old at the time of this second application. At the age of 16, she was met with a teenage pregnancy which resulted in the birth of her first child who was born on 29 January 2014. She had to repeat grade 9, but thereafter elected to leave school to be the primary care giver to her minor child. She gave birth to her second child 15 months thereafter, on 24 April 2015. Both pregnancies were without complications. Unlike in the case of the first pregnancy, the second pregnancy was a planned one.
- [3] ND has been in a relationship with JD for 7 to 8 years. JD, who is 25 years old and is the father of her two minor children supports the application. JD is a Site Manager at a firm owned by his step-father and is the bread winner of the home. He states that:
- "We have agreed upon that it is in our best interest to help other families who cannot carry their own embryos"*
- [4] ND (and JD) live on a small holding with four houses, owned by her fiancés' (JD's) mother as part of his extended family[1]. ND is the primary care giver. She earns an extra living assisting JD's mother make beach bags and hand bags. In the first report prepared by Ms Rodrigues, ND candidly disclosed what was referred to as "heart-breaking" early childhood years. She had been to four different primary schools. Her parents had separated when she was 18 months old. She felt torn between them. She relocated to New Zealand with her father and elder sister. He is reported to have prevented contact with their mother leading to their temporary placement in foster care in New Zealand. She returned to South Africa where she attended school until the pregnancy.
- [5] On 29 June 2017, my sister, Modiba J[2] rejected the evidence presented that ND was a suitable candidate as well as the conclusion reached in the psychologist report. The court raised a concern about the impartiality of the psychologists who prepared the suitability report and held that the conclusion about ND's psychological well-being, which was supported by the expert evidence was not supported by the disclosed facts. ND had been pregnant as a teenager and there had been no report to give the court an objective analysis of her psychological well- being. The court held that it was probable that ND continued to have a limited perspective of life and may not fully appreciate the consequences of her decision.[3]

[6] This hindered ND's suitability under section 295 (c) (ii) of the Children's Act which provides that the surrogate mother must in all respects be a suitable person to act as a surrogate[4]. In addition, the court found that there had been insufficient disclosure of income and expenses by ND which cast a doubt on her

bona fides and that there were factors which pointed to indigence and a financial incentive for entering into the surrogacy agreement in a potential breach of sections 295 (c)(iv) and 301(2) of the Children's Act. These shortcomings were premised on a lack of information about their financial position. The municipal account where they lived was in arrears in an amount of R 14 967. R12 936.58 was overdue. The surrogate agreement provided a globular amount of compensation for expenses and failed to provide a breakdown of how the amount was to be appropriated. These factors raised concerns about the financial standing of the entire extended family.

[7] Much has already been written about the dangers of commercialisation of surrogacy. In my view, the regulatory intent behind the prohibition of a "commercial benefit" is not one-sided. It is to prevent the potential exploitation of commissioning parents from likely financial damage that could result on the one hand, as well as the potential exploitation and commodification of would be surrogates as well as the rights of the child to be born. It is also likely that some surrogate mothers, despite the Act limiting payment to reasonable expenses only, may be desperate enough to enter into these contracts for the limited financial benefit that they may receive. This concern has also been expressed in the recent judgment in the North Gauteng High Court.[5] The court mentioned the deep socio-economic disparities and the prevalence of poverty as factors that may increase the possibility of abuse of underprivileged women who enter into these agreements solely for the financial benefit, however limited this may be. The court noted that costs of full surrogacy is high (currently estimated around R200 000), which makes this clearly an option for the affluent. The attempt to achieve a balance between the rights and interests of all the parties to a surrogate arrangement is a delicate one.

[8] Before me, the information provided is that JD earns a stable income and a nett monthly income of R 8000.00. They do not have debts. They live on the small holding owned by JD's mother. The municipal bill is JD's mother's liability and they contribute the levy of R1000 to her. The arrears were explained separately and were rectified. Their current monthly expenses are made up of:

R 3 300 in respect of groceries,

R105 for internet services;

R 1000 in respect of the levy;

R500 petrol.

