



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20453/2014

Reportable

In the matter between:

STRIX LIMITED

APPELLANT

And

NU-WORLD INDUSTRIES (PTY) LTD

RESPONDENT

Neutral Citation: *Strix Limited v Nu-World Industries* (20453/2014) [2015] ZASCA 126 (22 September 2015).

Coram: Navsa, Saldulker, Swain and Dambuza JJA and Van der Merwe AJA

Heard: 17 August 2015

Delivered: 22 September 2015

Summary: Patent – alleged infringement of patent relating to overheat control in kettle comprised of multiple sensors spaced apart – interpretation of patent – allegedly infringing kettles falling within scope of claims – defence of invalidity of patent

– lack of novelty alleged – defence available even where revocation of patent not sought – allegedly infringing kettles not embodied in prior publication - obviousness expressly abandoned in court a quo, but raised on appeal – would be prejudicial to appellant to allow at this late stage – held that patent had been infringed.

ORDER

On appeal from: Court of the Commissioner of Patents (Preller J sitting as court of first instance).

The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order in the court below is set aside and the following is substituted:
 - ‘(a) the defendant is interdicted from infringing claim 1 of South African Patent 95/4779 (“the patent”) by making, using, disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06 or Sunlight SLD-105A IL thermally sensitive overheat controls or any other thermally sensitive overheat controls as claimed in claim 1 of the patent;
 - (b) the defendant is ordered to deliver up any product infringing the patent and any article or product of which an infringing product forms an inseparable part;
 - (c) as to damages:
 - (i) an enquiry is ordered as to the damages suffered by the plaintiff as a result of the infringement of the patent by the defendant, alternatively as to the amount of a reasonable royalty as contemplated in s 65(6) of the Patents Act, 1978 and payment of the amount found to be due to it;
 - (ii) in the event of the parties being unable to reach agreement as to the further pleadings to be filed, discovery, inspection or other matters of

procedure relating to the enquiry, any of the parties may make application to the court for directions in regard thereto;

- (d) the defendant is ordered to pay the plaintiff's costs, including the costs of two counsel to the extent that such were employed and including the qualifying and attendance fees of the expert witness Richard Moorhouse.'

JUDGMENT

Navsa JA (Saldulker, Swain and Dambuza JJA and Van der Merwe AJA concurring):

[1] This appeal is directed against a finding by the Court of the Commissioner of Patents (Preller J), that claim 1 of the patent in suit was not novel¹ and that in any event the import and sale of kettles by the respondent, Nu-World Industries (Pty) Ltd, did not infringe appellant's patent 95/4779. I shall, for convenience, refer to the appellant and respondent as Strix and Nu-World, respectively.

[2] The patent is entitled 'Liquid heating vessel'. Claim 1 which is central to the dispute reads as follows:

'1. A liquid heating vessel comprising: a liquid receiving container; an electrical heating element provided on or in thermal contact with the base of said container; a thermally sensitive overheat control arranged to operate in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element; said thermally sensitive overheat control comprising at least two thermally responsive sensors arranged in good thermal contact with, and at spaced apart locations on, the base of the container or the element, said sensors individually being operable, in the event only of said element overheating when the vessel boils dry or is switched on dry so as to interrupt or reduce the supply of electrical energy to the element.'

[3] The following are the agreed 8 integers in respect of claim 1:

¹ Although, as will become apparent later, the court below appears to have confused novelty and obviousness.

- ‘(a) a liquid heating vessel comprising:
- (b) a liquid receiving container;
- (c) an electrical heating element provided on or in thermal contact with the base of said container;
- (d) a thermally sensitive overheat control arranged to operate in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element;
- (e) said thermally sensitive overheat control comprising at least two thermally responsive sensors;
- (f) arranged in good thermal contact with;
- (g) and at spaced apart locations on, the base of the container or the element;
- (h) said sensors individually being operable, in the event only of said element overheating when the vessel boils dry or is switched on dry so as to interrupt or reduce the supply of electrical energy to the element.’

