

UGANDA / JUDGMENT

Ashaba v Mutoni Construction Uganda Limited (Labour Dispute Reference 116 of 2020) [2025] UGIC 1 (16 January 2025)

[2025] UGIC 1

COURT

Industrial Court of Uganda

BEFORE

Wabwire Musana, J, Namara, Panel Member,
Nabirye, Matovu

CASE / FILE NUMBER

Labour Dispute Reference 116 of 2020

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THE REPUBLIC OF UGANDA IN THE INDUSTRIAL COURT OF UGANDA AT
MUBENDE LABOUR DISPUTE REFERENCE NO. 0116 OF 2020 *(Arising from Labour
Dispute No. ¹ of 2020)*

ASHABA EMINED

VERSUS

MUTONI CONSTRUCTION UGANDA LIMITED:I:::::::::::::::::::::::::::::::::::::
zRESPONDENT

Before:

The Hon. Mr. Justice Anthony Wabwire Musana:

Panelists: Hon. Adrine Namara, Hon. Susan Nabirye & Hon. Michael Matovu.***Representation:***

- *1. Mr. Davis Ngonde and Ms. Samantha Anena Okello of M/S. Okello-Oryem & Co Advocates for the Claimant.*
- *2. Mr. Isaac Newton Kyagaba of M/S Kyagaba & Otatina Advocates(Dentons) for the Respondent.*

Case Summary

Employment Law; Claim for unfair termination: Failure to prove termination: The Claimant sought ^a declaration of unfair termination, citing lack of due process and seeking various financial remedies, including back pay and compensation for injuries. The Respondent countered that the Claimant absconded from his duties. The court examined the evidence, including witness testimonies and emails, to determine whether ^a termination occurred and, if so, whether it was lawful. The Court found that the Claimant failed to prove the fact of termination and dismissed the claim.

AWARD**introduction**

[1] On the 5th of May 2019 the Respondent, a construction company, recruited the Claimant to be in charge of its warehouse and storage. In June 2019, the Claimant was promoted to Administrative Assistant on a one-year renewable contract. In a memorandum of claim filed in this court on the 18th of December 2020, the Claimant alleges that in November or December of 2019, the Respondent's Managing Director, Iain Dunbar, unfairly terminated his services before the expiry of his contract in May 2020. He contended that he was not given a fair hearing, not notified of any offences, not invited for ^a disciplinary hearing, not given reasonable time to prepare any defence, was not given the statutory notice of termination, and was not treated with justice and equity. For this, he sought various remedies, including one month's pay in lieu

of notice, one month's pay for failure to give written notification, severance allowance, compensation for injuries on site, unpaid National Social Security Fund Benefits, general damages for breach of contract, costs of the claim and interest on his monetary claims.

[2] In its reply to the memorandum of claim, the Respondent denied the claim, contending that the Claimant absconded from duty in or around December 2019. The Respondent tried to reach out to the Claimant, but he was obstinate. The Respondent denied dismissing or terminating the Claimant and contends that it only heard from the Claimant when he filed a labour complaint at the Labour Office in Wakiso on 24th May 2020. The Respondent admitted to paying the Claimant's December 2019 salary as this was the Claimant's last month of service before he absconded. The Respondent denied liability for workplace injuries.

The proceedings and evidence.

- [3] The parties filed a joint scheduling memorandum which was adopted on the 27th of October 2022 with the following issues for determination:
- *(i) Whether the Claimant's was terminated and if so whether the termination was lawful?*

- *(ii) What remedies are available to the Parties?*
- [4] The documents in the Claimant's trial bundle filed in Court on the 21st of September 2021 were admitted in evidence and marked "CEX1" and "CEX5". The medical forms were admitted for identification and marked "CID 1". The documents in the Respondent Trial Bundle filed in Court on the 4th of April 2022 were admitted and marked "REX1" and "REX7".

