

SOUTH AFRICA / JUDGMENT

National Credit Regulator v DFP Community Financial Service (Pty) Ltd, trading as Money Box (NCT/91471/2017/140(1)) [2018] ZANCT 43 (15 May 2018)

[2018] ZANCT 43

COURT

National Consumer Tribunal

BEFORE

FK Manamela, T Bailey, B Dumisa

CASE / FILE NUMBER

NCT/91471/2017/140(1)

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IN THE

NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

Number: NCT/91471/2017/140(1)

In

the matter between:

NATIONAL

CREDIT

REGULATOR

APPLICANT

And

DFP

COMMUNITY FINANCIAL SERVICE (PTY) LTD,

Trading

as MONEY

BOX

RESPONDENT

Coram: Adv.
FK Manamela - Presiding Member
Mr
T Bailey
- Tribunal Member
Prof
B Dumisa -
Tribunal Member
Date
of Hearing - 17 April 2018

JUDGMENT

AND REASONS

INTRODUCTION

1. The Applicant is seeking an order from the Tribunal to declare that the Respondent has engaged in prohibited conduct, and for that reason, to be interdicted from future breaches of the NCA. The Tribunal is also asked to impose an administrative fine against the Respondent for repeated contraventions of the NCA.
2. This application comes to the Tribunal in terms of section 140 of the National Credit Act 34 of 2005 ("the NCA"). The Applicant conducted an investigation into the credit granting practices of the Respondent, and during the course of its investigation, uncovered repeated contraventions of sections of the NCA, namely, section 80(1); 81(3) read with Regulation 23A; section 100(1) (c) read with section 101(1)(d)(ii) and Regulation 42(1). The Applicant asks the Tribunal to declare these contraventions, prohibited conduct in terms of section 150 (a) of the NCA.

THE PARTIES

3. The Applicant is the NATIONAL CREDIT REGULATOR ("the NCR"); an organ of state and a juristic person within the public administration established in terms of Section 12 of the National Credit Act 34 of 2005. The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, ("hereinafter referred to as "the Applicant").
4. The Founding Affidavit of the Applicant is deposed to by Ms Jacqueline Peters, the Manager for Investigation and Enforcement in the employ of the Applicant. At the hearing, the Applicant was represented by Ms Katherine Germishuys from the NCR.
5. The Respondent is DFP COMMUNITY FINANCIAL SERVICES (PTY) LTD, Trading as MONEY BOX an unregistered credit provider whose physical trading address is 3 VIP Building, Civic Centre, CR Swart Street, Vanderbijlpark, Gauteng Province. At the time of this hearing, the Respondent's registration NCRC782 lapsed due to failure to pay its annual

registration renewal fees for the period July 2017 - July 2018.

6. The Respondent did not attend the hearing, nor did a representative attend on its behalf. The Respondent's attorney had withdrawn

as its attorney of record.

7. Under these circumstances, the matter was heard on a default basis[1].

JURISDICTION

8. The National Consumer Tribunal ("Tribunal") has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the NCA to make orders in line with prayers canvassed in the notice of motion.

BACKGROUND

9. An investigation was initiated by the Applicant into the credit lending practises of the credit provider after receiving a complaint from a consumer, Mr Mongezi Jonas Hokomane ("Hokomane"). This led to a reasonable suspicion that credit was being extended in a manner not compliant with the NCA and the Regulations, and not consistent with its Conditions of Registration.

10. The Applicant, appointed Douglas Musandiwa in terms of section 25 of the NCA to conduct an investigation into the Respondent's

activities in the granting of credit. During the investigation, it was found that the Respondent had contravened certain

provisions of the NCA, as will appear more fully in the Applicant's submission below. These contraventions are reported in the Applicants' investigation report which is part of the documents before the Tribunal.

APPLICANT'S

SUBMISSIONS

11. The Applicant's submissions are evidenced from the investigation report[2] it compiled after conducting an investigation into the activities of the Respondent in May 2017. According to the

Applicant, it became apparent during the investigation that the Respondent breached the Act in various respects. The alleged contraventions are dealt with in more detail hereunder.