[4] At the priority date in 1994, thermally sensitive kettle controls were not novel. It is undisputed that integers (a)-(d) were part of the prior art. Integers (e) to (g) are critical in the determination of the present dispute. At the priority date of the patent in suit it was common to have electrical kettles with a thermally sensitive overheat protection switch in thermal contact with the heating element of the kettle which, when activated, would interrupt the supply of electrical energy to the element. That would happen for example when the vessel boiled dry or if it was switched on without any liquid in the vessel. A thermally sensitive switch in the base of the kettle was also in use at the priority date of the patent in suit. The actuator switch could either reset automatically upon the vessel cooling down or it might have consisted of a once-off switch which had to be replaced after serving its purpose, namely, turning off the electrical supply. In this judgment, for practical purposes, we use the words ‘sensor’ and ‘control’ interchangeably.

[5] The relevant part of the patent specification of the patent in suit states that the problem with existing switch controls of the type located in the base of the kettle as described above is that the temperature of the container base of the kettle is sensed at a *single* location. In the body of the patent specification an example is provided of how, because of a *single* thermally sensitive switch, problems could arise, namely:

‘The problem with existing controls of this type is that the temperature of the container base, and thus indirectly the temperature of the element, is sensed effectively only at a single location on the base. Thus if, for example, the vessel is accidentally placed on a work surface so that its base slopes, it is possible that as the vessel boils dry one part of the bottom of the container may still be covered by water, but another be uncovered. This part of the base will therefore overheat first, and if the overheat protecting means is arranged under the part of the vessel base still covered with water, severe overheating of the element may occur locally which is potentially very dangerous.’

[6] The body of the patent specification goes on to state the following:

‘The invention from one aspect seeks to provide an improved vessel of the above type. From a first aspect therefore, the invention provides a liquid heating vessel comprising: a liquid receiving container; an electrical heating element provided on or in thermal contact with the base of said container, a thermally sensitive overheat control arranged to operate in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element, said thermally sensitive overheat control comprising at least two thermally responsive sensors arranged in good thermal contact with, and *at spaced apart locations* on, the base of the container or the element, said sensors individually being operable, in the event of said element overheating so as to interrupt or reduce the supply of electrical energy to the element. Thus in accordance with the invention, at least two thermally responsive sensors are provided in close thermal contact with the base of the vessel container, which will allow the temperature of the base and element to be detected accurately at at least two spaced apart locations so that should the base or element overheat locally, at least one of the sensors may sense this quickly and operate to interrupt or reduce the power supply to the element, for example opening a set of electrical contacts remote from the sensor through suitable actuating means.’ (My emphasis.)

[7] Simply put, if regard is had to claim 1 and the constituent integers set out above, and indeed to Strix’s contentions in the court below and before us, the novelty claimed is that there are two thermally sensitive switches, spaced apart, on the base of the kettle, which provide an additional safety measure against overheating. The body of the patent specification states that the additional switch is a measure against the danger of overheating that could be caused by the kettle’s base being placed unevenly (at a slope) and the one switch not sensing that a part of the base is uncovered by water

which is potentially hazardous. In short, it was submitted on behalf of Strix that the patent related to an improved kettle with a novel feature of spaced apart sensors serving the aforesaid purpose.

[8] Nu-World, a South African company, makes, imports and sells, amongst others, electrical kettles. The litigation leading up to the present appeal commenced with Strix, a company registered in the Isle of Man, instituting an action against Nu-World in the court below seeking an order in the following terms:

- '(a) an interdict restraining the defendant from infringing claim 1 of South African patent 95/4779 by making, using, disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06, Sunlight SLD-105A IL or Jia Tai KSD688-A thermally sensitive overheat controls;
- (b) an order for the delivery up of any product infringing South African patent 95/4779 and any article or product of which an infringing product forms an inseparable part;
- (c) as to damages
 - (i) an enquiry as to the damages suffered by the plaintiff as a result of the infringement of the South African patent 95/4779 by the defendant, alternatively as to the amount of a reasonable royalty as contemplated in s 65(6) of the Patents Act, 1978 and payment of the amount found to be due to it;
 - (ii) an order directing that, in the event of an enquiry in terms of sub-paragraph (i) being ordered and the parties being unable to reach agreement as to the further pleadings to be filed, discovery, inspection or other matters of procedure relating to the enquiry, any of the parties may make application to the court for directions in regard thereto; and
- (d) costs of suit.'

