

SOUTH AFRICA / JUDGMENT

Pheiffer and Others v About it Pretoria (Pty) Ltd and Others (65188/2014) [2016] ZAGPPHC 1232 (10 November 2016) [2016] ZAGPPHC 1232

COURT

North Gauteng High Court, Pretoria

BEFORE

Brenner AJ

CASE / FILE NUMBER

65188/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Date

of hearing: 31 October 2016

Case

Number: 65188/2014

Date

of hearing: 11/11/2016

Reportable:

yes

Of

interest to other judges: yes

Revised

In

the matter between:

RUDI
PHEIFFER First
Plaintiff
RUDI
PHEIFFER N.O
(in
his capacity as trustee of the Pheiffer Family
Trust) Second
Plaintiff
CORNELIA
MARIA PHEIFFER N.O
(in
her capacity as trustee of the Pheiffer Family
Trust) Third
Plaintiff
And
ABOUT
IT PRETORIA (PTY)
LTD First
Defendant
GERHARDUS
MARTHINUS
OLIVIER Second
Defendant
GERHARDUS
MARTHINUS OLIVIER N.O
(in
his capacity as trustee of the Reivilo
Trust) Third
Defendant
MADELEIN
OLIVIER N.O
(in
her capacity as trustee of the Reivilo
Trust) Fourth
Defendant

JUDGMENT

BRENNER AJ

1. This case involves an exception taken by the four defendants to the declaration of the first to third plaintiffs.
2. For convenience, the parties are referred to by name where relevant. The first plaintiff is Rudi Pheiffer personally ("Rudi

Pheiffer"), Rudi Pheiffer N.O. as trustee of the Pheiffer Family Trust ("Rudi Pheiffer N.O."), and Cornelia Maria Pheiffer N.O. as trustee of the Pheiffer Family Trust ("Cornelia Pheiffer N.O."). The first defendant is About It Pretoria (Pty) Ltd ("About It"), the second defendant is Gerhardus Marthinus Olivier, personally ("Gerhardus Olivier"), the third defendant is Gerhardus Olivier N.O. as trustee of the Reivilo Family Trust ("Gerhardus Olivier N.O."), and the fourth defendant is Madelein Olivier N.O., as trustee of the Reivilo Family Trust ("Madelein Olivier N.O."). It merits mention that Cornelia Pheiffer N.O. and Madelien Olivier N.O. do not play any significant roles in this matter.

3. The matter finds its genesis in motion proceedings launched in 2014, which culminated in material disputes. Accordingly, on 28 October 2015, the case was referred by order of Court to trial, with the notice of motion standing as a simple summons and the plaintiffs being directed to serve a declaration. It is this declaration which forms the subject matter of the defendants' exception in casu.
4. Prior to the hearing before this Court, the defendants launched an application for condonation for the late service of their heads of argument. In the exception, the defendants were dominus litis and should have served their heads before the plaintiffs served their heads. After hearing argument, I granted condonation, reserved the costs for determination in this judgment, and afforded Counsel for the plaintiffs an opportunity to serve supplementary heads of argument to cure the prejudice which they maintained they had suffered from not having had the benefit of the defendants' heads before serving theirs.
5. The supplementary heads of argument were duly served and considered before this judgment was given. Having regard to the circumstances

under which there was non-compliance with the rules of Court and the practice manual by the defendants, the plaintiffs appropriately

called for an explanation for condonation. A reasonable explanation was given. An order for costs against the defendants on the party and party scale, including the costs of Junior Counsel, is warranted.

6. Before traversing the five grounds of exception, the provenance of the plaintiffs' action will be briefly summarised.
7. On 22 April 2011, a written agreement was executed. It is described at page one as an "Agreement of Sale of Shares" in About It, between the "Reivilo Trust (Reg.No. 9344/96)", as seller, and "the Pheiffer Family Trust (Reg No.....)", as purchaser. Still part of the heading, at page two of the document, it is described, in addition, as an "Agreement of Loan for the Purchase of Shares" in About It, between Gerhardus Olivier, personally, and Rudi Pheiffer, personally. The document will be referred to below as "the agreement".

