

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION – PORT ELIZABETH

CASE NO: 1122/10

HEARD: 08 JUNE 2012

DELIVERED: 10 JULY 2012

In the matter between:

LINDILE MBOTYA

PLAINTIFF

v

MINISTER OF POLICE

DEFENDANT

JUDGMENT

MAGEZA AJ:

Background

[1] Plaintiff herein claims damages in the amount of R250 000 for an alleged unlawful arrest and detention. In the alternative, plaintiff sues on the basis that the arrest and detention was undertaken maliciously and without probable cause.

[2] It is common cause that the arrest and detention was carried out by a member of the South African Police Services (SAPS) in the employ of the defendant on 15 June 2009. Defendant was subsequently released without having been made to appear in court some two days later on 17 June 2009. It is also common cause that the arresting member was one Warrant Officer Mitchell who was at the time stationed at Mount Road police station, Port Elizabeth.

[3] Defendant pleads that plaintiff was lawfully arrested without warrant in accordance with the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977 based on Mitchell's reasonable suspicion of the plaintiff having committed an offence contemplated in schedule 1 of the Act, to wit Robbery of a motor vehicle.

[4] The issues that arise for consideration are the following:

- (i) Whether the arrest was effected at Korsten Road as stated by plaintiff or at New Brighton Police station as contended by the defendant.
- (ii) Whether on the facts, Warrant Officer Mitchell had formed a reasonable suspicion that the plaintiff had committed an offence falling under Schedule 1 of the Act.
- (iii) Whether he applied his mind properly in exercising his discretion to arrest the plaintiff.
- (iv) If not, then the quantum of plaintiff's damages occasioned by the arrest and detention.
- (v) liability for costs.

The evidence.

[5] Plaintiff testified that he is employed by Volkswagen –(South Africa) at its Uitenhage vehicle manufacturing plant. He was on 15 June 2009 driving a Blue Polo sedan vehicle leased to him by his employer. He woke up that Monday morning with a hangover and decided to call a friend, one Monde, with whom he had been out drinking the night before. He went to pick Monde up and this was at around 08h00. They both went to have drinks at a tavern situate in his area.

[6] An hour later, the two men went to pick up his father in order to drive him to hospital for medical attention. They returned from hospital thirty minutes later and by 10h00, he had dropped his father off at home. On the way to Korsten and whilst in New Brighton, they met two more of his friends near Nangoza Jebe Hall. One of these friends is named 'Beast'. In total there were five of them, although it is not clear when the fifth person had joined them. At a shop in Korsten, they bought prepared liver which they ate in the car and later left this place and proceeded back to the New Brighton.

[7] On the way to New Brighton and at 'Barry's corner' at the intersection of Kempston Road and Commercial Road, they saw a police-van parked at a set of traffic lights. Plaintiff says he brought his vehicle to a stop at a red traffic light next to the police-van in which he noticed were two police officers. One of the officers "indicated with his head" that he must stop.

He crossed over and came to a stop next to Standard Bank and the policemen followed and parked behind his vehicle. Both police officers approached with firearms pointed at them. One policeman was positioned behind their vehicle whilst the other was next to the window on the

driver's side. This officer instructed him to come out of the vehicle and he searched him without informing him why he was being searched. They also searched his friends.

[8] The police found a knife from one of his friends as well as a police-issue pepper spray pump from one Adam. They were all instructed to sit on the roadside kerb with legs crossed whilst the vehicle was being searched. Nothing more was found in the vehicle. Another police vehicle with two more plainclothes officers arrived and began to assist the others in the searches. All this lasted for about an hour.

[9] Plaintiff stated that within the vicinity at which they had been stopped was a security vehicle transporting money and the area where his car was stationed was cordoned off. This according to him, made his situation worse because as this was a main road, there were taxis passing through and people saw him in that undesirable situation. The police took them to New Brighton police station. He was driven in his car by one of the policemen. At the police station, they were handed pens and paper and instructed to write what they had been doing at Korsten.

[10] The police did a criminal record background check on all of them and some pre-dating crime related records on some of them were generated by the police record computerised database. In his case, there existed a record of his having been charged in 2008 with the unlawful possession of an unlicensed firearm, a case which had subsequently been withdrawn. A police woman at New Brighton recognised 'Beast' as a commonly known and regular criminal offender. They were told that they would be taken to Algoa police station on allegations that they had been involved in a robbery. They were taken to Algoa police station at about 13h00 where

they were then locked up and detained.