[9] By agreement between the parties, merits and quantum were separated and the trial proceeded to determine whether Strix was entitled to interdictory relief. It was agreed that each of the kettles listed in the preceding paragraph had two thermally sensitive overheat controls. The question was whether a Nu-World kettle with any one of these controls constituted an infringement of claim 1 of the patent in suit. After hearing the evidence, including those of experts, Preller J reasoned and concluded as set out immediately hereafter. First, the learned judge rightly took into account that he

was addressing novelty and therefore considered prior art. He held that at the priority date the idea of two thermally sensitive switches in an electrical kettle was well known. In this regard Preller J took into account Strix's own prior patent registered in the United Kingdom during 1985 on which Nu-World relied. He went on to find that at the priority date the idea of more than one overheat control in kettles was not novel. He concluded that everything contained in integers (e), (f) and (h) was part of the prior art. Turning to integer (g) Preller J held that it did not necessarily form part of the prior art. Having regard to that integer and the patent specification he took the view that, to serve the stated purpose of providing a safety feature in the event of the kettle being tilted, the two thermally responsive sensors must be at substantially spaced apart locations on the base of the kettle. He went on to say:

'It is difficult to imagine such a person not immediately saying that to provide for such an eventuality the two overheat controls must be mounted as far apart as possible. It is an obvious solution for the problem and requires hardly any ingenuity. It follows then that the invention did not add anything new to the prior state of the art and that the defendant's defence on this basis must be upheld.'

From the above, and as will be explained in due course, it appears that the learned judge did not keep the distinction between lack of novelty (ie anticipation) and obviousness in mind.² He went on to find that the thermally sensitive controls in each of the allegedly offending kettles were too close together to serve the stated purpose and thus concluded that there was no infringement of the patent in suit. Consequently, the court below dismissed Strix's claim with costs. It is against that order and the aforementioned conclusions that the present appeal is directed.

[10] Before us Strix contended, firstly, that in the absence of a claim in reconviction by Nu-World for revocation of the patent, a defence that the patent in suit was not novel at the priority date was unavailable to the latter. Furthermore, so it was contended on behalf of Strix, the defence was, in any event, not specifically pleaded and could thus not be relied upon. It is common cause that there was no counterclaim for the revocation of the patent based on its invalidity for lack of novelty. Nu-World is adamant

² In this regard see T D Burrell *Burrell's South African Patent and Design Law* 3ed (1999) para 4.12.2 at 169-170 and the authorities there cited.

that this defence was nevertheless pertinently raised. In this regard Nu-World points out that in response to Strix's claim that the patent was at all relevant times valid and in full force and effect and was being infringed by Nu-World, the plea denied the validity and enforceability of the patent in suit as well as any infringement. According to Nu-World the defence was specifically predicated and raised in its summary of expert opinion, with reference to prior art. Moreover, so Nu-World asserted, it was made clear in the opening address by counsel on its behalf and referred to and dealt with extensively in the *viva voce* evidence and in argument at the conclusion of the case.

[11] Secondly, it was submitted on behalf of Strix that even if the defence of invalidity was available to Nu-World, the latter had not shown that the allegedly infringing kettles were simply embodiments of kettles described in a publication prior to the patent in suit. Lastly, Strix submitted that the court below erred in its restrictive interpretation of the words 'at spaced apart locations' as contained in integer (g), and the consequent finding that the overheat controls were not arranged in such a manner.

[12] At the outset it is necessary to consider whether, in the absence of a claim for revocation of the patent in suit the defence of invalidity on the basis of lack of novelty was available to Nu-World. Section 65(4) of the Patents Act 57 of 1978 (the Act) provides:

'In any proceedings for infringement the defendant may counterclaim for the revocation of the patent and, by way of defence, rely upon any ground on which the patent may be revoked'

Section 61 sets out the grounds of revocation of patents, including that the invention is not patentable in terms of section 25 (s 61(1)(c)).