8. It is noteworthy that the final signing page of the document bears only two signatures. The first being that of Gerhardus Olivier "for and on behalf of the Seller who warrants that he is duly authorised to do so", and the second being Rudi Pheiffer, "for and on behalf of the Purchaser who warrants that he is duly authorised to do so". It is unambiguous from the agreement that the purchaser is the Pheiffer Family Trust.
9. The parties are described at clause 1 as: the Reivilo Trust, the Pheiffer Family Trust, Gerhardus Olivier and Rudi Pheiffer.
10. I will summarise the operative clauses. The Reivilo Trust sold 50% of the share capital in About It to The Pheiffer Family Trust for a purchase price of R50,00, being the "nominal value of the shares". Vide clauses 4.1 to 4.2.
11. The agreement goes further, because, in substance, the price was not R50,00 but R1 500 000,00, and took the form of a leveraged sale. Clauses 4.3 to 4.11 are summarised as follows. The Pheiffer Family Trust shall "receive finance from Pheiffer" for the purchase of the shares, such finance being a personal loan from Gerhardus Olivier to Rudi Pheiffer in the sum of R1 500 000,00. Rudi Pheiffer will pay the loan to the Pheiffer Family Trust. A non-refundable deposit of R50 000,00 will be paid by Rudi Pheiffer to Gerhardus Olivier on or before 1 June 2011.
12. The total loan was repayable over not more than six years from 22 April 2011. The instalments would be R250 000,00 for any twelve month period from 1 June of every year, plus accrued interest and any arrears. The instalments would be payable within seven days of the declaration and payment of dividends which may accrue to the shareholders, in proportion to their respective 50% shareholdings.

Accordingly, so the agreement reads, should Rudi Pheiffer receive a dividend of R250 000,00, this would be ceded to Gerhardus Olivier as part-payment of the loan. One may observe from this that, if the purchasing shareholder is the Pheiffer Family Trust, any dividends

should have been payable to it, and not to Rudi Pheiffer personally.

13. The interposition of Rudi Pheiffer and Gerhardus Olivier regarding the loan of R1 500 000,00 is peculiar. As I comprehend the substance of the document, 50% of the shares in About It were sold for R1 550 050,00. Rudi Pheiffer's only involvement would be to pay R50 000,00 of the price to Gerhardus Olivier. Presumably the Pheiffer Family Trust would owe the amount paid by him towards the price, on its behalf. In substance, this amount was part of the purchase price and was payable by the Pheiffer Family Trust to the seller, the Reivilo Trust. I assume that payment of the nominal sum of R50,00 was of no significance. The balance of R1 500 000,00 would come from the Pheiffer Family Trust foregoing dividends declared by the company from time to time over the next six years, and permitting same to be used to expunge the purchase price, until the full amount had been paid. Since the seller was the Reivilo Trust and the purchaser was the Pheiffer Family Trust, as a matter of law, the payment for the price of the shares was owed by the Pheiffer Family Trust to the Reivilo

Trust, and not by Rudi Pheiffer to Gerhardus Olivier. The agreement admits of no other interpretation.