The Claimant's testimony

- [5] In his witness statement, made on the 21st of September" 2021, which was adopted as his evidence in chief, the Claimant testified that his contract was set to expire on the 1st of May 2020 and that around November 2019, the Respondent's Managing Director Iain Dunbar unfairly terminated him without a fair hearing. He testified to having been injured on the 27th of September 2019 at a construction site in Munyonyo and sought recovery of UGX 275,000/= expended on treatment. He also reiterated his compensation claims.
- [6] Under cross-examination, he testified that he stopped working in December 2019 and only returned to the Respondent's premises in May 2020 to serve Court documents. He confirmed receipt of the December 2019 salary. He confirmed his email address and said he did not get a termination letter for Mr. Dunbar. He said he wrote an email. He confirmed that paragraph six of his witness statement did not explain how he had been terminated but that Mr. Dunbar had used an expletive in telling him he did not wish to be seen around the Respondent's premises. When shown REX 2, he confirmed that he was sending this email to one Shaz, who he suggested was likely behind his termination.
- [7] In re-examination, he said he was verbally terminated, and Mr. Dunbar had used the words "Fuck Off". That this was Mr. Dunbar's mode of termination. He said Shaz (Sharren Dunbar) had influence, and workers were occasionally asked to send their CVs to her.

The Respondent's evidence

- [8] The Respondent called Iain Dunbar(RWI), its Managing Director, who testified that Dei Natural Products International Limited had contracted the Respondent to construct pharmaceutical factories in Matuuga in Wakiso District. The Claimant was deployed as a site clerk at that site. On 5th December 2019, when he visited the site, his impression was that administration and support site documentation were lacking. When he interviewed the Claimant, the Claimant did not appear to understand his duties and was not suitably dressed by applicable health and safety standards. He, therefore, invited the Claimant to the office to discuss and appraise him of the role. It was RW1's evidence that the Claimant did not return to work again. The site manager, Simon Williamson, reached out to the claimant to return to work, but the claimant refused to do so, and the respondent engaged a new Site Clerk. He said that the Respondent did not hear from the Claimant again until April 2020, when he sent a menacing email to RW1's wife, Sharren Dunbar. He said this was followed by a visit from the Uganda Police, a complaint at the Labour Office of Wakiso, and the referral of the

complaint to this Court. He suggested that the Claimant was not dismissed nor terminated, but he absconded from work. He denied any works in Munyonyo, denied the Claimant's claims for compensation and suggested the claim was without merit.

- [9] Under cross-examination, RW1 told this Court that he had no proof that he had reached out to the Claimant to find out what had happened to him after he left the Matuuga site. Regarding Mr Williamsons' contact with the Claimant, he said he did not have the messages or emails. He said he had not attended the mediation before the labour officer but had sent his apologies.
 - [10] In re-examination, he told the Court that the Claimant's email, REX2, was abusive, not factual, offensive, counterproductive, and aggressive. Concerning the Claimant's deployment as site agent, he said his Co-Director, Mr Mugerwa, felt the Claimant could be deployed at the Matuuga site. When he visited the site, he asked for specific things, including the wage and material delivery sheets, and found these not to be updated. He said Mr. Willaimson had then asked him to return to the site to train the Claimant. He said he called the claimant and sent him emails as well.
 - [11] The Respondent then called Sharren Dunbar(RW2), who testified to having received a disturbing email from the Claimant, and she was shocked because she did not work for the Respondent. She said she reached out to her husband, Iain Dunbar who then explained the employment dispute with the Claimant. It was her testimony that she presumed the Claimant thought that by threatening her, her husband would be coerced into making the payments to the Claimant.
 - [12] Under cross-examination, she conceded to having worked for the Respondent for three months. She said her roles did not include managing human resources during this time. She said her employment was on a casual, temporary basis.
 - [13] In re-examination, she said during the three months, she was only helping out to update files. Her evidence was that Henry Mugerwa handled the human resource function and had since left the Respondent.
- [14] After RW2's re-examination, Mr Kyagaba closed the Respondent's case. We directed the filing of written submissions which we have summarised and considered in this award.

Analysis

Issue 1. Whether the Claimant's was terminated and if so whether the termination was lawful?