Section 25 bears the title 'Patentable inventions', and section 25(5) reads as follows:

'An invention shall be deemed to be new if it does not form part of the state of the art immediately before the priority date of any claim to that invention.'

The relevant part of section 25(10) reads as follows:

' . . . [A]n invention shall be deemed to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms, immediately before the priority date of the invention, part of the state of the art . . . '

[13] A defence based on the invalidity of a patent on the statutorily recognised ground of lack of novelty is competent without a claim for revocation. That appears to be clear from the wording of s 65(4) read with the other sections of the Act referred to above. In *Clipsal Australia (Pty) Ltd & another v Trust Electrical Wholesalers & another* [2007] ZASCA 24; 2009 (3) (SA) 292 (SCA) at 295B-C para 15, Harms ADP, in dealing with almost identical wording contained in corresponding sections of the Designs Act 195 of 1993, said the following:

‘The defendant in infringement proceedings may counterclaim for the revocation of the design registration or, by way of defence, rely on any ground on which the registration may be revoked (s 35(5)). In this case, the respondents chose the second option, namely to rely by way of defence on the grounds that the design was neither new nor original as required by s 14(1)(a), which are grounds for revocation under section 31(1)(c). In addition they denied infringement, alleging that their products do not embody either of the two designs and differ substantially from them.’

The consequence of not applying for revocation was spelt out In *Thomas Grant v Winkelhaak Mines Limited* 1985 BP 143 (CP) at 152 where Nestadt J said the following:

‘As Mr Osborn pointed out, although the Patents Act allows for invalidity to be raised as a defence, it does not require that a counterclaim for revocation be coupled therewith (Section 65(4) of Act 57 of 1978). If invalidity is raised only by way of a defence it has no consequence beyond the parties to the action. Even if a defence of invalidity is successful, thereby defeating an infringement action, the patent remains on the register and the proprietor can sue others on the patent.’

See also *Roman Roller CC & another v Speedmark Holdings (Pty) Ltd* [1995] ZASCA 78; 1996 (1) SA 405 (A), at 412H-J and *Electro-Medical Corporation (Pty) Ltd v Madame et Monsieur Franchise (Pty) Ltd & others* 1996 BP 539 (CP), at 543B-544C. This disposes of the first point raised on behalf of Strix as recorded at the beginning of para 10 above.

[14] The next question then, is whether, in the present case the defence of invalidity on the basis of lack of novelty of the patent was indeed pleaded and whether novelty was indeed an issue in the trial. At the outset it needs to be acknowledged that Nu-

World's defence to Strix's particulars of claim was pleaded in general and vague terms and for reasons that will become apparent, perhaps designedly so. Nu-World's plea is a general denial of the plaintiff's claim that the patent in suit is valid and enforceable and that there was in fact an infringement. However, in a supplementary expert notice in terms of Uniform Rule 36(9)(b) there is an express and relatively detailed reference by Nu-World to prior art and the lack of novelty of the patent in suit is pertinently raised. Novelty as an issue was also distinctly raised by counsel on behalf of Nu-World during his opening address and the trial was conducted on the basis that it was an important issue in the case. That disposes of the second submission on behalf of Strix.

[15] That leads us to the next question, namely, whether the patent was invalid on the basis of lack of novelty. In this regard, it is necessary to be reminded that the onus of proving that the patent in suit was invalid rested on Nu-World.³ The prior art relied on by Nu-World is that embodied in Strix's own expired 1985 United Kingdom patent (GB 2181 598 A). The 1985 patent relates to thermally sensitive controls for electric heaters for containers such as kettles. The body of the patent specification records that thermally sensitive controls for heaters, which include a switch meant to interrupt power supply in the event of overheating, are well-known. It further indicates that the heaters to which the patent relates are either immersion heaters or 'similarly constructed heaters mounted externally to the containers in good thermal contact with a wall thereof, for example being brazed to the underside of the container base'. The 1985 patent then goes on to describe the use of such controls principally in immersion heaters. The problem sought to be overcome, so that patent specification asserted, was that in the event of failure of the one switch the power supply would not be interrupted leading to a potentially hazardous situation. That patent sought to introduce an effective back-up protection in the form of a second improved thermally sensitive switch as a further safety measure in the event of the failure of the first. The features described in this and the preceding paragraph would encompass integers (a) to (e) of the patent in suit.