[11] On Wednesday 17 June, the investigator of the Robbery case, Warrant Officer Ferreira, came and took his fingerprints and asked him why he associated himself with criminals. Mr Ferreira said he saw no reason to keep them in detention and that their friend Adam, who had been identified by a witness at New Brighton, would be the only one to remain in custody. At Algoa police station they were kept locked up in a holding cell for 2 (two) hours and subsequently transferred to the ordinary cells around 16h00.

[12] They were ordered to fetch dirty blankets which had a pungent-smelling odour similar to that of urine with which they were to sleep. In the cell in which they were locked up, there were water puddles on the floor; the walls were dirty; windows did not open and the non-flushing toilet emitted an awful smell. There was a water tap next to the toilet cistern from which they had to draw water. In his view the place was comparable to a pigsty where no human being should be kept. There were no other detainees except his group. He was released on Wednesday 17 June by Warrant Officer Ferreira.

[13] Cross-examined by Mr Dala for the defendant, plaintiff said the only items found on his group when they were searched at Kempston road were the knife and pepper-spray. He was not handcuffed when driven in his car to New Brighton and it had not been conveyed to him that he was at that stage under arrest. It was put to him that the police had initially asked them a few simple questions to which they could not provide straight answers. He denied that the second policeman, one Warrant Officer Van Huysteen who had been with Mr Mitchell had spoken to him.

He denied that the police had asked for his permission to search his vehicle. He said he did not know that the pepper-spray pump was a police-issue spray. Mr Dala put it to him that Warrant Officer Mitchell had only carried out their arrest at New Brighton police station after informing him that one of them, Mr Adam, had been pointed out as having been involved in an earlier Robbery in Sidwell. Plaintiff then closed his case.

[14] The defence called Warrant Officer Mitchell to testify. He said he has been a member of the SAPS for some 19 years and had arrested Plaintiff on 15 June whilst he and Warrant Officer Van Huysteen were doing crime prevention patrols on Kempston road in a business and industrial area notorious for bank and business robberies. At the intersection of Commercial and Kempston roads, they noticed on the opposite side of the road a blue Polo Player motor vehicle with 5 (five) occupants. These occupants appeared jovial and on realising they had noticed them, changed their demeanour and appeared to become somewhat nervous. He asked the driver to stop and one of the occupants sitting in the back tried to hide. The plaintiff alighted from the vehicle and came towards them and they formed the impression plaintiff was doing so to dissuade them from approaching the vehicle. His colleague spoke to plaintiff whilst he himself requested the others to come out of the vehicle.

[15] One of the men in plaintiff's vehicle was known to them as 'Beast' and as a notorious criminal offender. He saw something in the pocket of Adam and asked him if he had a weapon in his possession. This turned out to be a police-issue pepper-spray. One of the occupants had a maroon knife with a clip handle. They became suspicious and asked the men to come with them to New Brighton police station to check for outstanding criminal case warrants and to conduct further general background checks.

[16] The group was informed and were aware that as police officers, they were at that stage simply investigating and that they had not been placed under arrest. He admitted that at that stage they did not have any evidence to arrest anyone of them but had entertained a suspicion which they wanted to follow up with the background checks. During his testimony, Mr Mitchell emphasised that crime is a huge problem in that specific area and that it is a banking area with shops and businesses attended by frequent robberies.

[17] On arrival at New Brighton police station, he was approached by a Mr Botha, an employee of British American Tobacco Company, who informed him that he had two passengers in his vehicle who had been robbed and their vehicle hijacked earlier in the Sidwell area, a few kilometres from New Brighton. He did not know why Mr Botha was at the police station but said he just appeared out of nowhere. One of these men was a Mr Petrus Johannes Roberts. He interviewed this Mr Roberts the driver of the vehicle that had allegedly been hijacked. Roberts deposed to a statement in which he pointed out Mr Adam who was with plaintiff as one of the hijackers. In the statement Roberts stated that Adam had, as at the time of seeing him at New Brighton police station, had a change of clothing from that worn by him earlier during the alleged Robbery.

[18] Mr Mitchell said that he telephonically contacted the investigating officer of that Robbery matter, one Warrant Officer Ferreira. Mr Ferreira asked him if there was red mud on the plaintiff's vehicle and he told him he had indeed seen red mud. It was explained to him that there was mud of that colour at the place where the Robbery had taken place. At this point Mr Mitchell said they always follow all avenues to assess whether

there is reason to believe that a crime had been committed and a suspect implicated. The background check also yielded police information of previous offences of Robbery and unlawful possession of firearms. With the report of the hijack and mud connected to the plaintiff's vehicle, he deemed it necessary and reasonable to arrest the plaintiff.

