

SOUTH AFRICA / JUDGMENT

Liberty Group Limited t/a Liberty Life v K and D Telemarketing CC and Others (75525/2010) [2015] ZAGPPHC 1135 (4 September 2015)

[2015] ZAGPPHC 1135

COURT

North Gauteng High Court, Pretoria

BEFORE

A.J. Louw

CASE / FILE NUMBER

75525/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

[GAUTENG

DIVISION, PRETORIA]

DATE:

4/9/2015

CASE

NUMBER: 75525/2010

In

the matter between: LIBERTY
GROUP LIMITED t/a LIBERTY LIFE
(REGISTRATION
NO
1957/002788/06)
PLAINTIFF
and
K
& D TELEMARKE TI NG CC
(REGISTRATION
NO
CK2009/013740/23) FIRST
DEFENDANT
KAREN
SHAFER SECOND
DEFENDANT
(ID
NO: [7....])
ERIC
BUTOWSKY THIRD
DEFENDANT
(ID
NO: [4....])

JUDGMENT

A.J. LOUW AJ

- [1] The Plaintiff claims R545 840.23 being commission paid to the First Defendant on insurance policies that lapsed on grounds whereof the First Defendant purportedly became liable to refund such commission to the Plaintiff. The Second and Third Defendants are alleged to be sureties in terms of written agreements of surety for the liability of the First Defendant to the Plaintiff, the Plaintiff being the cessionary of Liberty Active Limited, Capital Alliance Life Limited and Rentmeester Assurance Limited.
- [2] The cedent insurers entered into a written commission agreement with the First Defendant at Johannesburg on the 25th June 2009.
- [3] In terms of the commission agreement the First Defendant act as an independent intermediary to canvas for contracts on products of the cedent insurers. The only authority that the First Defendant had, was to obtain insurance proposals.
- [4] The sole compensation for obtaining proposals successfully is the payment of commission in respect of premiums paid in full and received by the particular cedent company during the currency of the commission agreement on insurance contracts issued pursuant to proposals submitted by the First Defendant.

- [5] Commissions shall be paid in accordance with a schedule of commissions. It needs to be pointed out here that no schedule of commissions was proved by the Plaintiff.
- [6] If any commission is paid to the First Defendant on any premium that any of the cedent companies have not yet received in respect of an insurance contract introduced by the First Defendant, then the First Defendant shall refund to the cedent company on demand any commission so paid. In the event of termination of the commission agreement payment of any commission due to the First Defendant shall be suspended for a period of 12 months from the date of such termination whereafter the balance of commission then due shall be paid to the First Defendant.
- [7] Anyone of the parties to the brokerage agreement may summarily terminate the brokerage agreement for any reason whatsoever at any time by written notice to that effect sent by personal delivery or by pre paid registered post to the other party at its domicilium citandi et executandi.
- [8] On termination of the brokerage agreement payment of any commission to the First Defendant shall be subject to liquidation or setoff of all indebtedness to the relevant cedent insurer and compliance with clause 9.3 of the brokerage agreement in terms whereof the First Defendant shall deliver all monies belonging to the cadent companies and all records to the cadent companies.
- [9] On termination for whatever cause, the First Defendant is not released from any indebtedness to the cadent companies. Any advances made to the First Defendant at any time against commission to be earned or amounts advanced to it or paid on its behalf for any other purpose whatsoever, shall constitute debts owed by the First Defendant to the relevant cadent company which such sedent company may call upon to be paid at any time. These debts attract interest at a rate determined from time to time if it remains outstanding in excess of 30 days.
- [10] The entire agreement between the parties is set forth in the brokerage agreement. In the brokerage agreement the First Defendant chose an address as domicilium citandi et executandi.
- [11] In terms of clause 17 insofar as any laws or regulations which are in force from time to time relating to insurance intermediaries require any provisions to be incorporated in any service contract, such provisions shall, for so long as any such law or regulation remains enforce, be deemed to be incorporated in the brokerage agreement as if specifically set out therein.
- [12] In the pleadings both deeds of suretyship were placed in dispute as well as the cessions between the cedent insurers and the Plaintiff.

