

SOUTH AFRICA / JUDGMENT

Papiyana and Others v Master of the High Court and Others (09/9061) [2010] ZAGPJHC 130 (10 December 2010)

[2010] ZAGPJHC 130

COURT

South Gauteng High Court, Johannesburg

BEFORE

HK Saldulker

CASE / FILE NUMBER

09/9061

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REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 09/9061

DATE:10/12/2010

In the matter between:

PAPIYANA, MADODA..... First Applicant

BOTH A, THOZAMILE.....Second Applicant

SING, SUREN.....Third Applicant

.

VARACHIA, MOHAMMED..... ..Fourth Applicant

EVAN, ALEX.....Fifth Applicant

DE KOKER, NOELENE.....Sixth Applicant

and

MASTER OF THE HIGH COURT..... First Respondent

PHA PHAMA AFRICA STAFF SERVICES (PTY) LTD..Second Respondent

MOTALA, ENVER MOHAMED N.O.....Third Respondent

TSEKE, JOHANNES MPH AHLELE N.O..... .Fourth Respondent

STRYDOM, H T.....Fifth Respondent

J U D G M E N T

SALDULKER, J:

INTRODUCTION

- [1] In this application, the applicants seek an order reviewing and setting aside the decision of the first respondent, the Master of the High Court (the Master), to convene an enquiry and to grant subpoenas in respect of them, in terms of section 417 read with section 418 of the Companies Act 61 of 1973 (the Companies Act) in respect of the winding-up of Midrand Computer Repair Centre (Pty) Ltd (in liquidation) (Midrand).

BACKGROUND

- [2] The applicants are the former directors of Midrand and the present directors of Simeka Business Group Limited (Simeka). On 6 March 2008, a winding-up application was launched by the second respondent, a creditor, against Midrand.¹ This application was unopposed and Midrand was placed under final winding-up on 1 April 2008, on the grounds that it was unable to pay its debts. The third and fourth respondents were appointed as joint provisional liquidators of Midrand by the Master on 30 April 2008, with the powers as set out in section 386(1)(a)(b)(c)(e) and 4(f) of the Companies Act.
- [3] On 7 August 2008, whilst the third and fourth respondents were provisional liquidators, they made an application to the Master to convene an enquiry in terms of sections 417 and 418 of the Companies Act. It is common cause that the request to convene an enquiry was made to the joint provisional liquidators by the second respondent, a creditor of Midrand.
- [4] In the application, addressed to the Master, the joint liquidators emphasised the need to convene an enquiry with particular emphasis on the affairs, property, dealings and assets of Midrand and ‘more specifically since a necessity exists to investigate the circumstances under which the company [Midrand] conducted business with inter alia, the Applicant [the second respondent] as a subsidiary of the Ultimate Holdings Company, namely SIMEKA BSG LIMITED (BSG).’ They stressed the need to subpoena persons to attend the enquiry and give evidence as to the background and the circumstances under which Midrand was trading, particularly during the period in which its indebtedness to the second respondent was incurred. According to the liquidators, given the fact that Midrand was not possessed of funds to pursue such an enquiry, the second respondent would bear the costs of the enquiry. Should assets and/or monies be recovered as a result of the enquiry, then in such event, the second respondent would be entitled to an order whereby the costs of the enquiry would be treated as administration costs payable by the estate, subject to the taxation of a bill of costs.
- [5] On 22 August 2008 the Master granted the application. In terms of the application, the Master authorised the third and fourth

respondents, the then joint provisional liquidators, at the time, to hold an enquiry into the affairs of Midrand. The fifth respondent was appointed as Commissioner. On 2 April 2009 the third and fourth respondents were appointed as final liquidators.

[6] It is common cause that a summons was issued in respect of each applicant in terms of the relevant provisions of the Companies Act, and the Commissioner was directed to report to the Master on various aspects of the enquiry. The Commissioner was also authorised to further subpoena as he may in his discretion regard necessary.

[7] In terms of the summons each applicant inter alia:

was to testify on matters within their knowledge regarding the affairs and business of Midrand;

was required, in terms of section 418(2) of the Companies Act, as read with section 417 thereof, to bring with them and produce to the Commissioner, all the books, documents, records and papers in their possession/custody or under their control relating to Midrand or Simeka.