[19] Cross-examined by Mr Dyer for plaintiff, Mr Mitchell stated that he personally interviewed Mr Roberts and that prior to this he knew that there was no basis to arrest the plaintiff. This remained the case even after the background checks yielded the information relating to past brushes with the law. There were no outstanding warrants and the possession of the knife and pepper-spray pump was not sufficient a basis to suspect the commission of an offence and on which to arrest. He had not known any direct link to a crime under investigation until the approach by Mr Botha to him.

Once the statement was deposed to by Mr Roberts and he had spoken to the investigator Warrant Officer Ferreira and had been informed of the mud which he observed on plaintiff's vehicle, this confirmed to him in his mind that not only Adam was implicated, but that plaintiff was equally a suspect in respect of the newly reported robbery. He said police experience is that criminals favour the use of Polo Player vehicles as these have, *inter alia*, hidden compartments useful to hide illegally possessed items. These types of vehicles are also regularly hijacked from innocent owners. In the work they do, police work as a team and have back up police teams and local business owners also support their crime fighting efforts.

[20] Continuing his testimony, he said when they first stopped the plaintiff at Korsten, they had enquired if he had any objection to them

searching his vehicle to which he said he had none. This meant to them that he had consented to the search. They also did the background searches because they did not believe the plaintiff was telling them the truth. Without following up with these searches during crime prevention patrols, it would not be possible to successfully achieve the goals of crime prevention. Bringing plaintiff and his friends to the New Brighton police station was an imperative as they could not possibly access the information without the use of computers. No one was placed in a police van when driving to the police station as none were under arrest. He said no-one saw the plaintiff when sitting on the side-walk as they were behind the vehicles.

[21] Mitchell said he made the decision to arrest all of them as suspects himself based on all the facts he had at his disposal as set out in his evidence. He itemised these reasons collectively as follows:

- (i) They had lied to them from the beginning;
- (ii) There was a knife and police issue pepper-spray in their possession;
- (iii) 'Beast' a well-known offender was in their company;
- (iv) The group had behaved suspiciously;
- (v) The police printout showed involvement in other previous offences contrary to what they said;
- (vi) The statement of Mr Roberts implicated Adam and the red mud on the car connected the vehicle with the allegations of a motor vehicle robbery;
- (vii) Robbers generally work in large groups and more often than not drive more than one vehicle.

He also said that at New Brighton police station, he released the plaintiff's vehicle to representatives of Volkswagen South Africa on the instructions of Warrant Officer Ferreira as investigator. He denied dealing with plaintiff in any manner suggestive of malice.

The defence closed its case without calling Warrant Officers Van Huysteen and/or Ferreira.

Analysis.

[22] During the course of his testimony it was quite clear that Mr Mitchell is a well-trained police officer with vast amounts of experience in crime prevention. He certainly came across as a dedicated police officer who took his responsibilities seriously and with an honest commitment to do his best to combat crime given the well-known unacceptable high levels at which robberies and other associated crimes continue to occur. His testimony that the area in which they were patrolling was notorious for robberies was not disputed.

[23] In Mr Mitchell's earlier evidence, he admitted to the court that even when they arrived at New Brighton police station and prior to interviewing Mr Roberts, he had no basis to arrest the plaintiff. He said the earlier searches which yielded a knife and a pepper-spray can, as well as the background checks which generated the computerised background information relating to past brushes with the law was not of itself enough to justify any arrest. He had not known any direct link to a crime under investigation until he was approached by Mr Botha and then interviewed Mr Roberts. The statement of Mr Roberts implicating Adam in the robbery

on the one hand, and the red mud on plaintiff's vehicle provided the foundation that led to him entertaining a strong suspicion in his mind that plaintiff had also been involved in the robbery.

Legal position.

[24] Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 provides that, "a peace officer may without warrant arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1".

The jurisdictional requirements have come to be stated as follows, that for a lawful arrest under section:

- (i) the arrestor must be a peace officer;
- (ii) the arrestor must entertain a suspicion;
- (iii) the suspicion must be that the suspect committed an offence referred to in schedule 1;
- (iv) the suspicion must rest on reasonable grounds.

The test to be applied is an objective test.

- See Duncan v Minister of Law and Order 1986(2) SA 805 (A) at 818 G-H; Nkambule v Minister of Law and Order 1993 (1) SACR 434 (T) at 436 A-B; Mvu v Minister of Safety and Security and Another 2009 (2) SACR 291 (GSJ) para 9; Olivier v Minister of Safety and Security and Another 2009 (3) SA 434 (W) at 440G.

It is not in dispute that Warrant Officer Mitchell is such a Peace Officer as defined in the Act.