[13] In the amended plea a number of defences are raised against the Plaintiff's claim for repayment of advances in respect of commissions

to be paid, premiums unpaid and/or premiums returned to policy holders and commissions paid in respect of insurance contracts that

were surrendered, cancelled, made paid up or lapsed or went out of force subsequent to such commission payments.

[14] Two pretrial conferences were held. In terms of the second pretrial conference the parties agreed with regard to the status of documents in the trial bundle that all documents which are not common cause in terms of the particulars of claim and plea will require proof. Copies of the documents may be used. The truth of the contents of the documents is not admitted. If further documents are placed in issue, the party placing the document in issue will give notice thereof to the other side and formal proof of such documents would then be necessary. Documents not referred to during the course of the trial, identified and admitted into evidence shall not be taken into account.

[15] Although the cessions were placed in issue, that dispute fell away as a point in dispute and accordingly it is not in dispute that the Plaintiff is the cessionary of the cedent companies.

[16] Both suretyship agreements were placed in issue. However, the Second Defendant admitted in the further particulars that she signed the suretyship agreement applicable to her and accordingly that point in dispute falls away. In any event Mr Bubu who was called by the Defendants to testify, signed as a witness to the suretyship of the Second Defendant.

[17] The suretyship of the Third Defendant remained in issue throughout. The Plaintiff never attempted to properly prove the fact that the Second Defendant signed the suretyship agreement and accordingly insofar as any claim against the Third Defendant is concerned, that claim stands to be dismissed.

[18] The parties handed up 5 exhibits that are marked Exhibit "A", "B", "C", "D" and "E". In Exhibit "A" Items 11, 13 and 14 are disputed documents. Item 11 consists of a reconciliation summary of the commissions of the First Defendant. Item 13 are the commission statements generated by the Plaintiff and Item 14 are the policy detail as produced by the Plaintiff. All of these documents are computer generated documents.

[19] In Exhibit "B" Items 1, 3 and 4 are disputed. Item 1 is the debt movements of the First Defendant's account with Plaintiff. Item 3 is the Plaintiff's document setting forth the policy detail from 2003 to 2012 debt movements of the First Defendant and Item 4 is the letter of termination issued by the Plaintiff against the First Defendant dated the 7th December 2010. Further in Exhibit "B" under the so-called "trigger documents", being letters that inform policy holders of the lapsing of their policies and that invite them to maintain the policy are disputed by the Defendants only insofar as it concerns those documents that have signatures of persons on them. The computer generated "trigger documents" are not disputed in the sense that they have to be proved. These documents are in Exhibit "B" at pages 96, 126 to

127, 130 to 131, 141 to 142, 145 and 154 to 155.

- [20] It is disputed that the letter of termination referred to above, came to the knowledge of the First Defendant. The First Defendant's case is that it only received the letter of termination during the process of discovery during the litigation. However, the postal address on the letter of termination is the official registered office postal address of the First Defendant at all relevant times. However, there was no evidence by any witness that it was delivered in any fashion to the First Respondent. In fact Mr Bubu who was the broker agent dealing with the First Defendant, denies ever having delivered such a letter to the First Defendant. The postal address is not the chosen domicilium citandi ex executandi in terms of the brokerage agreement. There is also no proof whatsoever that the letter was sent by registered post to the address indicated on the letter of termination. If this was the case, then, it being the registered postal address in terms of the Close Corporations Act 69 of 1984 receipt in the normal course of postage delivery, in the absence of any evidence on the part of the First Defendant in this regard, would have been proved. However, no such evidence is available and accordingly I cannot find that the termination letter dated the 7th December 2010 reached the First Defendant.
- [21] Three witnesses testified, two of them for the Plaintiff and one for the Defendants. The first witness was Mr Craig Philip Heldsinger, the manager of the debt management department of the Plaintiff. He is so employed in this position since July 2009. He is in charge of recovering bad debt and work with all of the Plaintiff's computer systems. He has a staff complement of four. In his evidence in chief he introduced the registration certificates of the Plaintiff and the cedent companies and also proved the cessions between the Plaintiff and the cedent companies. These cessions are at Exhibit "A" pages 20" to 27. He was a witness to both cession agreements. Accordingly the existence and locus standi of the Plaintiff is proved.
- [22] Mr Heldsinger joined the Plaintiff in July 2009, shortly after the business relationship between the Plaintiff (in the collective sense of the Plaintiff and its cedent companies) had commenced on the 1st April 2009. From his evidence he in general explained the type of business wherein the Plaintiff and the First Defendant were involved. It is the soliciting of entry level insurance products such as funeral cover. It appears from the evidence that commission is paid on policies that are actually issued and in effect the commission is an advance on commission to be earned over a two year period, resulting in a first year commission and a second year commission. Accordingly the First Defendant receives the commission in advance on the issue of the insurance policies. If the premiums are paid then the first year commission is earned on the first anniversary of the policy and if the premiums are not paid then the policy lapses and the First Defendant becomes liable to repay the commission paid in advance.
- [23] Mr Heldsinger was of the view that the agreement between the Plaintiff and the First Defendant was cancelled.