Claimant's submissions

- [15] For the Claimant, it was argued that he was terminated and did not abscond. It was suggested that his conduct of sending emails and reporting to the labour officer was consistent with termination. He argued that Mr. Dunbar had not produced the emails and messages he had sent to the Claimant, and neither did Simon Williamson come to Court. He suggested that RW1 and RW2 were unreliable witnesses. He concluded that the Claimant had been terminated and asked us to find so.
- [16] Concerning the lawfulness of the termination, it was submitted that there was no fair hearing contract to Section 66 of the Employment Act, 2006. Counsel also cited sections 58(3) (b) and (5) of the Act for the proposition that there was no notice of termination, and it was, therefore, unlawful. On the authority of **Florence Mufumba v Uganda Development Bank*[1] (#page-3-0)* Mr. Ngonde submitted that an employer must explain to an employee why he or she is considering termination for misconduct or poor performance and that the employer is obligated to give the employee a hearing. Counsel argued that the Claimant was commanded to leave the Respondent's premises and never return to work. It was Counsel's view that the expletive "fuck off", ought to be interpreted as ^a termination on the employer's whims, which the cases of **Hilda Musinguzi v Stanbic Bank(Uganda) Ltd**[2] (#page-3-1) and **Nassanga Saphina Kasule v Stanbic Bank Ltd** [3](#page-3-2) found unlawful. We were asked to find that the Claimant was unlawfully terminated.

Respondent's submissions

- [17] For the Respondent, it was submitted first that the Complaint was filed outside the statutory Q three months from the date of dismissal as set out in Section 71(2) of the Act. Having been filed on the 27th of May 2020, the three months expired in February 2020. There was no extension of time, so the complaint was out of time. Counsel cited **Lubandi v Uganda Electricity Generation Company Ltd*[4](#page-3-3)* in support of this proposition. It was also suggested that the Claimant had not pleaded any of the reasons outlined in Section 73(1) and (5) of the Act to support a "statutory claim" for unfair termination. It was suggested that the pleadings per **Semalulu v Nakitto** bind the party and Court[5](#page-3-4).
- [18] Alternatively, it was argued that the Claimant absconded from work and that evidence of his abscondment was uncontroverted and unchallenged. It was submitted that the Claimant was paid for November and December 2019 when he was not at work and that his claims of abuse

¹ LDC 138 of 2014. Counsel also cited Allan Kwagala v Soliton Telmec Uganda LDC 13/2017

² SCCA 05/2016

³ LDC 227 of 2014

⁴ LDR 95 of 2015

⁵ [20171 UGHClD 49

and insults were an afterthought not brought together with the complaint before the labour office. On the authorities of *Ayebazibwe v Good Will Collage School Ltd & Another*[6](#page-4-0), *Nyakabwa v Security 2000 Ltd*[7](#page-4-1), *Otim Robert v Tirupati Development Ltd*⁸ and *Mwaka Moses v Road Master Cycles(U) Ltd*[9](#page-4-2)* it was submitted that the Claimant had terminated himself and there was no proof that the Respondent's conduct was unreasonable, or that he was verbally dismissed. He did not seek ^a termination letter and only made allegations of unfair termination four months after being absent from work. We were asked to find no evidence of termination.

Rejoinder

[19] In rejoinder, Counsel for the Claimant relied on *Engineer John Eric Mugyenzi v Uganda Electricity Generation Co Ltd*[10](#page-4-3)* for the proposition that ^a labour dispute should be brought before a labour officer within six years. It was submitted that unfair termination occurs when the employer does not follow procedure and that the Respondent had a previous practice of firing verbally. It was argued that being asked to "fuck off" amounted to termination and constructive notice and that the Claimant did not abscond from work as claimed by the Respondent. It was also submitted that the Claim was made after four months because of the COVID-19 Pandemic restrictions. It was submitted that the REX2 was an email challenging his termination and that the delay could be attributed to the Claimant's emotional state after losing his job.

Determination %

The distinction between termination and dismissal under the Employment Act Cap. 226

- [20] In their written submissions, Counsel for the Claimant wavered between termination and dismissal. While the EA employs an interchangeable use of these terms, the approach is unhelpful. An employee can either be dismissed or terminated, but not both. This Court clarified this point in *Nakanwagi Solome Fiona* v *Opportunity Bank Uganda Ltd*[11].* In that case, we observed as follows:
- *"[15] Under the Employment Act Cap.226(from now EA), the employment relationship can be ended in one oftwo ways: termination or dismissal. Under Section 64EA, a termination, which we have called a no-fault discharge, is by way ofan employer discharging the employee on notice or without notice but with payment in lieu of notice[12](#page-4-4), because of the expiry of the contract term or completion of a fixed task, retirement, constructive dismissal or resignation by an employee serving notice. For termination, there is no fault attributable to the employee.*"