[25] "The test whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980(4) SA 28 (E) at 33H). Would a reasonable man in the second defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information, a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion not certainty. However the suspicion must be based on solid grounds. Otherwise it will be flighty or arbitrary, and not a reasonable suspicion." – See Mabona and Another v Minister of Law and Order and Others 1988 (2) SA 654 (SE) at 658 E-H. See also S v Purcell-Gilpin 1971 (3) SA 548 (RA)

[26] As regards onus of proof in these matters it is settled law that a plaintiff need only allege the deprivation of his freedom and require of the defendant to plead and prove justification. It is thus the defendant who bears the onus of proving the lawfulness of the arrest. – See Minister of Law and Order v Hurley 1986(3) SA 568 (A) at 589 E-F; Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) per Grosskopf JA.

Did Warrant Officer Mitchell entertain a belief that was reasonable in the

circumstances ?

[27] For purposes of this decision, I will accept the evidence of Mr Mitchell that he only carried out the arrest once he received the report from Ferreira after having noted Roberts' statement and not during the earlier search conducted on Korsten Road, North End.

He said having taken a witness statement from Mr Roberts he called Warrant Officer Ferreira who asked him if there was red mud on the plaintiff's vehicle and he in turn told Ferreira he had indeed seen red mud on plaintiff's vehicle. Ferreira then commented to him that there was mud of that colour at the place where the Robbery had taken place. Roberts himself did not implicate plaintiff in the robbery. On the basis of the report of red mud connected to the plaintiff's vehicle, he deemed it necessary and reasonable to arrest the plaintiff.

[28] Ferreira did not come out to New Brighton even though Sidwell, where the robbery was alleged to have taken place, was no more than a brisk drive to New Brighton where the plaintiff's vehicle was. Ferreira was the investigating officer in respect of that alleged robbery and one would expect that in those circumstances a reasonably vigilant police officer would follow up such information himself and not to outsource a function as invasive as an arrest over to another police officer when the need to follow up on such crucial evidence was patent. In fact, when Mr Botha informed Mitchell that there were passengers in his vehicle who had been robbed and who wanted to make a statement about a robbery already having an investigator – Ferreira, quite why it was necessary for Mr Mitchell to take this statement and not call Ferreira to come out given the meagre distance is unexplained. Mitchell told this court that as policemen doing crime-prevention shifts, they always follow all avenues to assess

whether there is in any given situation reason to believe that there has been possible involvement in the commission of a crime. Indeed this is the very function that Warrant Officer Ferreira should have served in light of the fresh occurrence of the incident.

[29] Ferreira did not attend at New Brighton and although in Mitchell's decision making process, the persuasive information upon which he deemed it necessary to arrest plaintiff came from Ferreira, the defence did not call Ferreira to testify in support of the contention that he enquired as to the presence of red mud, a factor which led to Mitchell effecting the plaintiff's arrest. There was no suggestion that Ferreira was unavailable but the defence elected to rely only on the evidence of Mitchell as a single witness.

[30] There is no explanation as regards what the basis was for the release of the plaintiff's vehicle to representatives of his employer when it was suspected of being an instrument utilised in a robbery offence. This release was done before any evidentiary material was collected for forensic evaluation and evidential proof. The arrest of plaintiff was not carried out simultaneously with an intent to preserve the very alleged evidence forming the foundation for his arrest.

[31] The statement of Roberts is also of little assistance to Mr Mitchell. This statement only mentions one vehicle, a "white Bakkie LDV" as the vehicle used by the Sidwell robbers. It contains this allegation that he only saw three robbers who alighted from this LDV.

[32] Mr Ferreira's further conduct in summarily releasing the plaintiff and

others on 17 June (save for Mr Adam) lends itself to further uncertainty as regards what the true telephonic exchange was between himself and Mr Mitchell that Monday midday at New Brighton police station. The court never had the benefit of this testimony and in my view it was incumbent upon the defence to place this on record in its efforts to discharge the onus resting upon it to justify the arrest.

[33] There is a further difficulty. Plaintiff was employed and this would have been confirmed by the employer when contacted to verify the ownership of the vehicle. The police made contact with plaintiff's employer and the ownership status of the vehicle and his being in their employ must needless to say have been confirmed by the employer. In such circumstances, there being clear evidence of employment and a settled home address, Roberts not having connected the plaintiff with the incident and the evidence of connecting red mud being foregone, very little else remained that could have persuaded a reasonable police officer to arrest.

[34] I am not persuaded that Mr Mitchell had a reasonable basis at all to arrest the plaintiff and he failed to properly apply his mind to Roberts' report. His conduct fell far too short of that expected of a police officer in his position with the scant information he had at his disposal.