[8] On 6 October 2008 and in pursuance of the order of the Master, an enquiry was convened in terms of the provisions of sections 417 and

418. However, during the enquiry, a letter dated 5 October 2008 addressed by the applicants' attorneys, Alex Evan Inc, to the Master and the Commissioner, was handed to the Commissioner in support of an application to postpone the enquiry pending a request in terms of section 5 of the Promotion of Administration of Justice Act² (PAJA), for reasons from the Master, for his decision to convene the enquiry and permit the interrogation. Pursuant to submissions by the legal representatives on behalf of the second respondent and the applicants, represented by the fifth applicant, the enquiry was postponed by the Commissioner.

[9] It is common cause that the second respondent has instituted an action against Simeka under Case No 28848/08. This cause of action is based on an alleged agreement that Simeka bound itself as co-principal debtor with Midrand to the second respondent.

SUMMARY OF

SUBMISSIONS

[10] In their founding affidavit, the applicants relied on the provisions of PAJA, 'and where necessary, Section 151 of the Insolvency Act, 24 of 1936 ('the Insolvency Act'); the Common law; and the Rules of the above Honourable Court.' However, the applicants have abandoned their reliance on PAJA. The applicants assert that 'the powers of a provisional liquidator depend on the terms of his appointment, under section 386 of the Companies Act by the Master'. In this regard, the applicants contend that the certificate of appointment of the provisional liquidators does not confer upon them the authority to apply for and seek an enquiry in terms of sections 417 and 418 of the Companies Act. In this regard they rely on 'Henocheberg Commentary on the Companies Act' where the learned authors, when dealing

with section 417, comment as follows

“It is submitted that a provisional liquidator in a compulsory winding-up cannot apply under the section unless he has the power under s 386(4)(i) and is authorised accordingly. If (as ordinarily would be the case) the power under s 386(4)(i) has been withheld from him, he would additionally require the leave of the Court under s 386(5) read with s 387(3).”³

- [11] Furthermore, the applicants contend that on 7 August 2008, when the third and fourth respondents made an application to convene an enquiry, they did not have any authority to do so, since at that stage they were provisional liquidators, having been appointed on 30 April 2008. Their status changed only on 2 April 2009 when they were appointed as final liquidators. The Master should not have granted the order to convene an enquiry as the third and fourth respondents had at that stage:
- 1) not been given the power by the Master;
 - 2) not been given the power by creditors of Midrand at a duly constituted meeting;
 - 3) not approached the High Court for leave to proceed.
- [12] The applicants further contend that should the enquiry proceed, the provisional liquidators will be doing so on an unlawful basis and that the applicants will be compelled to give evidence in an unlawful and irregular enquiry, which will be prejudicial to them. In their founding papers they contend that the primary purpose of the enquiry is for the applicants to be interrogated by the second respondent in regard to issues in Case No 08/28848 where the second respondent has issued summons against Simeka. In view of all the foregoing, the applicants urge the court to exercise its inherent jurisdiction and to set aside the proceedings on the basis that the third and fourth respondents did not have the necessary power to apply to the Master to order an enquiry in terms of section 417 and 418 of the Companies Act, and that the Master’s conduct, in exercising his public power, in convening the enquiry, was clearly wrong in that it constituted an abuse of process.
- [13] In answer to these contentions the respondents contend that the purpose of the enquiry is to enquire into the honest conduct of the affairs of Midrand and to facilitate the acquisition of information and the recovery of assets for the benefit of its creditors, and that the Master specifically granted the joint provisional liquidators powers in terms of section 386(1)(e) which empowered them to conduct an enquiry into the affairs of Midrand. The certificate appointing the liquidators did not exclude the powers of the provisional liquidators to make an application to the Master for an enquiry. Furthermore, it made no difference that when the application for the enquiry was made, the third and fourth respondents were provisional liquidators, as they were finally appointed as liquidators only on 2 April 2009. The definition of ‘any person’ includes a provisional liquidator and / or a creditor. They contend that on this basis alone the provisional liquidators had the authority to apply to the Master for an enquiry in terms of section 417, read with section 418 of the Companies Act. In any event now that the liquidators have become final liquidators there cannot be any reason for the

enquiry not to proceed.

THE LAW

[14] The third and fourth respondents were appointed as joint provisional liquidators in terms of sections 386(1)(a)(b)(c)(e) and

4(f) of the Companies Act on 30 April 2008. When they were finally appointed as joint liquidators, a year later, their powers in terms of the aforesaid sections remained unchanged. The relevant sections inter alia, read as follows:

“Powers of Liquidators

386 General powers

(1) The liquidator in any winding-up shall have power-

(a)

to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;

(b)

to prove a claim in the estate of any debtor or contributory of the company and receive payment in full or a dividend in respect thereof;

(c)

to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4) (f) have power to impose any additional liabilities upon the company;

....