³ See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 629D-F.

[16] The patent in suit acknowledged prior art which encompassed integers (a) to (d). It is clear that integers (e) to (h) are claimed in combination. The problem for Nu-World is that the 1985 patent does not describe two thermally responsive sensors arranged in good thermal contact with the base of the container. Although the 1985 patent describes two thermally responsive sensors, one being a bimetallic actuator or sensor (item 11 on Figure 1 of the 1985 patent) and the other a push-rod or thermal fuse (item 27), neither of these sensors are in good thermal contact with the base of the container and it is only the bimetallic sensor that is in good thermal contact with the element (item 5). The bimetallic sensor is located adjacent to where the 'hot return' of the element is brazed to the heater (element) head but the thermal fuse is placed a distance apart from the 'hot return' and is in poor thermal contact with the element. Integers (e) and (f) in combination are not embodied in the 1985 patent. Indeed, integer (f) is conspicuously absent. Furthermore, and critically, the 1985 patent does not describe two thermally responsive sensors spaced apart on the base of the container. Thus, critically, integer (g) also does not form part of the prior art. The problem that the patent in suit sought to address would occur when one part of the kettle base is uncovered with water and would overheat at that spot whilst another part of the base would be covered. The effect of the second control would be that the control at the part that overheats because it is dry would activate and cut off the electricity supply. The 1985 patent dealt in the main with immersion heaters, in which an element to which the thermally sensitive controls were linked would protrude into the container vessel from a side wall of the kettle container, and perhaps extend to its base. The juxtaposition of the two controls in order to deal with the safety problem that might ensue in the event of the kettle being tilted was not considered or addressed. Simply put, the additional safety feature in the form of two thermally sensitive controls *spaced apart* and in good thermal contact with the base to deal with the problem that might present itself, when the kettle is tilted, does not occur in the prior art.

[17] It thus appears to me to be clear that the combination of integers (e) to (g) were not embodied in prior art and constituted a novel safety feature as described above.

[18] It is true, as noted by the court below, that the patent specification provided as follows:

‘ . . . to obtain a good response, the sensors should be spaced apart by a *substantial* distance.’
(My emphasis.)

And further, later in the specification:

‘As stated above, preferably only two actuators are provided, most preferably spaced apart by substantially 180°.’

‘Substantial’ is defined in the *Shorter Oxford Dictionary*, amongst others, as follows:

‘5. Of an act, measure, etc.: having force or effect, effective, thorough.’

The adjective is relative to subject matter. In this particular instance distances have to be considered in relation to the relatively limited extent of the base of the kettle. It also has to be borne in mind that the controls being spaced apart has the purpose described above, namely, to provide a safety measure in the event of the kettle being tilted. In short, as will be demonstrated below, an 8 millimetre distance between the controls was ‘significant’ enough for the controls to be effective.

[19] I now turn to deal with Preller J’s conclusion that there was no infringement of the patent in suit because the controls in the allegedly offending kettles were too close together to be effective as a safety feature. In coming to the aforesaid conclusion, he disregarded the tests conducted on the kettles in question by Nu-World’s own witness, Mr Mark Wheeler, who completed a report setting out the nature and the results of the tests which he had conducted on the kettles in question. The report was compiled to demonstrate that the controls in each of the kettles, which were the subject of the litigation, were substantially ineffective to serve the purpose spelt out in the patent specification, namely, to act as a safety feature in the event of the kettle being tilted. Ironically, the test results proved the controls to be relatively effective.

[20] In three of the kettles, namely Sunlight SLD-105A IL, Liang Ji LJ-06 and Liang Ji LJ-06A the distances between the sensors were 8 millimetres, 8 millimetres and 12 millimetres respectively. In Jia Tai KSD688-A there was a bridge between the sensors and the distance was zero millimetres.