- *[16] At the other end of the discharge spectrum lies dismissal. Dismissal of an employee is the discharge of the employment contract by the employer for employee performance or underperformance and misconduct."*

⁶ LOR 183 of 2015

⁷ LOC 108 of 2014

[•] LDR 104 of 2017

⁹ [2017] UGIC 10

¹⁰ Civil Appeal No. 167 of 2018

[&]quot; LDR ¹⁵² of ²⁰²¹ Industrial Court of Uganda,
²⁰ⁿ December ²⁰²⁴

¹² Stannic Sank (Uganda) Limited v Nassanga (Civil Appeal 182 of 2021) [2023] UGCA342

- [21] This Court is minded of the legislative accident that resulted in the interchangeable use of the expressions "termination" and "dismissal" in the EA. For this reason, in **Nambuya v Bajabar Millers Limited™** following the clarification by the Court of Appeal in **Mugyenzi**, we observed that termination is distinct from dismissal and does not share a threshold or remedies. The cause of action should be defined.
- [22] Termination occurs where the employment relation is brought to an end because of the circumstances laid out in Section 64EA and that is: the expiry of the contract term or completion of a fixed task, retirement, constructive dismissal or resignation by an employee serving notice. Dismissal, on the other hand, occurs when the employer initiates the discharge on the grounds of poor performance or misconduct on the part of the employee. It follows that termination and dismissal are not regular bedfellows.
- [23] The distinction above is important because the Claimant suggests that he was terminated without a fair hearing. That proposition is untenable because termination envisaged under Section 64EA13⁴ is not at the fault of the employee and does not require a hearing. This was the dicta of Gashirabake JA in **Stanbic Bank (Uganda) Limited v Nassanga*[15](#page-5-0).^{*} In that case, the Court of Appeal was clear in its distinction on when a hearing is necessary, with the Learned Justices of Appeal concurring that when a reason for termination is given, then the employer must give a hearing. Where no reason is given, then a hearing would be unnecessary. The Court of Appeal was dealing with a termination with or without notice under Section 64(1)(a)EA. In the present case, we have not been shown that the Claimant was terminated in circumstances under Section 64(1)(a)EA. We will return to the termination shortly.

The burden of proof in employment disputes

- [24] In our evaluation of each of the party's cases and the evidence, two questions abound: First, who bears the burden of proof, and secondly, what is the standard of proof?
- [25] In employment disputes regarding termination and dismissal, the burden of proof is not as direct as in civil and criminal disputes. For their illustrative value, we need to revisit the burden in civil disputes. Under Sections 101 and 102 of the Evidence Act Cap 8. the burden of proof lies upon a party who wishes the court to believe in the existence of facts, and the standard of proof is on a balance of probabilities^[16](#page-5-1). In criminal cases, the burden of proof rests with the prosecution and the standard of proof is beyond reasonable doubt.^[17](#page-5-2) 18
- [26] In employment disputes, the onus probandi shifts. In **Kimbuqwe v Kiboko Enterprises Limited*^⁸* we observed that the burden of proof is specific and keeps shifting. Under Section 70(6) of the Employment Act **2006*(which is now Section 69(6)EA),* for any complaint of unfair dismissal, the burden of proving that a dismissal has occurred rests on the employee. The burden of

^{¹³} ^{®241jjgic_38}

^{^M} Counsels' submissions refer to Sections 65 and ^{⁶⁶} EA because they were filed before the Laws ^{^o} Uganda Revised Edition, ^{²⁰²³} took effect on the ^¹" of July 2024

^{¹⁵} Cited in **Nakanwagi.** See footnote 10.

^{¹⁶} See *Twine v Attorney General* (Mi\Sc Cause 3 of 2024) (2Q241 UGHC 478

^{¹⁷} See *Unanda v Kwarmiq & Qrs* (Criminal Session Case No, 27 of 20131 f?015l UGHCCRD 50

^{¹⁸} [20221 UGIC 5

justifying the grounds for the dismissal rests on the employer. In **Achiro v Uganda_Land Alliance*^[19](#page-6-0) 201we* observed that Section 68 EAnow **Section 67EA)** requires an employer to prove the reason for termination.