[24] Mr Heldsinger and his staff prepared a document called a K & D Telemarketing Recon Summary 2009 to 2012 setting forth all payments made by the Plaintiff to the First Defendant, the movements in commission and debts and a summary of the indebtedness of the First Defendant to the Plaintiff. This amount he calculated as R545 840.23, being the claim amount in the particulars of claim. Having regard to the K & D Telemarketing Recon Summary 2009 to 2012 at Exhibit "A" pages 36 to 37 is a list of purported payments made by the Plaintiff to the First Defendant. The payments from 12th May 2009 and thereafter are admitted by the Defendants and are accordingly common cause. However, the payments of 17 April 2009, 24 April 2009, 27 April 2009 and 5 May 2009 amounting to the sum of R172 034.40 are disputed by the Defendants. The payments as from the 12th May 2009 are admitted as the bank statements of the First Defendant are pages 38 to 71 of Exhibit "A" and all these payments are confirmed by the First Defendant's bank statements. The payments of the 17th April 2009 to the 5th May 2009 do not appear on the bank statements. However, the bank statement for the period 27 March 2009 to 25 April 2009 on pages 40 and 41 of Exhibit "A" shows a deposit from "Libery" of R80 000.00 on the 21st April 2009. This deposit does not show the same features as the deposits that are admitted in the sense that the other deposits clearly and incontrovertibly show that the deposits are from the Plaintiff. The

date of the deposit on 21 April 2009 also does not accord with any of the dates of the alleged payments at "A" 36 from the 17th April 2009 to the 5th May 2009. In the circumstances I cannot make the finding that the R80 000.00 credit on the 21st April 2009 emanated from the Plaintiff.

[25] I return to the evidence of Mr Heldsinger. Mr Heldsinger explained that the sub brokers in the employ of the First Defendant did the telesales resulting in the issue of the insurance policies by the Plaintiff to the policy holders. The commission statements are generated automatically by the Plaintiff's computers. The commission statements in Exhibit "A" as from 295 in Exhibit "A" sets forth the code of the Plaintiff, the policy reference, the life insured, the premium amount, the date thereof, the type of commission and the type of product. It also sets forth the payments made to the First Defendant. With reference to various examples in these statements Mr Heldsinger explained the commissions and the reversal of commission upon lapsing thereof. He incorrectly testified that there are references to second year commission. It transpired from the evidence of Mr Bubu that the Plaintiff did not pay the full commission upfront on issue of the policies but only 70% thereof. Accordingly those amounts that Mr Heldsinger thought were second year commissions, in fact were the 30% of the first year commission that was held back by the Plaintiff. He also explained with reference to Exhibit "B" the letters sent to policy holders the policies whereof had lapsed because of nonpayment of their premiums. He also testified about the contents of Exhibit "C", that firstly contains the commission statements showing the policies issued, the policy holders, the type of insurance, the statement date and the commission earned with regard to each policy issued, or if there are reversals, the reversals as well as then the nett amount. He testified that these commission statements are sent to the broker's nominated email address. He testified that the claim amount of R545 840.23 is calculated by the Plaintiff's computers and his summary thereof (at page 36 to 37) is an

extract from the Plaintiff's

information system and a summary of the information to be found in the various statements.

[26] He confirmed that he is the author of the breakdown of each policy that appear in Exhibit "C" from page 117 to page

253. He then explained that all three his schedules reconcile to the same amount and that it also reconciles back to the tax invoices being the commission statements I referred to above.