Reckless Credit[3]granting to Consumers

12. The Respondent entered into credit agreements with consumers without taking necessary steps to assess their existing financial means,

prospects and obligations accurately. Annexures C2; C3, C4; C6 and C8 show circumstances where affordability calculations were done on consumers whose monthly income was insufficient to meet monthly expenses, yet credit had been advanced to them, notwithstanding.

Elsewhere; the following were uncovered:

- debt obligations of consumers were dishonoured and the Respondent's monthly instalments under the credit agreements entered into with the consumer cannot be met.

In other instances the consumers-

- were already over-indebted;
- had judgments against their names due to unsatisfied debt;
- had arrears on their accounts, being a clear indication that they had difficulty meeting their debt obligations; and
- Hokomane, had an emoluments attachment order against his salary in the amount of R2940.60 being deducted every month.

13. The consumers' files investigated by the Applicant, showed evidence that the Respondent failed to conduct proper assessments of the financial obligations of consumers. All these circumstances surrounding the affordability assessments, is something that the Respondent ought to have known about, before advancing credit to these consumers, but failed to do so.
14. The failure by the Respondent to establish the existing financial means, prospects and obligations of consumers at the time of conducting an affordability assessment is a direct contravention of Section 81(2) (a) (iii) read together with Section 82 of the NCA.
15. The Respondent's failure to accurately establish the debt repayment history of consumers (at the time of conducting affordability assessments) is a contravention of Section 81 (2) (a) (ii) of the NCA.
16. The Respondent entered into reckless credit agreements with consumers in contravention of section 81 (3) of the NCA, read with Regulation 23A, which sets out the criteria to be used when conducting an affordability assessment[4]in a credit application. These Regulations do not apply where the consumer is a juristic person.

Contraventions Relating to Cost of Credit[5]

17. The amount of interest levied by the Respondent on credit agreements exceeds the maximum limit allowed by the NCA, to be charged for such agreements. The investigation report and its annexures illustrate that the consumers were levied interest at a rate which exceeds the actual maximum prescribed rate per month on short term loans. This conduct of the Respondent amounts to a contravention of section 100(1) (c) and section 101(1) (d) (ii) read with Regulation 42(1)

CONSIDERATION OF THE APPLICABLE LAW TO EVIDENCE ON A DEFAULT BASIS

18. As previously stated, the Respondent did not attend the hearing, nor did it make any representations to the Tribunal, except for a letter [6] from the Respondent's attorney (who has since withdrawn as attorney of record) addressed to the Tribunal and the Applicant, where it is stated that the Respondent is withdrawing its opposition to the current application. The letter goes further to state that the Respondent has filed an application for liquidation, the details of which are unknown to the attorney.[7] However; be that as it may, the evidence of the Applicant remains uncontroverted and is considered on a default basis, referenced

against the following provisions of the NCA:

"Rule 13:

- (1) Any Respondent to an application or referral to the Tribunal may oppose the application or referral by serving an answering affidavit
- on-
- (a) the Applicant; and
 - (b) every other person on whom the application was served.
- (2) An answering affidavit to an application or a referral other than an application for interim relief must be served on the parties and filed with the Registrar within 15 business days of receipt of such party to the application.

19. Rule 13(5) provides:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted."

It follows therefore; that; in the absence of any answering affidavit filed by the Respondent, the Applicant's application and all of the allegations contained therein; are deemed to be admitted.

The allegations made by the Applicant; regarding the Respondent's conduct; are therefore accepted by the Tribunal as allegations made on the basis of Rule 13(5) which provides:

"Any fact or allegation in the application or referral not specifically denied or admitted in the answering affidavit, will be deemed to have been admitted."

20. The Applicant provided evidence of the Registrar's set down notice by registered mail to the Respondent's address, dated 16 March 2018 as proof of service. The Respondent has not filed any answering affidavit or a response to the application's set down notice issued by the Tribunal's Registrar, on even date. The notice was sent to the Respondent's last known address.

21. Rule 25(3) provides:

“The Tribunal may make a default order-

- (a) after it has considered or heard any necessary evidence and
- (b) if it is satisfied that the application documents were adequately served.”