- [27] Therefore, the onus of proving the occurrence of a termination or dismissal rests on the employee while the employer has the burden of justifying the lawfulness of the termination or dismissal.
- [28] In terms of standard of proof, in **Nalule Gloria v Centenary Rural Development Bank Limited*^²[®] *Ruhinda-Ntengye, J* held the standard of proof of a wrong committed by an employee to be lower than in ordinary civil cases although it is on balance of probability. His Lordship cited **Bwenqye Herbert v Ecobank (U) Ltd2'** where the Industrial Court held that the employer need not prove a case against the employee beyond

reasonable doubt but that it was enough for the employer to justify its decision based on the facts. This is the essence of Section 67(2)EA, which provides that the reason or reasons for dismissal shall be matters that the employer genuinely believed to exist at the time of the dismissal. Therefore, the Court's inquiry in ^a claim for unlawful and unfair dismissal would be to establish if the employer had a reasonable basis for believing its employee is culpable for some misconduct for which the sanction of dismissal is warranted. In other words, genuine belief of complicity in a stated employment offence. As stated by the Industrial Court in **Nasuuna v Equity Bank (J) Ltd*[22](#page-6-1)* mere belief that ^a reason for termination/dismissal exists at the time of dismissal, is not sufficient cause for dismissal or termination of an employee. The reason must be proved or justified. Thus the need for procedural fairness in holding ^a hearing.

Decision

- [29] In the case before us, the Claimant claimed unfair termination. There was no termination letter for which a reason for termination should be immediately ascribed. The Claimant argues that he was terminated verbally by Mr. Dunbars' use of the expletive "F" word to terminate the Claimant. Mr. Dunbar denies having expressed himself in the manner so alleged. Further, the Respondent counters that the Claimant absconded from duty.
- [30] In our view, the criteria for unfair termination, as expressed in a broad range of judicial decisions, entails procedural fairness as espoused by Mwangushya JSC in **Musinguzi** and Gashirabake JA in **Nassanga**. In short, where an employer does not follow procedure, the termination is unlawful (See **Akewa v Loving one by One Ministries*)[23](#page-6-2). \Ne* will return to Section 72EA on the criteria later in this award.
- [31] The Claimant maintains that it was the practice of the Respondent to terminate verbally. He also says he did not lay his claim immediately after the verbal termination because of the COVID-19 Pandemic restrictions. However, the Claimant did not point us to the exact date of his verbal altercation with the Respondent's Managing Director, Iain Dunbar. How is it that he was told not to return to work around November 2019 and did not protest until May 2020 by REX 2? In this

¹⁹ [~2024] UGIC 22

²⁰120221 UGIC 81

²¹ [20171 UGIC 26 2212020] UGIC 36

²³ [2024] UGIC 64

email, which the Claimant owned up to, was written to RW2, complaining about his termination under the subject "Very Absurd". He opened the email by suggesting that RW2 was worse than her husband and behind the terminations. The email was dated the 7th of April 2020 and was not copied to RW1 or Henry Mugerwa, both Directors of the Respondent. It is the first of the Claimant's written complaints regarding his termination. He did not use email or other

communication between November 2019 and April 2020 to protest his verbal termination. He put this down to the COVID-19 pandemic restrictions but did not explain how the restrictions which were put in place by a Presidential Directive on the 25th of March 2020, prevented ^a protest before that date. The email itself was well constructed. It reflected an understanding of his rights as an employee. The language employed included assertions of legal rights. Further, there is no letter of termination, no complaint or protest letter, and no email or text message before the 7th of April 2020. The Claimant suggested that the Respondent had practised verbal terminations. He did not help his case by producing corroborating evidence of this practice of verbal dismissal such that we should believe his version of events. In our judgment, the Claimant does not make a very believable case of his verbal termination or any termination at all.