- [9] An addendum to the surrogate motherhood agreement signed by the commissioning parents on 21 January 2018 and ND and JD on 25 January 2018 respectively provides the breakdown of the globular out of pocket expenses payable to them as follows:

Item/ Purpose Rand Amount Duration maternity clothes R 6750 For the duration of the pregnancy cellular phone R 500 From the confirmation of the Agreement until the birth of the child nutritional supplements and vitamins R1500 For the duration of the pregnancy domestic worker R3500 per Month From the onset of the pregnancy until three months there after

- [10] Whether ND has entered the agreement for an altruistic purpose and whether there is a risk of commercialisation through unlawful

payments is inextricably linked to the financial stability and means of the surrogate mother under section 301 of the Children's Act. ND and JD have household costs. She had not disclosed how much she earns assisting JD's mother. The costs associated with raising the two young children are also not clear, but potentially derives from the surplus income. I have concluded that their demands are nominal given their age.

- [11] I have considered whether the above payments could be construed as cloaked payments made under the guise of legal and legitimate payment in contravention of the law. As pointed earlier, in view of the costs associated with surrogacy, it is most likely that those who make themselves available will not be economically on par with those who seek assistance. The evaluation of the financial benefit accruing to ND cannot mean she must be financially well off nor can it mean she may have no benefit at all for the duration of the intended pregnancy. It is that she and/or her family unit must have a reliable source of income, live within her and/or their means. Outside of safeguarding the interest of the child to be born, the benefit should not place her beyond her ordinary standard of living. I am satisfied that the payments are not unlawful and do not create the risk of commercialization of the surrogacy arrangement. This limits the main issues in this application to the suitability of ND as a surrogate mother and the criteria to be applied in assessing her suitability.

- [12] This fresh application is supported by fresh affidavits by Ms Friedman, the first applicant as well as a joint expert opinion by the three psychologists[6] ('the joint expert opinion'). It is supplemented by fresh confirmatory affidavits and report from medical experts and Ms Samouri. I am indebted to the applicant's counsel, Mr Thaladar, who at the request of the court filed comprehensive Heads of Argument to address the number of issues raised during the hearing of the application.

- [13] It is common cause that the commissioning mother (the first applicant) F was born in 1979. F was diagnosed with polycystic ovaries and ovulation which was partly indicated in her fertility. Since 2014,

she has been a patient at Vita-Lab. It was established that she had a congenital birth defect which resulted in an infantile uterus. If she were to attempt pregnancy, this could either result in recurrent miscarriages, pre-term birth or implantation failure. Even though a surgical correction of the uterus was performed, the first applicant underwent four invitro fertilisations (IVF) attempts, no implantation occurred. F and her husband F were recommended as intended parents for surrogacy. (Dr Venter 25 November 2017)

[14] Of the two main types of surrogacy agreements envisaged by the law, namely total surrogacy, where the surrogate is not biologically

related to the child, and partial surrogacy where her ovum is used, the commissioning mother intendeds utilizing four of the remaining

embryos previously created for the purposes of IVF for the surrogacy agreement. Yet, not one of these embryos can be legally equated with the ‘child that is to be born’.[7]

[15] I accept for this application that the commissioning parents meet the criteria in section 295(a) and (b)[8] of the Children’s Act.

[16] It is a trite legal position that the confirmation of a surrogacy agreement is at the discretion of the court. In view of the interests

of the child to be born and as an upper guardian of all minor children, an application is subject to strict judicial scrutiny. In re Confirmation of three Surrogate Motherhood Agreements[9] the court held that it would not simply “rubber stamp” agreements and expects to be fully apprised of all facts pertaining to the parties and their

circumstances. The court will scrutinize the value chain and the relationship between the parties to ensure that the agreement is lawful and meets the requirements under section 301.