Quantum.

[35] Plaintiff's employer was informed of his arrest by Warrant Officer Mitchell and it is reasonable to imagine that word would have spread quickly among his co-workers. At Algoa police station he said they were kept locked up in a holding cell for 2 (two) hours and subsequently transferred to the ordinary cells around 16h00.

They were ordered to fetch dirty pungent-smelling blankets with which they were to sleep. In the cell they were locked up in, he said there were water puddles on the floor; the walls were dirty; windows did not open and the non-flushing toilet emitted an awful smell. There was a water tap next to the toilet cistern from which they had to draw water.

[36] In *Thandani v Minister of Law and Order 1991 (1) SA 702 (E) at 707B*, Van Rensburg J observed:

"In considering *quantum*, sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitute a serious inroad into the freedom and rights of an individual."

[37] Visser and Potgieter, Law of Damages 2nd edition at 475 outline some of the factors to be taken into account in the awarding of damages to include:-

"The circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and the nature (e.g. solitary confinement) of the deprivation of liberty; the status, age and health of the

plaintiff; the extent of publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendants; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name have been infringed; the high value of the right to physical liberty; the effect of inflation; and the fact that the *action injuriarum* also has a punitive function.”

[38] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93 d – f, Bosielo AJA (as he then was) commented:

“In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed *solatium* for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation is viewed in our law...Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325 para 17; *Rudolph and Others v Minister of Safety and Security* 2009 (5) 94 (SCA) ([2009] ZASCA 39) paras 26-29).”

[39] In an unreported decision of this Court per Jones J in *Olgar v Minister of Safety and Security* [ECD 18 December 2008 (case 608/07) at para 16], the following was stated:

“In modern South Africa a just award for damages for wrongful arrest and detention should express the importance of the constitutional right to

individual freedom, and it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth. These considerations should be tempered with restraint and a proper regard to the value of money, to avoid the notion of an extravagant distribution of wealth from what Holmes J called the 'horn of plenty', at the expense of the defendant."

[40] In another unreported judgment of this division, Sandi J in Juan Jonathan van der Merwe v Minister of Safety and Security [case number 2565/2009], (in which reference is also made to the decision of Plasket J in Petersen v Minister of Safety and Security (1173/2008)), Plaintiff was arrested on Friday and kept in custody until his release on the Monday. At paragraph 52 the Court observed as follows:

"On the question of quantum I have been referred by Mr Cole to unreported decisions of this division. The first one is the matter of Fubesi v The Minister of Safety and Security case no. 680/2009 where a plaintiff was awarded damages in the sum of R80 000.00 for arrest without warrant and a detention which lasted for three days and about 18 hours. In the matter of Tommy Petersen v The Minister of Safety and Security 1173/2008 the plaintiff was assaulted by members of the police force. He was arrested and dragged from his home in only a pair of shorts. At the police station he was assaulted. He was arrested at 20h00 and released at about 04h00. He claimed damages for unlawful arrest and detention and for the assault on him. In respect of the unlawful arrest and detention the plaintiff was awarded R60 000 and R120 000 in respect of the assault which was a fairly serious one. Having considered the fact of this matter and the judgment to which I have been referred I am of the view that the amount of R120 000 would be reasonable in respect of the unlawful arrest and detention. In so far as the assaults are concerned I propose to award an amount of R2000 in respect of each assault"

[41] I am also mindful of the decision in Mvu v Minister of Safety and Security and another 2009(6) SA 82 (GSJ) in which Willis J, feeling suitably chastised by the Supreme Court of Appeal (*Seymour* decision) acknowledged the conservative approach of our Courts and awarded damages in the sum of R30 000 for a day's detention. (see also Ramakulukusha v The Commander Venda National Force 1989(2) SA 813 (V)). All these decisions however are influenced in the final determination by the specific facts of each case.

[42] Taking into account all of the afore-going, I make the following order:

42.1 Judgment is entered in favour of Plaintiff:

42.2 In respect of the unlawful arrest, attendant *contumelia* and detention between the afternoon of 15 June 2011 to 17 October 2011 damages in the amount of R55 000.00 are awarded.

42.3 Defendant is ordered to pay interest on the damages awarded above at the legal rate from a date fourteen days after date of this judgment to date of final payment.

42.4 Costs of suit together with interest calculated at the legal rate from a date fourteen days after the *allocator* to the date of payment. These to include costs occasioned by the postponements ordered by Pillay J on 15 June 2011 and by Eksteen J on 5 March 2012.

MAGEZA AJ

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