22. In *Sebola v Standard Bank of South Africa*[8] , the following statement bears reference:

“The answer has to be that it applies to a situation where the consumer’s current whereabouts are not known to the credit provider. That is why section 168(b) says that the address to which the notice, order or document must be sent by registered post is his last known address. This means that, if a notice is sent by registered mail to the address that a consumer gave to the credit provider in the agreement as his domicilium citandi et executandi, that service will not be proper service where the notice is returned from that address as unclaimed and the credit provider is aware of another address as the consumer’s last known address. In such a case the credit provider would be obliged to send the letter by registered mail to the consumer’s last known address even if that address is not given in the credit agreement as his domicilium citandi et executandi”.

23. In determining whether the documents were adequately served on the Respondent, the Tribunal considered the requirements for the serving of documents in terms of the Rules of the Tribunal.

Rule 30 provides:

“Service and proof of service of documents.—(1) A document may be served on a party by—

- (a) delivering it to the party; or
- (b) sending it by registered mail to the party’s last known address.

(1A) any document, application or affidavit served or delivered by a party must contain at the front thereof a filing notice in accordance with form TI.r30A and must be filed at the Tribunal.

- (2) parties may expedite service by sending notices and documents by fax or e- mail, provided that this is followed within 3 business days with service in accordance with rule 30 (1) (a). Parties to proceedings may agree in writing to service of notices and documents by way of fax or e-mail only, in which event service in terms of rule 30 (1) will not be required.
- (3) proof of service in terms of:
 - (a) Rule 30 (1) (a), must be by—
 - (i) a signed acknowledgment of receipt by the party, a representative of the party, or a person who is 16 years or older residing or employed at premises occupied or utilized by the party; or

(ii) an affidavit by the person who served the document if the person to whom it was delivered refused to sign for it;

(b) Rule 30 (1) (b), must be the postal agent's receipt with the tracking code of the document;

(c) Rule 30 (2), must be a copy of the transmission report, to be followed subsequently with proof in terms of rules 30 (3)

(a) or (b).

(4) The Tribunal may serve documents in accordance with rule 31. [Sub-r. (4), substituted by GNR.203 of 13 March 2015.]

(5) If any party cannot serve a document or notice in accordance with these rules, it may apply to the Tribunal in Form TI.r30 for an order of substituted service."

24. The Applicant further submitted that the evidence before the Tribunal is that the Tribunal had sent the Notice of Set down to the Respondent's last known address.[9]

25. The Tribunal is therefore satisfied that the requirements for a default hearing have been met. Furthermore the Tribunal, in order to make an appropriate ruling has to satisfy itself with the evidence presented during the hearing and on the papers filed by the Applicant.

THE RELIEF SOUGHT - ADMINISTRATIVE PENALTY

26. One of the main prayers of the Applicant is for the Tribunal to impose an administrative fine against the Respondent, considering the seriousness and the gravity of the contraventions.

27. Section 151(3) of the NCA provides that in considering the imposition of an administrative fine, certain factors must be considered by the Tribunal, as elaborated hereunder by the Applicant:

27.1 The nature duration, gravity and extent of the contraventions:

The Applicant argues that the small sample of files extracted from the records kept by the Respondent and the nature and extent of the contraventions identified from that batch, warrants serious action against the Respondent. These amount to, inter alia, reckless credit granting. Consumers are exploited by additional, unlawful interest, and the gravity of these contraventions depicts

the Respondent's callous disregard of the legislation, the rights of consumers and the interests of the industry in which the Respondent operates. These contraventions, the Applicant argues, date back in time.

27.2 Loss or damage suffered as a result of the contraventions:

The Respondent partook in a regulated activity but failed to take reasonable steps to make sure that the loans are affordable to the consumers. The consequence therefore is that the credit agreements concluded with consumers are deemed to be reckless. Consumers have suffered financial loss by being induced to pay more interest than what was warranted, under prohibited conduct of the Respondent who unduly received these monies from unsuspecting consumers;

27.3 Behaviour of the Respondent:

According to the Applicant, the Respondent ought to have been aware of its statutory obligations to adhere to the provisions of the NCA, when the Respondent first registered as a credit provider under the NCA;