(e) subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.

.....

(4) The powers referred to in subsection (3) are-

(f)

to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has

obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

...

- (i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.”

[15] Section 417 and 418 of the Companies Act read inter alia as follows:

“417 Summoning and examination of persons as to affairs of company

- (1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings,

affairs or property of the company. (my emphasis)

.....

- (3) The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.....

.....

- (6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental

thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned. (my emphasis)

[doja61y1973s418] 418 Examination by commissioners

- (1) (a) Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company..... “(my emphasis)

[16] In 1995, in *Bernstein and Others v Bester and Others* NNO4 the Constitutional Court carefully analysed the nature and purpose of the section 417 enquiry. Ackermann J stated as follows:

"[16] The enquiry under ss 417 and 418 has many objectives.

(a) It is undoubtedly meant to assist liquidators in discharging these abovementioned duties so that they can determine

the most advantageous course to adopt in regard to the liquidation of the company.

(b) In particular it is aimed at achieving the primary goal of liquidators, namely to determine what the assets and liabilities of the company are, to recover the assets and to pay the liabilities and to do so in a way which will best serve the interests of the company's creditors.

(c) Liquidators have a duty to enquire into the company's affairs.

(d) This is as much one of their functions as reducing the assets of the company into their possession and dealing with them in the prescribed manner, and is an ancillary power in order to recover properly the company's assets.

(e) It is only by conducting such enquiries that liquidators can:

(i) determine what the assets and who the creditors and contributories of the company are;

(ii) properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.

.....

(g) Not infrequently the very persons who are responsible for the mismanagement of and depredations on the company

are the only persons who have knowledge of the workings of the company prior to liquidation (such as directors, other officers and certain outsiders working in collaboration with the former) and are, for this very reason, reluctant to assist the liquidator voluntarily. In these circumstances it is in the interest of creditors and the public generally to compel such persons to assist.

(h) The interrogation is essential to enable the liquidator, who most frequently comes into the company with no

previous knowledge and finds that the company's records are missing or defective, to get sufficient information to reconstitute the state of knowledge that the company should possess; such information is not limited to documents because it is almost inevitable that there will be transactions which are difficult to discover or understand from the written materials of the company alone.

(i) The liquidator must, in such circumstances, be enabled to put the affairs of the company in order and to carry out the liquidation in all its varying aspects.

(j) The interrogation may be necessary in order to enable the liquidator, who thinks that he may be under a duty to recover something from an officer or employee of a company, or even from an outsider concerned with the company's affairs, to discover as swiftly, easily and inexpensively as possible the facts surrounding any such possible claim.

(k)

There is a responsibility on those who use companies to raise money from the public and to conduct business on the basis of limited

liability to account to shareholders and creditors for the failure of the business, if the company goes insolvent. Giving evidence at a s 417 enquiry is part of this responsibility. This responsibility is not limited to officers of the company, in the strict sense, but extends also to the auditors of the company . . . “

ASSESSMENT

[17] Sections 417 and 418 of the Companies Act provide statutory mechanisms for the proper investigation into the affairs of a company. In consequence of the information revealed at an enquiry, offences or irregularities, if any, and dishonest conduct of the affairs of the company are exposed. The acquisition of information may also lead to the recovery of assets or monies for the benefit of

the company and its creditors.⁵

[18] In terms of section 417(6) of the Companies Act ‘any person’ can apply for an examination or enquiry in terms of sections 417 and 418.⁶ The reference to ‘any person’ does not in my view exclude provisional liquidators who have a statutory duty to enquire into the affairs of a company. Any person having an interest in the company may apply to the Master to order an enquiry. This also does not exclude a creditor or member.⁷

[19] The enquiry envisaged in terms of sections 417 and 418 is investigative, the liquidator’s functions being ancillary to

their statutory powers set out in section 386(1)(e). An enquiry into the affairs of a company is as much a function of a provisional

liquidator as is ‘reducing assets of a company into their possession’⁸.