- [32] In these circumstances, we do not find that the Claimant was terminated by the Respondent as alleged. The burden is on the employee to prove that termination has occurred and we do not think that on the balance of probability, the Claimant has discharged that burden.
- [33] Mr. Kyagaba, for the Respondent, raised an important point that merits some comment. Counsel submitted that the Claimant had not met the criteria for unfair termination as a statutory claim. By statutory claim, it is meant that the criteria for unfair termination are contained in the Employment Act and that the Court ought not to consider any other circumstances. Mr. Ngonde countered that under Sections 73(1)(b) and (2)EA, any unjust termination can be found to be unfair. We indicated that we would return to the criteria for unfair termination as provided under Section 72EA. The criteria includes circumstances where it is found that the employer did not act with justice and equity in terminating the employee from service. The EA requires a labour officer to consider the disciplinary code in Schedule 2EA, the disciplinary procedures communication and handling of any appeal, the employee's capability, compliance with statutory provisions and the previous practice of the employer in dealing with the circumstances which led to the termination. The disciplinary code in Schedule 2 covers the language and form of an employer's disciplinary rules, matters of discrimination, minor infringements, consultation of unions, a record of offences, disciplinary procedure and imposition of penalties. These are matters that concern a dismissal for reasons of misconduct. Once again, the ghost of the interchangeable use of termination and dismissal lingers over Section 72(2)(a) because the disciplinary code is not ^a matter for ^a no-fault termination as envisaged under Section 64EA.
- [34] The other criteria for unlawful termination are under Section 74EA. This section is infected by the overarching arm of the legislative accident. Section 72(1)(a)EA refers to reasons for termination in Section 74EA. That section refers to matters that do not constitute fair reasons for dismissal or an imposition of a disciplinary penalty. As we have observed in paragraph [22] above, termination is distinct from dismissal. The reasons set out in Section 74(a) to (i) include pregnancy, leave, labour union membership and activities, race, colour, sex, religion, political opinion or affiliation, national extraction, nationality, social origin,

marital status, HIV status or disability or an employee proposing legal action against his or her employer. For these reasons, an employee cannot take disciplinary action and termination is not disciplinary action.

- [35] Therefore, the main criteria for determining the lawfulness of a termination is whether the employer acted with justice and equity which are themselves elastic prescripts. Equity carries with it about twenty maxims.[24](#page-8-0) In ^a general juristic sense, equity means whatever is just or right or a moral judgment. Other criteria include failure to give notice or giving less notice than provided under the EA[25](#page-8-1) and collective terminations under Section 80EA without notice to the Commissioner of Labour, Labour Unions or the employee²⁶
- [36] Having found that the Claimant is unable to establish the fact of termination, it would not be necessary to test the lawfulness of the termination or require the Respondent to justify the termination.

Conclusion

- [37] In the circumstances that we have found the Claimant unable to establish the fact of termination, we find that he self-terminated and cannot now suggest that he was unlawfully terminated. Issue one is answered in the negative. The Claimant was not unlawfully and unfairly terminated and his claim collapses.

Issue II. What remedies are available to the parties?

- [38] Having found that the Claimant was not unfairly and unlawfully terminated, he is not entitled to any remedies.
- [39] Under Section 8(2)(d) of the Labour Disputes(Arbitration and Settlement) Act Cap. 227, this Court may make orders as to costs as it deems fit. We have held that in employment disputes, the grant of costs to the successful party is an exception and granted only where the unsuccessful party has filed a frivolous action or is guilty of some form of misconduct. [27](#page-8-2) In the present case and in keeping with access to labour justice, we do not think that the Claimant should be burdened further with costs.

Final Order;

- [40] In the final analysis, we find that the Claimant was not unfairly and unlawfully terminated. His claim is hereby dismissed with no order as to costs.

It is so ordered.

Signed, seale and delivered at Kampala this **16,h day** of January 2025. ²⁴ See *Slater v. U. S. Steel Cor* , 82< F.3d 1193,1247 (2016) where the 11th Circuit of the United States Court of Appeal gathered together 13 nthony Wa **Judge, Indu ire Musana, tWal Court**

maxims of equity.

²⁵ Section 57EA

²⁸ Qmara v Roofings Company Limited 12024] UGIC 32

²⁷ Joseph Kalule Vs Giz LDR 109/2020(Unreported)

The Panelists Agree:

- 1. Hon. Adrine Namara,
- 2. Hon. Susan Nabirye &
- 3. Hon. Michael Matovu.

16th January 2025.

9:52 am

Appearances

1. **For the Claimants:**
2. **For the Respondent:**

Court Clerk:

Ms. Anena

Ms. Samantha Anena Okello

Mr. Fabian Omara

Mr. Samuel Mukiza.

Matter for award, and we are ready to receive it.

Award delivered in open Court.

Court:

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