[17] Notwithstanding the fact that the Children’s Act has been in force for 10 years and the guidelines set out in Ex parte: WH and again in In re Confirmation of three Surrogate Motherhood Agreements, criticism that the Act fails to establish an objective criteria and guidance on the supporting documents an applicant should place before a court in support of the confirmation of the agreements remains[10]. It is evident too, that given the discretionary powers conferred, and the likely different circumstances where the court’s

confirmation is sought, each court may construe the parameters for the exercise of discretion differently from the next.

[18] The scope of discretionary powers may vary and as held by the CC in Affordable Medicines Trust and Others v Minister of Health of RSA and Another[11]:

“Where broad discretionary powers were conferred, there had to be some constraints on the exercise of such power so that those who were affected by the exercise of the powers will know what was relevant to the exercise of those powers or in what circumstances they were entitled to seek relief from an adverse decision.

[19] In determining the suitability of the surrogate mother the court In Ex-Parte WH supra and to, it held as follows:

“The surrogate mother’s background as well as her financial position should be investigated and set out in the affidavit. Furthermore a comprehensive report by a psychologist is essential to assess the suitability of the surrogate mother. This should deal in particular

with her background, psychological profile and the effect that the surrogacy and the giving up of the baby will have on her. Full medical reports should also be obtained regarding her physical condition to indicate whether surrogacy poses any dangers for her and/or the child. In our view the medical report should deal with the HIV status of the mother, as well as any disease that could be transferred from her to the child in order to protect the child and to allow the court to exercise its discretion properly in confirming the agreement.”[12] [Emphasis added]

[20] The previous finding that due to her teenage pregnancy, ND may continue to have a limited perspective of life and a lack of appreciation of the consequences of her decision which requires “an objective analysis of her psychological well-being” resulted in the launch of a fresh application. The case illustrates that the requirements for assessing “the suitability” to act as a surrogate mother remain unclear.[13] There is a need to develop further the guidelines and the requirements set out in Ex Parte WH. I also deal with the submissions made in respect of the procedure to be followed where information is lacking, later in the judgment. In this application, the main issue hinges on whether ND is “in all respects a suitable person to act as a surrogate mother” and how an applicant or a court might assess this.

[21] Mr Thaldar submitted that a court seized with the application must be alive to the constellation of intersecting constitutional rights under sections 10,[14] 12(2)[15] and 28[16] of the Constitution which entrench a person’s right to make decisions regarding reproduction, including his or her rights to dignity and privacy (in respect of both the commissioning parents and the host mother) as well as the right to access health care services, including reproductive health care.[17] The Pretoria High Court in AB v Minister of Social Development[18] held that surrogacy indeed falls within the ambit of the right to access to health care services.

[22] He argued that on the facts of this case, ND was an autonomous moral agent[19] with a right to bodily integrity. In this regard, her life decisions, such as acting as a surrogate mother must be respected, and her right to autonomously decide how to use her own body including her womb must be respected and protected. He nevertheless, agrees that whatever rights ND has are justifiably limited by the requirements in Chapter 19 of the Children’s Act as she must be a “suitable person”.

[23] To assist the court address what the applicants refer to as a lacuna in our law, they approached three clinical psychologists who regularly work with surrogacy applications to combine their expertise

in co-authoring the joint expert opinion and jointly identify a set of objective criteria. Collectively, they have 75 years of experience as psychologists amongst them. I have considered the joint expert report which, though expert opinion, cannot usurp the role of the court. I deem it of valuable assistance.

[24] In my view, the mandated psychological assessment in Ex- Parte WH must be read in the light of the provisions in section 295 (c) (ii) which reads:

A court may not confirm a surrogate motherhood agreement unless—

(c) the surrogate mother -

(ii) is in all respects a suitable person to act as a surrogate mother;

as well as the general provision in section 295 (e) which reads:

(e) in general, having regard to the personal circumstances and family situation of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.