[20] The applicants challenge the authority of the third and fourth respondents to apply for an enquiry, on the basis that it demonstrates a clear abuse of process. According to the applicants, a provisional liquidator in a compulsory winding-up cannot apply under section 417 unless he has the power under section 386(4)(i) and is authorised to do so accordingly.⁹ Section 386(4)(i) reads as follows:

“(4) The powers referred to in subsection (3) are –

[21] Whether the proposed enquiry constitutes an abuse of process must depend on the particular circumstances of the case. The third and fourth respondents were appointed as provisional liquidators in terms of the relevant provisions of section 386. At the time they made the application for an enquiry, 7 August 2008, they were not finally appointed. However, in my view this makes no difference, because they were finally appointed on 2 April 2009, and their functions as liquidators, remained unchanged. In terms of section 386(e) their powers include the taking of 'such measures for the protection and better administration of the affairs and property of the company.' This must in my view include the power to apply to the Master for an enquiry to be held in terms of section 417(1). To exclude them from applying to the Master for an enquiry merely because they were provisional liquidators would make no sense. There is no indication that the Master limited the powers of the provisional liquidators so that only the final liquidators could apply for a section 417 and 418 enquiry. Clearly, the third and fourth respondents would be failing in their duties if they were to neglect to make use of the elaborate machinery provided by the Companies Act, under which they were appointed.

[22] Section 417, empowers the Master or the court, in any winding-up of a company unable to pay its debts, at any time after a winding-up

order has been made, to summon before him or it, any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the court deems capable of giving information concerning the trade, dealings, affairs or property of the company. Clearly, the wording of the section lends itself to no other interpretation.

[23] Consequently, in my view the application by the then provisional liquidators to the Master to order an enquiry in terms of section 417 read with section 418 of the Companies Act does not affect the validity of the order made by the Master constituting the enquiry.¹⁰ The order was made by the Master who is vested with the power to do so, and whether he made the order in consequence of an application

received by the provisional liquidators, or a creditor would make no difference.

[24] In their founding papers, the applicants further contend that the liquidators are holding a secret enquiry and are intent on using this enquiry to hold an interrogation about Simeka. I find this contention difficult to follow. According to the papers, the second respondent is a creditor of Midrand. There is a need to investigate the circumstances under which Midrand conducted business with the second respondent, particularly during the period under which its indebtedness to the second respondent was incurred. There is a need for the affairs of Midrand to be investigated in the proposed insolvency enquiry.

[25] The applicants contend that should the enquiry proceed, the joint liquidators will be doing so on an unlawful basis and the applicants will be compelled to give evidence in an unlawful and irregular enquiry, which will be prejudicial to them. In my view, these contentions of the applicants are fallacious. There is no indication that the Master acted unlawfully and wrongfully in granting the application by the provisional liquidators to hold an enquiry in terms of sections 417 and 418 of the Companies Act.

[26] Furthermore, the liquidators have no knowledge of the manner in which Midrand's affairs were conducted and the circumstances

under which Midrand conducted business with the second respondent. The applicants are former directors of Midrand and are in a position to know about the affairs of Midrand. There is clearly a need to interrogate the applicants concerning their knowledge regarding its straitened position.

Furthermore there is no indication that the proposed interrogation will be unfair and abusive¹¹. The applicants have failed to demonstrate that there will be an abuse of process.

[27] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,¹² Sachs J stated as follows:

"The whole purpose of getting to the bottom of the collapse so as to inform and reimburse as much as possible those who invested or traded in good faith, would be defeated if the director could shield him or herself behind the right not to answer incriminating questions. It is precisely in areas where assets have been fraudulently disposed of, that specially penetrative investigations for their recovery might be required. Company directors and other officials who appeal to the public for funds and engage in public commercial activity with the benefit of not being personally liable for company debts, cannot complain if they are subsequently called upon to account for their stewardship, at least, for the purposes of discovering all assets so as to minimize the loss to creditors and give full information to shareholders ... Indeed, it would be ironical if crooked directors were more able to avoid submitting themselves to an enquiry than honest ones."(my emphasis)

[28] In *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA*¹³ the Court of Appeal outlined the following criteria for the exercise of the court's discretion whether to order an examination:

"It is clear that in exercising the discretion the court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other. If the information required is fundamental to any assessment of whether or not there is a cause of action and the degree of oppression is small (for example in the case of ordering premature discovery of documents) the balance will manifestly come down in favour of making the order. Conversely, if the liquidator is seeking merely to dot the i's and cross the t's of a fairly clear claim by examining the proposed defendant to discover his defence, the balance would come down against making the order. Of course, few cases will be so clear: it will be for the judge in each case

to reach his own conclusion.”

[29] In *Cloverbay*, it was held that a clear case of abuse must be established in order to secure a discharge from a subpoena. Absent such proof it is the duty of persons who are subpoenaed to co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so.