14. Per clauses 5.1.1 to 5.1.3, on the effective date, being 1 June 2011, or within a reasonable time, against payment of the purchase price for the shares, the Reivilo Trust would deliver to the Pheiffer Family Trust:
 - 14.1. the share certificates, to enable the shares to be registered in the name of the Pheiffer Family Trust;
 - 14.2. a written cession by the Reivilo Trust to the Pheiffer Family Trust of all their right title and interest in and to "the claims"
(the claims are not defined);
 - 14.3. a board resolution of both the Reivilo Trust and About It approving the agreement. As security and surety for the loan, the share certificates would be kept by Gerhardus Olivier's legal representative and be available for inspection by Rudi Pheiffer (Clause 5.1.4).
15. I pause to mention that it was not an issue before Court that Gerhardus Olivier was not authorised to represent the trustees of the Reivilo Trust, albeit that Madelein Olivier was not a signatory to the agreement. Nor is a resolution of the trustees of the Reivilo Trust attached to the agreement.
16. It was agreed that the Pheiffer Family Trust would be the "holder in title of the allotted share amount" being 50%, implying that it became the half owner of the shares in About It, and all rights and responsibilities accrued to it from 1 June
2011. These rights and responsibilities would not be subject to the payment of the loan by Rudi Pheiffer to Gerhardus Olivier.
17. Ownership, risk and benefit in the shares would pass to the Pheiffer Family Trust on 1 June 2011. However, the latter would not be able to trade in its shares without the written permission of the Reivilo Trust (Clauses 5.1.5 to 5.1.6 and 5.2 and 5.3).
18. The Reivilo Trust warranted that the sold shares were free from encumbrance and that it could deliver good title in same to the Pheiffer Family Trust (Clause 6).
19. A proper construction of the agreement admits of no other interpretation than that the loan agreement between Rudi Pheiffer and Gerhardus Olivier was inextricably intertwined with the funding of the sale of the shares in About It, between the two Trusts. If the sale is found to be void, then the rationale for the financing of the sale would automatically fall away. Neither the sale nor the loan can exist without its counterpart.

20. I turn to the contents of the plaintiffs' declaration served on 30 November 2015. The relief sought against the defendants is relevant. In the first instance, the Pheiffer Family Trust claimed, as against the Reivilo Trust, payment of the sum of R4 000 000,00 representing the fair value of 50% of the shares in About it. This was based on the cancellation of the agreement arising from the plaintiffs' acceptance of the purported repudiation thereof by the seller.
21. Alternatively, the plaintiffs prayed for an order directing the Reivilo Trust to transfer 50% of the shares to the Pheiffer Family Trust. Rudi Pheiffer claimed payment of R50 000,00 from Gerhardus Olivier. All the plaintiffs prayed for a declaration against

Gerhardus Olivier to declare him a delinquent director for seven years, alternatively, for an order that he be placed on probation.

Pending such declaration, it was prayed that Cornelius van Niekerk should be appointed as independent director of About It. Such

appointee should be afforded the right to investigate the affairs of About It. Moreover, an order was sought granting the plaintiffs leave to bring proceedings under section 165 (b) of the Companies Act, 71 of 2008.

22. It is plain from the above that the plaintiffs pleaded over. In the first instance, the fair value of the 50% shareholding is claimed. In the alternative, assuming a finding that the cancellation was invalid, specific performance of the agreement is demanded, with ancillary relief pertaining to the management of the affairs of About It, the irresistible inference being that its affairs were being improperly managed.
23. I turn to the exception. The first ground of complaint was that the relief in the declaration contained additional prayers and causes of action which materially differed from those contained in the notice of motion. This was apparently rectified by an amendment to the declaration. The defendants did not persist with this ground when the exception was argued.
24. The second to sixth grounds remained contentious, there being an obvious overlap amongst grounds two, three, four, five and six, insofar as they pertained to the alleged voidness of the agreement, the fact that an agent could not act for unauthorised trustees, and the absence of proof of a stipulatio alteri.
25. I will deal with the second and third grounds together, because their provenance lies in the same facts, namely, that the Master of the High Court had not issued letters of authority to the trustees of the Pheiffer Family Trust when the agreement was signed, and accordingly, Rudi Pheiffer could not act as its agent at the time. Paragraphs 8 and 11 of the declaration are pertinent: Paragraph 8 reads:

"8. On or about 22 April 2011 and at or near Pretoria, a written agreement was concluded between the first plaintiff acting in his personal capacity and purportedly as agent of the trustees of the Pheiffer Family Trust, (on the one hand) and the second defendant acting in his personal capacity, and as agent of the trustees of the Reivilo Trust (third and fourth defendants), on the other hand. A true copy of this agreement is annexed hereto as "A".