27.4 Market circumstances under which the Contraventions occurred:

The conduct of the Respondent illustrates that the market circumstances within which the contraventions occurred, are such that the consumers who needed credit were ignorant of their rights when they transacted with the Respondent. The Respondent took advantage of consumers who were not aware of their consumer rights relating to access to the credit market;

27.5 Level of profit derived from the contraventions:

A substantial profit has been derived from the activities undertaken by the Respondents. The monies received were at the expense of the consumers and substantially benefited the Respondent when it was not entitled to receive it;

27.6 Degree of co-operation between the Respondents and Applicant:

The Respondent provided the investigator with the requisite information and co-operated during the course of the investigation. However, the Respondent, notwithstanding the seriousness of the contraventions, failed to furnish the Applicant with Hokomane's documentation after it had undertaken to do so. The Respondent also failed and / or refused to pay the annual registration fees to the NCR;

27.7 Prior contraventions committed by the Respondents:

There were no prior investigations or enforcements instituted by the Applicant against the Respondent. The nature and duration of the contraventions however show that the conduct of the Respondent has been going on for a substantial period of time prior to the investigation.

28. According to the Applicant, the gravity of the contraventions perpetrated by the Respondent justifies the Applicant's prayer to have an administrative fine imposed by the Tribunal. Wherefore in light of the Respondent's repeated contraventions of the NCA the Applicant prays that the Tribunal makes an order in the following terms:

- a) Declaring the Respondent to be in repeated contravention of the following sections of the NCA:
 - (i) Section 81(2) (a) read with Regulation 23A;

- (ii) Section 80 (1) (a);
- (iii) Section 81(3);
- (iv) Section 100(1)(c); and
- (v) Section 101(1)(d)(ii) read with regulation 42(1);
- b) Declaring the repeated contraventions referred to above, conduct which is prohibited in terms of section 150(a) of the NCA;
- c) Interdicting the Respondent from being a credit provider in future;
- d) Imposing an administrative fine against the Respondent in the amount of R1 000 000,00 (one million Rand) or 10% of the Respondent's annual turnover whichever is the greater; and
- e) Any other appropriate order required to give effect to the consumers' rights in terms of section 150(j) of the NCA, and
- f) Further and / or alternative relief.

THE TRIBUNAL'S FINDINGS IN CONSIDERATION OF THE EVIDENCE

29. The Applicant alleges that the Respondent is in contravention of the NCA, and should be penalized for such conduct. Section 151(1) of the NCA provides that:

"The Tribunal may impose an administrative penalty in respect of prohibited or required conduct in terms of this Act or the Consumer Protection Act, 2008."

30. It is within its powers that the Tribunal has this discretion, hence the appropriate use of the word "may". The Tribunal, in arriving at a decision whether or not an administrative penalty should be imposed, must consider whether or not the Applicant addressed all the factors required by the NCA in order to impose an administrative penalty. These considerations should also be applied to the present matter. When determining the amount of the penalty, the Tribunal must ensure that the penalty imposed is proportional in severity to the degree blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.
31. In the matter of Harmony Gold Mining Limited; Durban Roodepoort Deep Limited vs. Mittal Steel South Africa Limited, Macsteel International Holdings[10] the Competition Tribunal made it clear that the primary purpose of an administrative penalty is deterrence.
32. Section 151(2) of the NCA states -:

An administrative fine imposed in terms of this Act or the Consumer Protection Act, 2008, may not exceed the greater of –

- (a) 10 per cent of the respondent's annual turnover during the preceding financial year; or
- (b) R1 000 000