[27] He testified that the agreement with the First Defendant was terminated on the 21st May 2010. This date is to be found in the letter of 7 December 2010 in Exhibit "B" page

269. It cannot be the date of termination as the letter was directed to the First Defendant only in December 2010. What can be said is that clearly from no later than the 21st May 2010 no further policies were issued and no business was done between the Plaintiff and the First Defendant. Any obligation to pay commission on policies in existence or obligation on the part of the First Defendant to repay advance paid commission as a result of lapsed policies continued. He furthermore explained in crossexamination how the process works. This is his debt management department receive the debtors' information from other departments. There were a multitude of entry level insurance contracts. Mr Heldsinger knew of no Schedule of Commissions document and could not really assist with regard to the calculation of commission. In fact he testified that he does not have a say in the commission structure

and he does not know how it is structured. He explained that initially and before the system was automated, the policies would be submitted by the First Defendant to the Plaintiff and then the commission would be generated. At first these documents were, as stated, submitted manually but later on electronically. He could not give the names of the computer programmes used by the other departments of the Plaintiff for purposes of uploading the policy information and commission information of policy holders. He has no knowledge of that process. He had to concede that the 30% retention of the first year commission was held back by the Plaintiff and that these amounts in the commission statements do not represent second year commission as was the impression of Mr Heldsinger. He in fact confirmed that he did not know of the existence of a retention of 30%. Mr Heldsinger could not assist with regard to the schedules from the Long Term Insurance Act 52 of 1998 (the "Long Term Insurance Act" that inter alia appear at pages 425 and 426 of Exhibit "E". He accordingly had no knowledge of the fact that in terms of the legislation there is an obligation on the party such as the First Defendant to repay the full amount of advanced paid commission if a policy lapses within 6 months. His view was that this in any event occurred. He had no knowledge of the various maximum percentages of commission payable to a broker if premiums lapses on months 7, 8, 9, 10 and so on as are specified in Exhibit "E" page

425. It was put in cross-examination to Mr Heldsinger that his schedules are contrary to the provisions of the Regulations under the Long Term Insurance Act as referred to above. He disputed this and said he will say that it will be in terms thereof. His trust in this is on the basis that the commission payments are made in advance and the Plaintiff's commission schedules will show what will be paid and what will be reversed. In re-examination he explained that the schedule of commissions as received by him is derived from the Group Legal Department of the Plaintiff. He did not check on the percentages in those schedules.
- [28] Mr Tsebe testified that he was employed by the Plaintiff as Branch Manager of Entry Level Products (stop order brand) in 2010. He had broker consultants that reported to him and they on their part interacted with intermediaries such as the First Defendant. In other words the Entry Level Products Department was the link between the intermediaries and the Plaintiff. He confirmed that it is his signature that appears on the termination letter at Exhibit "B" page 269. He had authority to terminate the broker agreement with the First Defendant. He confirmed that the postal address on Exhibit "B" page 269 is the postal address as it appears in the close corporation records of the First Respondent. This is an incontrovertible fact. He left the employ of the Plaintiff in 2011 and returned to the Plaintiff in 2015. He speculated that there probably was more than the one letter of termination in view of the contents of Exhibit "B" page 269 in that it refers to a termination date of 21 May 2010. He explained that it is standard procedure when termination takes place to send such a letter by registered post together with a tracing document. He explained the termination was done as a result of policy lapses and vis-à-vis the lack of business coming in.
- [29] With that the Plaintiff closed his case and the Defendants called Mr Bubu to testify. He is employed with Sanlam as a broker consultant for 3 years and 4 months. He was employed by the Plaintiff from 2008 to 2010. At the Plaintiff he was a branch consultant who trained brokers and serviced brokers and did marketing. He personally was the point of call for the First Defendant. He explained that he collected applications and telephonic recordings of conversations with proposers and submitted the policy applications to the Plaintiff's new business department. The new business department checks the contents of the applications and does the administration at Plaintiff's head office. If the documents are in order they are scanned in and if the documentation is not correct the forms were returned to Mr Bubu who had to return it to the First Defendant for rectification. He was questioned about the issues and problems at the Plaintiff in 2009. He explained that there were long delays in issuing of policies. At some stage there were not enough staff and there was an incident where staff were fined but this incident was unrelated to call centres such as the First Defendant. He signed as witness on the brokerage agreement with the First Defendant. He also knew of no separate schedule of commissions and denied ever handing over such a document to the First Defendant. He explained the various products that could be sold by the First Respondent to proposers. All these products are multiple premium policies and the commission is