26. In paragraph 11 of the declaration, it is noted that the Pheiffer Family Trust was registered, and letters of authority were issued by the Master of the High Court on 10 May 2011, (eighteen days after the date of signature of the agreement), whereafter, the second and third plaintiffs purported to accept the benefits in terms of annexure "A", and became parties thereto.
27. In the second ground, it is argued that the agreement is void, because, at the date of signature of the agreement, being 22 April 2011, letters of authority had not been issued to Rudi and Cornelia Pheiffer NNO. The defendants argue further that, on a plain reading of the agreement, it was not concluded for the benefit of a third party, by way of a stipulatio alteri.
28. In the third ground, the defendants aver that the words that Rudi Pheiffer was "purportedly" acting as "agent of the trustees" are vague and embarrassing. In support of this, they contend that this does not appear from the agreement. Under section 6(1) of the Trust Property Control Act, 57 of 1988, ("the Trust Property Control Act"), a person may only act as trustee if authorised thereto in writing by the Master of the High Court.
29. Section 6(1) of the Trust Property Control Act reads:

"6(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master."
30. It is trite that the written authorisation by the Master takes the form of the issue of letters of authority to the trustees. Taking both the second and third grounds together, the defendants contend that the agreement is void at law, and that an agent cannot act for an unauthorised trustee, or trustees.
31. I am satisfied that the agreement relied on by the plaintiffs is ab initio null and void. Rudi Pheiffer had no legal capacity to act for unauthorised trustees or for the unregistered Pheiffer Family Trust when he signed the agreement on 22 April 2011.
32. I have relied on a line of cases mentioned below, and, more recently, the ratio in *Lupacchini v Minister of Safety and Security* 2010(6) SA 457 SCA. The facts in *Lupacchini* were as follows. The *Lupacchini* Family Trust was registered with the Master and its deed required a minimum of two trustees. Its first trustees, Ms Melinda and Mr Gabrielle *Lupacchini*, were issued with letters of authority on 4 October 1994. On 3 June 2003, Gabrielle resigned as trustee and duly notified the Master. It was resolved to appoint Luigi *Lupacchini* as temporary trustee in her place. On 8 September 2003, Gabrielle and Luigi decided to sue the

Minister for damages arising from an allegedly illegal raid of a nightclub owned by the Trust. In November 2003, they decided to appoint Ms Conradie as second trustee in lieu of Luigi. A letter was apparently written to the Master to apprise him of Conradie's appointment but it was not received.

33. In August 2004, the action for damages against the Minister was commenced by Gabrielle Lupacchini and Ms Conradie in their capacities

as trustees. It was only after the action against the Minister had commenced that Conradie was appointed as trustee, on 15 December

2004. The SCA found that the legal proceedings were invalid ab initio despite the fact that Conradie's letters of authority were issued shortly after the proceedings had been initiated.

34. Reference is made in Lupacchini to one of the earliest cases on the subject, that of *Schierhout v Minister of Justice* 1926 AD 99 at 109 in which Innes CJ noted:

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. "

35. In both *Simplex (Pty) Ltd v van der Merwe and others* NNO 1996 (1) SA 111 and *Van der Merwe v van der Merwe en Andere* 2000 (2) SA 519 C, the Court declared a contract concluded by unauthorised trustees as invalid. In *Simplex*, the Court held that section 6(1)

"is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustees. "

36. The SCA in *Lupacchini* supported the criticism levelled at the decision in *Kropman and others* NNO v Nysschen 1999 (2) SA 567 T at 576F which found that the Court had a discretion to retrospectively validate acts of a trustee performed without the requisite authority.

37. At paragraph 17G to Hat page 465 of *Lupacchini*, Nugent JA held:

"(17) One notable feature of s6(1) that seems to me to lead strongly to the conclusion that the acts of a trustee who lacks authorisation were intended to be invalid, is that there is no criminal sanction for acting in that way. When there is a criminal sanction the question will arise whether that was considered by the legislature to be of sufficient consequence for contravening the prohibition or whether nullity was to be a consequence as well."