33. In the National Credit Regulator v/s Werlan Cash Loans[11], the Tribunal held that even though the Applicant did not present proof of the Respondent's annual return, this factor did not prevent the Tribunal from imposing an administrative penalty. The Tribunal found the Respondent to have engaged in prohibited conduct in the Werlan matter and imposed an administrative penalty.[12]
34. In the present case, the Applicant approached the Tribunal not for the cancellation of the registration of a registrant (as in the Werlan matter), because it is common knowledge that the Respondent is an unregistered lender, but for the imposition of an administrative fine due to the alleged repeated contraventions of the NCA by the Respondent.
35. The Tribunal is empowered by section 151 (2) of the NCA to impose an administrative fine that may not exceed the greater of 10% of the Respondent's annual turnover during the preceding financial year or R1 000 000.00. In the present case, the annual turnover of the Respondent is unknown and it therefore behoves the Tribunal to consider an administrative fine that may not exceed R1 000 000.00.
36. The Competition Appeal Court has held that "the imposition of a penalty should not only promote the important objective of deterrence but that sight should not be lost of fairness to the offending party. In particular, a penalty should not be imposed to destroy the business of the offending party, a point confirmed by section 59(2) of the Competition Act[13]which places a cap on the amount of a penalty which may be imposed".[14]
37. Section 151(2) of the NCA as noted above, is similar to section 59(2) of the Competition Act. Both sections limit the extent of the penalty which may be imposed on an offending party in terms of the relevant Acts. Unfortunately, section 59(2) of the Competition Act provides only that an administrative penalty may not exceed 10% of the firm's annual turnover. No mention is made of an alternative maximum amount such as that appearing in section 151(2) of the NCA.
38. It was held in the matter of SPC v Competition Commission[15] referring to section 59(2) of the Competition Act that "the wording of this section is indicative of a clear structure to be followed in the determination of an administrative penalty".
- The same can be said of the provisions of Section 151(2).[16]
39. As explained above, where no evidence regarding annual turnover is available as in the present case, the Tribunal still has the option to award a penalty not exceeding R1 000 000.00. The question to be dealt with is the considerations to be taken into account when determining the amount that is payable by an offending party. Due to the unique nature of the legislative provisions dealing with administrative penalties, the only similar mandate to consider is that of the Competition Tribunal. As stated, section 59(2) of the Competition Act however only provides that an administrative penalty may not exceed 10% of the firm's annual turnover, no mention is made of an alternative maximum amount such as that appearing in section 151(2) of the NCA.

40. However, the considerations to be borne in mind when deciding on the amount of such a penalty remains the same as those considered by the Competition Tribunal in various matters where penalties were based on annual turnover. In most matters, the Competition Tribunal has considered factors that may lead to a reduction of the penalty that may have been imposed using the 10% of annual turnover-calculation. The Tribunal may also consider those factors.
41. Further, when determining an amount to be imposed as an administrative penalty, the Tribunal must consider the legislation from which it derives its own mandate and consider the factors in section 151(3) of the NCA. These factors have been dealt with above,

as canvassed in the Applicant's submissions. I do not intend to repeat them.

42. The market circumstances in which the contraventions took place is a critical factor to be considered. The areas where these

contraventions occurred are those with vulnerable consumers who may not be aware of their rights relating to access to credit, or are unaware of such practices being prohibited and contrary to the legislative prescripts. The Respondent has benefitted at the expense of these vulnerable consumers. The NCA provides specifically for the assistance of vulnerable consumers and more specifically people who are historically disadvantaged as provided for by section 2(6) of the Act. The consumers in these areas may not be sophisticated and experienced role players in the credit economy. This, in itself is an aggravating factor to be considered, regard being had to the substantial benefit the Respondent derived, by collecting additional interest from consumers, in direct and flagrant disregard of the law. It must be clear that the decision to impose an administrative fine should not just be reached for the sake of punishing the transgressors of the NCA, but to encourage refraining from future contraventions. In this matter the Respondent took advantage of vulnerable, unsophisticated consumers to achieve its own ends.

43. The Respondent has displayed a total disregard of the NCA by engaging in conduct that renders its actions inexcusable at the ignorance and detriment of unsuspecting consumers. The fact that the Respondent's registration has lapsed, does not exonerate the Respondent from adhering to the provisions of the NCA. In fact, the Tribunal views the fact that the Respondent engaged in the activities of a credit provider, whilst registration had lapsed, as aggravating.
44. The penalty imposed should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.
45. The Tribunal should consider both mitigating and aggravating factors before making a finding.[17] The mitigating factors are not present in this case.

CONCLUSION

46. The Tribunal has considered all the relevant submissions substantiating the Applicant's prayers. The Respondent has not

opposed the allegations levelled against it and did not attend the hearing, nor did it send a representative. The Applicant's

version of the alleged contraventions by the Respondent remains unchallenged and uncontroverted.