paid upfront as a first year commission and a secondary commission as a second year commission. The first year commission is paid as soon as the policy is issued. With reference to the regulations under the Long Term Insurance Act as it appears in Exhibit "E" page 424 he explained that if a policy lapses or is cancelled within 6 months then the total commission is reclaimable. He explained that with call centre business there always was a retention to his recollection of either 20% or 30%. If the policy lapses then the paid part of the upfront commission (in other words the 70% in the first year of the policy) is reclaimable by the Plaintiff. He confirmed in cross-examination that the contents of the regulations set the worst case (not his wording) terms and that the Plaintiff would be entitled to provide for less stringent provisions in its agreement with any broker such as the First Defendant. For instance the percentages in Exhibit "E" page 428 is a maximum percentage, a lesser percentage can also be agreed upon. He explained that the commission calculations are done by the computer itself and it is done with reference to the code of the particular product. He explained that the contents of Exhibit "C" page 155 for instance (with reference to one Mngcoane does not indicate how many premiums were actually paid. He further explained that there was a blanket approach of terminating the brokerage agreements of the Plaintiff with call centres such as the First Defendant. At the time when the business relationship was cut in or about March or April 2010 the First Defendant were in business and had in its employ approximately 50 employees. However, they were not profitable. In re-examination he again confirmed that the schedules do not indicate the number of premiums paid or the duration of the agreement.

[30] Thereafter the Defendants closed their case.

[31] As regards the demeanour of the witnesses I find that they were all credible and that there is no reason to distrust their credibility.

[32] The primary question in this matter is whether the documentary, actually hearsay evidence, based on the computer printouts of the Plaintiff is sufficient evidence. In this regard the Plaintiff has the onus of proof to prove the amount of its claim both in the application for absolution from the instance and at the end of the matter. There was much argument regarding the credibility and admissibility of the computer printout evidence of the Plaintiff.

[33] However, with reference to the matter of *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) I am of the respectful opinion that firstly it is not necessary for the Plaintiff to produce a certificate in terms of Section 15(4) of the Electronic Communications and Transactions Act 25 of 2002 (the "ECT Act"). The production of such a certificate makes the particular computer

printout prima facie evidence without more. However there is no such certificate available and accordingly the admissibility and weight of the computer printouts must be established with reference to the provisions of Section 15(1),

(2) and (3) of the Act read together with the Law of Evidence Amendment Act 45 of 1988 that makes provision for the acceptance of hearsay evidence.

[34] The greater part of the Plaintiffs documents are indeed computer printouts.

[35] As regards the admissibility of hearsay evidence the factors relevant are the nature of the proceedings, the nature of the

evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not

given by the person upon whose credibility the probative value of the evidence depends, any prejudice to a party which the admission of the evidence might entail and any other factor that in my opinion ought to be taken into account.

[36] In my respectful view the Plaintiffs evidence, as so far it goes, is admissible despite being hearsay. This is so firstly on grounds of the ECT Act. As regards the factors referred to in Section 3 of the Law of Evidence Amendment Act 45 of 1998 I find the following:

The proceedings speak for itself. The nature of the evidence is an exposition of the policy history of the lapsed policies that were brokered by the First Defendant. The purpose of the evidence is to prove the truth of the contents of these documents. The probative value is high. There is simply no reasonable possibility for a party in the Plaintiffs position to present the evidence of each and every proposer and each and every person in the Plaintiff's employ that dealt with the information that are essentially summarised in the Plaintiffs documents.

[37] I see no prejudice for the Defendant in the admission of this evidence. The information that Mr Heldsinger and his department used to prepare his schedules are generated in a marketing department whereto he has no connection in order to manipulate information. In fact as appeared from his evidence he did not even know what the computer programmes are called that are used to generate the

marketing department documentation. Insofar as the documents are concerned they all accord with each other and they accord, to the extent that the First Defendant made documentation available, also with the First Defendant's information. In this regard I specifically refer to the First Defendant's bank statements. The only aberration in this regard is the first four or five payments that are not reflected and that I already found has not been proven by the Plaintiff as payments to the First Defendant. In this regard I took into consideration that the onus of proof of payment always resides with the person that alleges that he made payment. Although no witness testified on behalf of the First Defendant in this regard, I cannot find on the summary generated by Mr Heldsinger's department that payment indeed was made into the bank account of the First Defendant.