38. And finally, at paragraph 23 E, page 468, the SCA quoted Fagan JA in *Pottie v Kotze* 1954 (3) SA 719 A at 726H:

"the usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

39. A conspectus of Lupacchini makes it plain that any steps taken ex post facto the void act serve of no assistance in regularising same, whether retrospectively, or at all. In other words, an act performed by a trustee prior to receipt of letters of authority is null and void and incapable of ratification. It matters not that the trustee was appointed under the trust deed. The trustee may not act until authorised to do so by the Master, in writing.
40. The fourth ground is two-pronged. Regarding paragraph 10 of the declaration, the defendants argue that the plaintiffs have failed

to explain the nature of the "peculiar factual matrix" against which the agreement was concluded, which attempts to introduce a stipulatio alteri in favour of the Pheiffer Family Trust once registered.

41. Paragraph 10 reads:

"10. Upon a proper construction of annexure "A" (the agreement), viewed within its peculiar factual matrix, the parties thereto bestowed certain benefits upon the Pheiffer Family Trust, with the intention that, as soon as the Pheiffer Family Trust is registered and Letters of Authority are issued to the trustees thereof, those trustees may accept such benefits whereupon those trustees will become parties to annexure "A".

42. As pointed out by the defendants' Counsel, there is not a single term in the agreement which refers to such a contract. No such inference can be drawn from a proper construction of the agreement. This is probably why the plaintiffs refer to a "peculiar factual matrix", to attempt to contextualise the agreement. In argument, Senior Counsel for the plaintiffs contended that one of the facts in the matrix was the knowledge by all contracting parties that the Pheiffer Family Trust had not yet been registered with the Master and that letters of authority had not yet been issued. Hence the effective date of 1 June 2011 being in advance of the signing date of 22 April 2011, to afford the Pheiffer Family Trust the chance to regularise matters. Even if this was the case, it is of no relevance. It does nothing to render valid what was a nullity to start with.
43. The act of ratification is not possible where the agent is obliged, by statute, to obtain authority from his principal prior to concluding the contract. In *Thorpe and others v Trittenwein* and another 2007(2) SA 172 SCA, a single trustee signed a sale agreement in respect of immovable property. His act was ratified thereafter by the remaining trustees. The SCA found that ratification, ex post facto, could not validate the sale because section 2(1) of the Alienation of Land Act, 1981, required prior written authorisation of the agent.
44. As mentioned in *Crookes NO and another v Watson and others* 1956(1) SA 277 A, "the typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A." This does not appear in the agreement in casu. On the contrary, the agreement unequivocally refers to Rudi Pheiffer as an agent for the Pheiffer Family Trust. When a trustee acts on behalf of a trust, the trust will only become bound if all necessary trustees

had the legal capacity to grant him the authority, at the date on which he purported to bind the Trust.

45. Secondly, based on a reading of paragraphs 12.1 to 12.8, which appear to define the salient terms of the agreement, the plaintiffs

plead "express, implied and tacit terms" of the agreement without specifying which terms are express, implied and tacit.

Moreover, implied or tacit terms at entirely at variance with the "non-variation" and "whole agreement" clauses at 9.1 and 9.2 respectively of the agreement. These clauses would by their very nature exclude an implied or tacit stipulatio alteri. At paragraph 43 page 411 of the judgment in KPMG v Securefin Limited 2009 (4) SA 399 SCA, Harms DP said:

"whether a tacit term can be inferred depends on an interpretation of the document and not on the evidence."

46. I refer to the argument based on there being a relevant "factual matrix" against which the agreement should be viewed and evidence should be adduced at trial. I was referred to the KPMG case as authority for the principle that this approach was applicable to the facts in casu. The statements of Harms, DP, at paragraph 39 page 409 of the judgment are inciteful, but serve to fortify, and not negate, my reasoning in this judgment, and the finding in Lupacchini:

"39. First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a Jura/ act, extrinsic evidence may not contradict, add to or modify its meaning (Johnston v Leal 1980 (3) SA 927 A at 9438). Second. interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnessesThird, the rules of admissibility of evidence in this regard do not depend on the nature of the document., whether statute, contract or patent (Johnson and Johnson (Pty) Ltd v Kimberley-Clark Corporation and Kimberley-Clark of South Africa (Pty) Ltd 1985 BP 126 A.... Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for the purposes of identification, "one must use it as conservatively as possible."(my emphasis)