[25] In assessing and reporting on the suitability of the surrogate mother, the wording of the section indicates, it should not be read in isolation, but in the context of the objects of the Chapter and other relevant provisions, particularly, taking account of the interplay of sections 293 (1); 297(1) and 301(1) in the assessment and the decision of the court. The primary purpose of the assessment under this section is to safeguard:

[1] the health of the child to be born;

[2] the fulfilment of the surrogate motherhood contract; and

[3] prevent the potential commercial exploitation of the commissioning parents and the surrogate mother in equal measure.[20]

In view of the utmost good-faith required of the surrogacy agreements, the role of the court as I see it is to scrutinize the contract for all factors which would compromise the health of the child to be born, jeopardize the surrogate agreement through mal-performance or a breach, including factors which would cast the lawfulness and/or consent to the surrogate agreement in doubt.

[26] Having regards to the tenure of the provisions, the nature of the issues to be assessed, their potential effects are inter-dependent. The requirements are both qualitative and quantitative. The assessment is an objective one but nevertheless the decision must be made in the subjective circumstances of the applicants which will differ from case to case. I am mindful that the structure of the family unit has evolved over the years from the traditional unitary family structure, and in view of the varying circumstances there cannot be an exhaustive closed checklist. Each case requires that it be judged on its peculiar facts.

[27] At a minimum, the personal clinical assessment of the prospective surrogate mother and her surrounding circumstances (see Ex Parte WH), which must be supported by other collateral information, where necessary, must include information on whether the surrogate mother:

[27.1] is physically and medically fit to carry the gamete and in turn the child to be born to full term;

[27.2] has an agreement with the commissioning parents regarding selective reduction and the risks pertaining thereto;[21]

[27.3] is of sound mind enjoys good mental health, and/ or suffers from any personality disorder, severe psychiatric illness, or has a history of self-harming behavior;

[27.4] does not have a history of substance abuse, including drugs and/or alcohol and addiction, likely to have similar effects as those referred to in 27.3 above

[28] The emotional welfare, emotional needs and resources available to the surrogate mother are relevant factors for consideration to determine the likely effects on the child to be born as well as the fulfilment of the agreement. Having regards to section 293(1) which requires the written consent of the spouse if the surrogate mother is married or involved in a permanent relationship, a report on the:

[28.1] host mother's need for emotional resources, if any;

[28.2] existing emotional resources;

[28.3] quality and stability of the existing emotional support structure; and

[28.4] whether the surrounding relationships are conducive for the fulfilment of the surrogacy agreement and may result in termination of the agreement after artificial fertilization or a breach.

[29] Under section 297(1)(a) and section 297(1)(c) of the Children's Act, the surrogate mother will not have any rights of parenthood or care of the child, or contact with the child and neither will her husband, partner or relatives. The surrogate mother must understand the nature of the surrogacy relationship, and she must understand the nature of surrogate motherhood, that the child to be born will legally not be her child, but the child of the commissioning parents. In this regard, there must be a report on:

[29.1] the psycho-social support structure of the surrogate mother;

[29.2] the understanding and influence of the spouse, partner, relatives or extended family in the decision;

[29.3] the understanding that the child to be born will belong to the commissioning parents;

[29.4] how handing the baby over to the commissioning parents will affect her;

[29.5] that the psychosocial support structure is not likely to result in the termination of the agreement after fertilization or in a breach; and

[29.6] whether she is emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension.

[30] The distinct, uncommon feature in this case is ND's age even though she has reached the age of consent/ majority. The argument about ND's agency is founded on important constitutional values[22], which are to be adjudicated within the parameters of the above legal principles and criteria. In addition to the above, I am of the view that ND's right to free agency and autonomy will be severely compromised were she to enter into the surrogacy agreement for any other reasons other than for altruistic reasons.