[21] Mr Wheeler's evidence during the trial that the further apart the sensors the more effective they would be to serve the purpose referred to in the specification and in the preceding paragraph is undoubtedly correct. His evidence that a Strix kettle with a 37 millimetre distance between the sensors was effective to serve the purpose is also uncontested. Despite Mr Wheeler's report stating that the controls in the Nu-World kettles were ineffective, and despite his protestations when he was testifying that this was indeed so he conceded, with reference to the tests he conducted, that a Nu-World kettle with an 8 millimetre distance between the sensors, when filled with 120 millilitres of water would have one of the sensors activated when the kettle was tilted at 19 degrees. The totality of tests conducted and reported on by Mr Wheeler show that in the Nu-World kettles with an 8 millimetre distance between the sensors one would be activated when filled with volumes of water varying from 40 to 120 millilitres, when tilted at angles ranging from two to 19 degrees. The Nu-World kettle with sensors spaced 12 millimetres apart would obviously be even more effective.

[22] It must be borne in mind that the patent in suit did not claim perfection but claimed that when the kettle was placed on a slope a second spaced-apart actuator which was uncovered by water as a result of it being tilted would serve as a safety feature and be activated and cut off the electricity supply. The Jia Tai KSD688-A kettle with a bridge between the two sensors and which effectively, at the most, had a distance of 0,5 millimetres between the two sensors would be ineffective and would not serve the purpose stated in the patent specification. In respect of that kettle the infringement would not have been proved.

[23] It is necessary to record that a defence by Nu-World based on a mediation agreement concluded upon direction of the Supreme People's Court in China was specifically abandoned before us.

[24] In respect of the remaining kettles, Preller J disregarded the evidence and erred in concluding that in relation to them there was no infringement.

[25] One further aspect requires brief attention. During the trial, counsel on behalf of Nu-World was emphatic that he was not relying on obviousness as a defence. In an exchange in the court below the following was said by counsel on behalf of Nu-World:

‘The Defendant is not relying on obviousness, but it is relying on old art and as I made it clear when I examined, and it ought to have been clear, I rely for the purposes of the Defendant’s case on the 85 patent.’

Before us the same counsel insisted that he could rely on obviousness as a ground of challenge to the validity of the patent and was not abandoning it. He took the view that it was a point of law which could be decided on the evidence that was adduced. I disagree. The defence of obviousness was never pleaded. The case was never conducted on the basis that it was contemplated as a defence. More importantly, that defence was expressly disavowed on behalf of Nu-World. The evidence required to establish a defence of obviousness is of a different nature to that required to establish a defence in relation to a defence of a lack of novelty. In this regard see *Burrel’s* op cit at 4.12.2 and *Veasey v Denver Rock Drill and Machinery Co Ltd* 1930 AD 243 at 281 *et seq.* This is not a case where allowing the defence of obviousness to be raised before us would not be prejudicial.⁴ I do not intend to deal with this aspect any further.

[26] Following on the aforesaid conclusions the following order is made:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order in the court below is set aside and the following is substituted:

- ‘(a) the defendant is interdicted from infringing claim 1 of South African Patent 95/4779 (“the patent”) by making, using, disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06 or Sunlight SLD-105A IL thermally sensitive overheat controls or any other thermally sensitive overheat controls as claimed in claim 1 of the patent;
- (b) the defendant is ordered to deliver up any product infringing the patent and any article or product of which an infringing product forms an inseparable part;
- (c) as to damages:

⁴ See *Alexkor Ltd & another v Richtersveld Community & others* [2003] ZACC 18; 2004 (5) SA 460 (CC) paras 43–44.

- (i) an enquiry is ordered as to the damages suffered by the plaintiff as a result of the infringement of the patent by the defendant, alternatively as to the amount of a reasonable royalty as contemplated in s 65(6) of the Patents Act, 1978 and payment of the amount found to be due to it;
 - (ii) in the event of the parties being unable to reach agreement as to the further pleadings to be filed, discovery, inspection or other matters of procedure relating to the enquiry, any of the parties may make application to the court for directions in regard thereto;
- (d) the defendant is ordered to pay the plaintiff's costs, including the costs of two counsel to the extent that such were employed and including the qualifying and attendance fees of the expert witness Richard Moorhouse.'

M S Navsa

Judge of Appeal

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