47. In this case, there is no warrant to have regard to any "peculiar factual matrix". The only facts that matter, and that are common cause are that, on the date the agreement was signed, being 22 April 2011, letters of authority had not been issued to the trustees of the Pheiffer Family Trust. When signing the agreement, Rudi Pheiffer purportedly acted as trustee of this trust when he lacked authority from duly appointed trustees to do so.
48. The case of Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA, also relied upon by plaintiff's Counsel, is of no assistance to them, since its facts have nothing to do with a contract which fails to comply with peremptory statutory formalities.

49. In the fifth ground, the defendants contend that the plaintiffs lack locus standi under section 162 of the Companies Act, 71 of 2008, to apply for relief under section 162. This because only a shareholder, director, company secretary, prescribed officer, registered trade union or representative of employees of a company may apply to declare a person delinquent. This claim is premised on the second alternative for specific performance of the terms of the agreement. Based on this claim, the Pheiffer Family Trust is a shareholder of About It and therefore enjoys locus standi to invoke section 162.
50. However, yet again, this claim is predicated on the validity of the agreement in the first place. The claim is unsustainable if the agreement is found to be void.
51. The sixth ground constitutes a complaint that paragraph 19 of the declaration repeats the wording of section 162 of the Companies Act, 17 of 2008, without providing the facta probanda on which the wording is based. Paragraph 20 of the declaration also falls foul of the requirement to provide the relevant facta probanda by simply averring:
- "20. Further particulars about the said conduct of the second defendant is contained in the Founding Affidavit of the first plaintiff filed under the same case number."
52. Counsel for the defendants quoted the decision in *Honikman v Alexandra Palace Hotels (Pty) Ltd* 1962 (2) SA 404 C at 406H to 407A:
- "to say that the defendant failed to exercise proper care and skill is merely to say again that he was negligent, and to refer to the matter of the valuation of the works executed takes the case no further. That is obviously the whole and only dispute between the partiesIn the result it seems to me that the defendant has pleaded the inference of law on which he relies, without setting out the facts on which such inference is to be drawn."(my emphasis)*
53. This is precisely what has occurred in casu, in conflict with the requirements of Rule 18(4) of the Uniform Rules. It is not facta probantia, but facta probanda, which are missing from the contents of the declaration.
54. However, yet again, this claim is predicated on the validity of the agreement in the first place. The Pheiffer Family Trust is not a shareholder if the agreement is void for non-compliance with section 6(1) of the Trust Property Control Act. And certainly, Rudi Pheiffer, personally, has no locus standi for such relief in any event. The claim is still born if the agreement is void.
55. In the final analysis, based on the established case law on the subject, the agreement which constitutes the plaintiffs' cause of action is a nullity and ab initio null and void, for non-compliance with section 6(1) of the Trust Property Control Act.

56. No "peculiar factual matrix" can resuscitate what was a nullity from the outset.
57. Judgment is granted as follows:
- a. The defendants are granted condonation for the late service of their heads of argument;
 - b. The defendants are directed, jointly and severally, to pay the costs of the condonation application on the opposed party and party scale, confined to the costs of one Junior Counsel;
 - c. The defendants' second, third, fourth, fifth and sixth grounds of exception are upheld;
 - d. The paragraphs of the declaration relating to the above grounds of exception are struck out;
 - e. The plaintiffs are directed, jointly and severally, to pay the defendants' costs of the opposed exception;
 - f. The plaintiffs are afforded leave to serve an amended declaration within 15 days of the date of this judgment, failing which, the defendants shall be entitled to apply for the dismissal of the plaintiffs' claims, with costs.

Appearances

For the Defendants (on Exception): Advocate APJ Els

Instructed by: Van der Merwe and Associates Inc

Counsel for Plaintiffs (on Exception): Adv JD Maritz SC with Adv PL Uys

Instructed by: Gerhard Botha and Partners Inc

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