[31] I have considered the report dated 27 November 2017 by Ms Stavroula Samouri.[23] It was compiled following an assessment conducted on 5 July 2017 after a referral of ND to assess her suitability for the role of surrogacy. Ms Samouri had regard of the 8 criteria in the joint minute.[24] She conducted an assessment through a battery of structured cognitive and emotional tests and compiled a report based on data gathered,

clinical observations and structured interviews.[25]

[32] The comprehensive report reveals that ND was cognitively sound and presented with no impairments. Her clinical profile was within normal limits. Her two children were born through a natural delivery. She had expressed the acceptable levels of anxiety about the birth of her first child but nevertheless described both experiences as positive and affirming of her life. She had demonstrated a good understanding of medical risks associated with selective reduction and surrogacy. At her own volition, she had conducted investigations and reached out to other surrogate mothers to inquire about selective reduction. Her executive functioning and her ability to reflect on her life and her own decisions led to the conclusion that she was capable of entering into the contract and appreciate the consequences of her own choice. The report describes how she witnessed her aunt go through what she described as a "heart breaking" process trying to conceive a child for years. She is reported to have acknowledged that she does not have resources but has the resource associated with time as well as the ability to conceive easily. She wishes to help others become families.

[33] I have considered the suitability requirements in the light of the new facts and submissions made. I am mindful that in cases like this one, there will be a lack of social consensus on the values a court must uphold because there will be a different emphasis on some values over others. I take account that ND leads a stable life and has been in a partnership which has endured longer than some marriages. I am also fortified by the court in *Ex Parte WH* which cautioned about the dangers of subjectivity in assessing suitability and aptly pointed out that:

“courts should consciously guard that in the exercise of their discretion personal perceptions should not operate to influence any decision on the suitability of a person to either accept parenthood or act as a surrogate mother”.[26]

I wholly agree with the judgment and add that in arriving at a fair and just decision, a court must as far as practicably possible provide a “check” on a potential intrusion or encroachment on the fundamental rights of the commissioning parents and the surrogate mother and afford equal weight to their protection.

[34] Accordingly, I find that ND meets the criteria in paras [27] to [29], and ND meets the suitability requirements under section 295 of the Act.

[35] A further question that arose during the hearing was whether the matter became res judicata given the dismissal of the first application. It was argued that, it would assist in the development of our surrogacy law if the court could specifically consider this procedural question. It is evidence that different procedural approaches have been followed by the courts.

[36] In re Confirmation of three Surrogate Motherhood Agreements (GSJ)[27], Judge Wepener and Judge Victor concurring, postponed the applications sine die to give the applicants an opportunity to rectify their applications to enable the court to consider the matters on their merits. In Ex Parte WH[28] the court requested additional information to assist it in the determination of the application. In this previous application, the court dismissed the application.[29]

[37] In neither of these cases did the court provide reasons for its procedural choice. I favor a postponement of the application sine die. I observe, however that given the Ex Parte nature of the application, a dismissal of the application does not render the matter res judicata. I decline to prescribe a procedure as each matter must be gauged on its

facts.

[38] In the circumstances, I make the following order:

- a. The Draft Order Marked X is made the Order of the Court;
 - b. The Identity of the parties may not be published without their written consent in terms of Section 302
- (1) of the Child Care Act

T SIWENDU

JUDGE OF THE HIGH COURT

APPEARENCES:

Applicant's Counsel: Mr Thaldar

Instructed by: Robyne Friedman Attorneys

Order Granted: 12 April 2018

Date delivered: 28 June 2018

- [1] JD's paternal grandmother lives in one house on the small holding. JD's sister, her husband and their two children live in another house. [2] Unreported judgment Ex Parte KAF (14341/17) [2017] ZAGPJHC 227 (10 August 2017).
- [1] JD's paternal grandmother lives in one house on the small holding. JD's sister, her husband and their two children live in another house.
- [2] Unreported judgment Ex Parte KAF (14341/17) [2017] ZAGPJHC 227 (10 August 2017).
- [3] Ibid at para 21.
- [4] Ex-Parte WH and Others 2011 (6) SA 514 (GNP).
- [5] Ex Parte HP and Others 2017 (4) SA 528 (GP)
- [6] Ms Karin Barkema, Ms Daksha Hargovan and Ms Mandy Rodrigues.
- [7] The embryos are merely the human biological material that may, if conception is successful, give rise to the child that is to be born. The National Health Act 61 of 2003 defines an 'embryo' as 'a human offspring in the first eight weeks from conception'.
- [8] Sections 295(a) and (b) Confirmation by court A court may not confirm a surrogate motherhood agreement unless - (a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible; (b) the commissioning parent or parents - (i) are in terms of this Act competent to enter into the agreement; (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
- [8] Sections 295(a) and (b) Confirmation by court
- A court may not confirm a surrogate motherhood agreement unless -
- (a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;
- (b) the commissioning parent or parents -
- (i) are in terms of this Act competent to enter into the agreement;
- (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and

(iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;

[9] 2011

(6) SA 22 (GJS) at para 25.

[10] Nicholson C "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?" 2013 De Jure 28.

[11]

[2005] ZACC 3; 2005

(6) BCLR 529 (CC) at p 531.

[12] At para 67.

[13] M Nöthling Slabbert 'Legal issues relating to the use of surrogate mothers in the practice of assisted conception' Vol 5, No 1 (2012) SAJBL

[14] Human dignity Everyone has inherent dignity and the right to have their dignity respected and protected.

[14] Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

[15] Freedom and security of the person (2) Everyone has the right to bodily and psychological integrity, which includes the right:- (a) to make decisions concerning reproduction;

[15] Freedom and security of the person

(2) Everyone has the right to bodily and psychological integrity, which includes the right:-

(a) to make decisions concerning reproduction;

[16] Children (2) A child's best interests are of paramount importance in every matter concerning the child.

[16] Children

(2) A child's best interests are of paramount importance in every matter concerning the child.

[17] See s27(1)(a) of the Constitution.

[18] AB v Minister of Social Development 2016 (2) SA 27 (GP)

[19] British American Tobacco South Africa (Pty) Ltd v Minister of Health

[2012] 3 All SA 593 (SCA) [13]

[20] Additional policy considerations are: the protection of the surrogate from emotional harm; the need to quell the fear that surrogacy (and commercialization) will undermine human dignity; support all (other) participants in the transaction; international surrogacy, which she finds altogether too commercial and too impersonal, It opens the door for exploitation and human rights violations; capacity for autonomy may be compromised becomes material when the intended surrogate mother and her family unit cannot live within their means – this is when persons become desperate and when capacity for autonomy is compromised.

[21] This is when the embryos in the surrogate mother's womb are selectively aborted by a medical specialist to reduce the embryos in the pregnancy to a desired number, such as one or two

[22] Freedom of choice and contract, right to dignity etc.

[23] She has been a Clinical Psychologist since 1999, is in private practice and is a consultant with Pearson's Institute of

Higher Education and is a clinical supervisors to Honours students.

[24] Understanding of surrogacy agreement, selective reduction, motivated by altruism, good mental health, emotional resourced, free from unhealthy substances; financially stable and emotionally available to her own children.

[25] Structured clinical interviews, the Beck Depression Inventory, Million Clinical Multiaxial Inventory; Basic Traits Inventory, The Barratt Impulsive Scale, Draw a Person Test; The Montreal Cognitive Assessment; The Values Scale; The Personality Inventory for DSM -5.

[26] At para 69.

[27] Fn 9 above.

[28] Fn 4 above.

[29] Unreported judgment Ex Parte KAF

[2017] ZAGPJHC 227 (to which I refer as the 'previous application', given that the parties are the same as the current application).

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