47. The Respondent is found to have engaged in prohibited conduct by contravening the relevant provisions of the NCA, by engaging in reckless lending; overcharging consumers amounts in excess of the prescribed rate of interest, thereby benefitting at the expense of the affected consumers.

48. Turning to the issue of the administrative fine, the Applicant has made out a case for the Tribunal to consider the imposition of an administrative fine in respect of the contraventions committed by the Respondent. The Tribunal is competent to make a determination whether or not to impose a penalty in these circumstances.

ORDER

49. Accordingly, the Tribunal makes the following order:

49.1 In terms of section 150(a) of the NCA, the Respondents' repeated contravention of the NCA and the Regulations is declared prohibited conduct. These contraventions relate to the following specific provisions of the NCA:

49.1.1 Section 81(2) (a) read with Regulation 23A;

49.1.2 Section 80 (1) (a);

49.1.3 Section 81(3);

49.1.4 Section 100(1)(c); and

49.1.5 Section 101(1)(d)(ii) read with regulation 42(1).

49.2 the Respondent is hereby interdicted from engaging in the activities of a credit provider, as its membership had lapsed;

49.3 the Respondent is hereby interdicted from engaging in conduct that is declared prohibited;

49.4 the Respondent is directed to pay to the Applicant, an administrative fine in the amount of R400 000.00 (Four Hundred Thousand Rand) within sixty days of the handing down of this order; and

49.5 there is no order as to costs.

Thus done and handed down on this 15th day of May 2018.

-----[signed]

ADV FK MANAMELA

PRESIDING MEMBER

With Prof B Dumisa (Member) and Mr T Bailey (Member), concurring

[1] Rule 25 provides: “(2) An applicant may make application by way of form T.I r25 (2) for purposes of obtaining a default order, if no response to the application was filed within the time stated in the application. (3) The Tribunal may make a default order- (a) After it has considered or heard any necessary evidence and (b) If it is satisfied that the application documents were adequately served. “ (underlining, own emphasis)

[1] Rule 25 provides:

“(2) An applicant may make application by way of form T.I r25 (2) for purposes of obtaining a default order, if

no response to the application was filed within the time stated in the application.

(3) The Tribunal may make a default order-

(a) After it has considered or heard any necessary evidence and

(b) If it is satisfied that the application documents were adequately served. “ (underlining, own emphasis)

[2] Per Annexure FA6

[3] Per Annexures C1 to C10- of the investigation report

[4] The Regulations apply to current, prospective and joint consumers; all credit providers and all credit agreements to which the NCA applies subject to Regulation 2

[5] Section 100 (1) and S101(1) read with Regulation 42(1)

[6] Dated 20 February 2018 addressed to the Tribunal and the NCR’s Katherine Germishuys.

[7] The Tribunal has no record of the Respondent filing for liquidation. The information provided by the Respondent’s former attorney is their say-so, and cannot be entertained by the Tribunal.

[8] CCT/98/11[2012] ZACC 11.

[9] being PO Box 2354, Vereeniging, 1930

[10] (13/ CR/Feb 04)

[2007] ZACT 21.

[11] NCT/3867/2012/57.

[12] In the Werlan matter, the National Credit Regulator (Applicant) brought an application before the Tribunal for the cancellation of the registration of the Respondent as a credit provider in terms of Section 57 of the NCA. The Applicant however duly stated in its founding affidavit that the Respondent is not registered as a credit provider and sought the following order from the Tribunal: (a) Declaring the repeated contravention of the NCA by the Respondent in terms of section 150(a); (b) Declaring the Respondent's non-compliance with the compliance notice an offence in terms of section 54(5) of the Act; (c) Imposing an administrative fine against the Respondent in terms of section 151 of the NCA.

[13] Act 89 of 1998

[14] Federal Mogul Southern Africa v Competition Commission [2005] 1 CPLR 50 CPAC at 67.

[15] Southern Pipeline Contractors and Conrite Walls (PTY) Ltd v Competition Commission (105/CAC/Dec10, 106/CAC/Dec10)

[2011] ZACAC 6.

[16] National Credit Act 34 of 2005

[17] Competition Commission v Aveng (Africa) Limited (84/CR/DEC09)

[2012] ZACT 32.

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