[30] All the applicants are former directors of Midrand. It must follow that they would have been intimately involved with the affairs of Midrand and would in all probability have particular knowledge regarding the affairs of Midrand and its association with Simeka. All of the applicants would have assisted in providing information as to whether or not the affairs of Midrand were properly conducted,

whether there were any irregularities, the cause of its insolvency and whether additional assets can be located for the benefit of creditors of Midrand in liquidation.

CONCLUSION

[31] Company directors cannot hide behind the right not to answer incriminating questions. Transparency, accountability and honesty in the conduct of the affairs of a company is a matter of public concern, requiring the exposure of dishonest conduct, if any, as a consequence of the enquiry and the possible restoration to the company of assets misappropriated from it.

[32] It is clear that the third and fourth respondents fall into the category of ‘any person’ envisaged in section 417(6) of the Companies Act and their powers include applying for a section 417 and 418 enquiry to be held. Even if the Master did not specifically include such powers in their certificate of appointment in terms of section 386, when he received their application for the enquiry to be conducted, and granted their application, the Master expressly gave the provisional liquidators such powers or at the very least, by implication bestowed such powers on them. As liquidators they had the powers ‘to take such measures for the protection and better administration of the affairs and property’ of Midrand and this would include making an application to convene an enquiry.

[33] In my view, the powers of the third and fourth respondents as provisional liquidators at the time the application was made to the Master was not limited. The third and fourth respondents clearly had the authority to make an application to convene an enquiry in terms of sections 417 and 418 of the Companies Act to the Master. The Master granted the application. There is no evidence that the Master’s conduct in doing so, was unfair, or an abuse of process. The Master did not wrongly exercise the power vested in him. Clearly there was a legitimate purpose for an enquiry to be held. Consequently, the Master’s decision to convene an enquiry in terms of sections 417 and 418 of the Companies Act does not fall to be reviewed.

[34] As regards the costs aspect, the scope and complexity of this matter warranted the services of two counsel. It is therefore appropriate

that the costs include the costs of two counsel.

[35] Accordingly, the following order is made:

The application is dismissed with costs, including the costs of two counsel.

HK SALDULKER

SOUTH GAUTENG -

HIGH COURT JOHANNESBURG

DATE OF HEARING.....29 JULY 2010

DATE OF JUDGMENT.....10 DECEMBER 2010

COUNSEL FOR APPLICANT.....ADV MASELLE

INSTRUCTED BY.....MCHUNU ATTORNEYS

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1 In the Witwatersrand Local Division. (Now, the South Gauteng High Court-Johannesburg)

2 Act no 3 of 2000.

3 Henochsberg, Commentary on the Companies Act, page 891

4 See Bernstein and Others v Bester and Others NNO

[1996] ZACC 2; 1996 (2) SA 751 (CC) at 766C and Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at 1057G.

5 See Bernstein and Others v Bester and Others NNO at 767G and Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others at 1057G.

6 Ex parte Brivik 1915 (3) SA 790 (W) at 791.

7 Venter v Williams 1982 (2) SA 310 (N) at 314 Friedman J stated obiter that, "I cannot imagine that the pecuniary interest required of a person applying to Court for the holding of an enquiry under s 417 must be any greater than that of one who applies for a winding-up order. In fact, I am inclined to agree with Mr Zulman, who appears on behalf of Williams, that, if anything, one would expect that a lesser interest would suffice in the case of a person applying for the enquiry. It is, however, unnecessary to say anything more than that, in my judgment, either a prospective

or contingent creditor would have a sufficient pecuniary interest to enable him to apply for a commission of enquiry.”

8 Bernstein and Others v Bester and Others NNO , p766 C para[16] [a]

9 Commentary, Henochsberg, p 891

10 Botha v Strydom and Others 1992 (2) SA 155 (N) at 159B-G.

11

Pretoria Portland Cement Co Ltd and another v Competition Commission and others 2003(2) SA 385 (SCA), at 401 para [34] Schutz JA stated “The reason behind this conclusion is to be found in the history of review procedure. The pattern of review may be fairly complicated

today and is to a considerable extent governed by statute. But the essential nature of review is simple. It is a means by which those in positions of authority may be compelled to behave lawfully.”

11

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today and is to a considerable extent governed by statute. But the essential nature of review is simple. It is a means by which those in positions of authority may be compelled to behave lawfully.”

12 1996 (1) SA 984 (CC) at 1116 para [261]. See also, in this regard, paras [122]- [127].

13

[1991] 1 All ER 894 at 899.

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Prepared on 10 October 2026 · Esheria