See: Pillay v Krishna 1946 AD 946.

If the payment of R80 000.00 on 21 April 2009 that I referred to earlier was referenced in the same fashion as all the other payments

reflected in the First Defendant's bank statements, I would have found in this regard in favour of the Plaintiff specifically in view of the fact that the Defendants called no witness to testify with regard to inter alia the payments made or not made.

- [38] As regards the acceptability of the information, further, several persons will be involved in capturing the information that in the end found its way into the Plaintiff's documents and accordingly it eliminates the possibility of fraudulent conspiracies. I accordingly allow the evidence of the computer printouts of the Plaintiff despite the objection thereto.
- [39] The few documents that were specifically singled out in Exhibit "B" that contain signatures, also appear to me to be nothing but computer generated documentation but excluding those few documents, which I do, do not detract from the veracity of the rest of the documents presented in evidence by the Plaintiff
- [40] I take into consideration that the Plaintiffs case, put at its simplest is that it only reclaims upfront commissions that are in fact not due and payable by the Plaintiff to the First Defendant. The Plaintiffs whole case is built upon the fact that for the upfront commission to be paid, there first must be issued a policy. This occurred in all these instances. It is also for this reason that the defence that the Plaintiff did not prove that it complied with all its obligations in terms of the agreement cannot be successful. (See paragraph 12.1 of the plea). In this regard the Plaintiff set out to prove that policies were issued and upfront commission was paid on the issue of the policies. That the documents showed. It is not part of the Plaintiffs cause of action in my view that anything else must be proved. Insofar as the First Defendant might have instituted a damages claim for alleged breaches of contract by the Plaintiff, it would have been the onus of the Defendants to prove such breaches of contract.
- [41] However, the question remains whether the evidence presented by the Plaintiff is sufficient to prove on a balance of probabilities that the Plaintiffs claim is correctly calculated. In this regard in my respectful opinion, the Plaintiffs case lacks. The schedule of commissions were never produced and this is clearly a vital document, having regard to for instance the table prescribed by the regulations in the Long Term Insurance Act at Exhibit "E" page 425. It is clear that there is a sliding scale of entitlement to upfront commissions by the First Defendant. It is not only a question of if the policy lapses within 6 months, no commission is payable. It is in my opinion not shown in the schedules produced by the Defendant how many premiums were paid and when precisely the lapse occurred and when the lapse occurred how the premiums received were compared to the equivalent value of premiums for instance a 6 month or a 7 or a 8 month period. None of that information is available. On the evidence of Mr Heldsinger he clearly did not have any regard to any such information. He merely assumes that the Plaintiffs computer systems would be correctly programmed in this regard. In the circumstances I checked on the policies as there was evidence that most of the lapses were within the 6 month period. That unfortunately will not suffice. If one has regard to Exhibit "C" page 117 and take two examples, namely that of ZK Selenda and ME Lisea it is clear that there were lapses, but in both these examples the lapses occurred after a 6 month period. In Selenda's case it appeared just after the 6 month period had expired and

it might not be the best example. In Lisea's case the lapse, according to the dates occurred 9 months after the issue of the policy. There is no indication that a sliding scale of commissions such as is prescribed at Exhibit "E" page 4 to 5 was followed at all by the Plaintiff.

[42] Accordingly although the Plaintiffs computer hearsay evidence goes a long way in solving the Plaintiff's problem, it lacks with regard to the abovementioned vital requirements in order to be able to successfully prove against the Defendants the Plaintiffs claim.

[43] I already found that the claim against the Third Defendant must be dismissed. I intimated that I will make a costs order with regard to the application for absolution from the instance at the end of the matter.

[44] I accordingly make the following order:

1. The costs of the application for absolution from the instance are costs in the cause.
2. Absolution from the instance with costs is granted on the Plaintiff's claim against the First, Second and Third Defendants.

AJ LOUW, AJ

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