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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 57858/2021

**REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
DATE: 05/04/2024**

In the matter between:

AD TRADE BELGIUM SPRL PRIVATE LIMITED

Applicant

and

THE CENTRAL BANK OF GUINEA

First Respondent

THE REPUBLIC OF GUINEA

Second Respondent

THE STANDARD BANK OF SOUTH AFRICA

Third Respondent

SOUTH AFRICAN RESERVE BANK

Fourth Respondent

AND

THE STANDARD BANK OF SOUTH AFRICA

Applicant

and

AD TRADE BELGIUM SPRL PRIVATE LIMITED

First Respondent

THE CENTRAL BANK OF THE REPUBLIC OF GUINAE
THE REPUBLIC OF GUINAE
SOUTH AFRICA RESERVE BANK

Second Respondent
Third Respondent
Fourth Respondent

In re:

AD TRADE BELGIUM SPRL PRIVATE LIMITED

Plaintiff

and

THE CENTRAL BANK OF GUINEA

First Defendant

THE REPUBLIC OF GUINEA

Second Defendant

THE STANDARD BANK OF SOUTH AFRICA

Third Defendant

SOUTH AFRICAN RSERVE BANK

Fourth Defendant

JUDGMENT

Marx du Plessis, AJ

Introduction

[1] On 22 November 2017 the International Chamber of Commerce, International Court of Arbitration made an award (***the arbitration award***) against The Republic of Guinea (***Guinea***) in favour of the Ad Trade Belgium SPRL Private Limited (***Ad Trade***).

[2] The arbitration award was made an order of court on 15 November 2018 under case number 48487/2018.

[3] During November 2021 Ad Trade issued summons against Guinea, The Central Bank of Guinea (***the Central Bank***), Standard Bank of South Africa (***Standard***

Bank) and the South African Reserve Bank (**SARB**) for, *inter alia*, declaratory relief and payment of the amounts owed to it by Guinea in terms of the arbitration award. Only the first defendant, The Central Bank, has defended the action and delivered a plea.

[4] Standard Bank is cited as the third defendant in Ad Trade's action under case number 48487/2018. Standard Bank has not entered appearance to defend the action and has not delivered a plea. Standard Bank has however delivered a discovery affidavit.

[5] On 20 June 2023 Ad Trade caused a request for further particulars to be delivered to Standard Bank and to which Standard Bank delivered a response.

[6] In Standard Bank's response to Ad Trade's request for further particulars, Standard Bank by and large states that the information and/or documentation sought is no longer in Standard Bank's possession or that the information sought by Ad Trade is irrelevant alternatively not required for purposes of preparing for trial further alternatively not a permissible interrogatory.

[7] Ad Trade being dissatisfied with Standard Bank's response launched an application for an order compelling Standard Bank to deliver to it the further particulars requested. Standard Bank opposes the relief sought.

[8] After receipt of Ad Trade's replying affidavit, Standard Bank launched an application to strike out certain paragraphs in Ad Trade's replying affidavit, asserting that the content of these paragraphs raise new matter and/or make out a case in reply.

[9] In response to Standard Bank's application to strike out, Ad Trade launched an application for leave to deliver a supplementary affidavit setting out the reasons why the allegations sought to be struck from its replying affidavit were not disclosed in the founding affidavit, disclosing certain bank account statements discovered by Standard Bank and reporting the sale of a property belonging to Guinea. This application too was opposed by Standard Bank.

[10] The application to strike out, the application for leave to file a supplementary affidavit and the application to compel delivery of the further particulars proceeded to argument before me over a period of two days.

Standard Bank's application to reopen

[11] Shortly before handing down the judgment in respect of the application to strike out, the application for leave to file a supplementary affidavit and the application to compel delivery of further particulars, I was requested by Standard Bank not to do so as Standard Bank sought to place further material before me.

[12] The parties engaged one another regarding the nature and extent of the further material to be placed before me in an attempt to reach an agreement on these aspects. No agreement could be reached.

[13] In view of the delay that had already occurred, I proceeded to direct that Standard Bank, having indicated its intention to do so, was to launch its intended application for the reopening of the application to compel before me by no later than 13 October 2023, failing which I would deliver my judgment in respect of the applications argued before me.

[14] Standard Bank proceeded to deliver its application to reopen the application to compel before me, which Ad Trade opposed. The matter proceeded to argument before me on 7 December 2023.

[15] In terms of the application to reopen, Standard Bank seeks leave to *“file supplementary submissions in regard to the relevance of, and the bearing upon the first application of the application instituted by the first respondent on 2 August 2023, in which the first respondent seeks to compel further particulars from the second respondent.”* (sic)

[16] It appears from Standard Bank's founding affidavit, and the documents uploaded onto the Caselines court file, that Ad Trade requested further particulars for

trial from The Central Bank, and that when The Central Bank failed to deliver the particulars requested, Ad Trade launched an application to compel delivery of the further particulars against The Central Bank.

[17] This event, the launching of an application to compel further particulars against The Central Bank, appears to be what motivated Standard Bank to launch its application to reopen and which forms the basis of the further material it seeks leave to place before me.

Test for reopening of a hearing

[18] Whether or not to allow the reopening of a matter falls within the discretion of the court. This discretion is to be exercised judicially and upon consideration of all relevant factors and is a matter of fairness to both parties.¹

[19] The relevant factors to be considered include the following:

“(i) *The reason why the evidence was not led timeously.*

(ii) *The degree of materiality of the evidence.*

(iii) *The possibility that it may have been shaped to relieve the pinch of the shoe.*

(iv) *The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings de novo.*

¹ Mkwana v Van der Merwe and another 1970 (1) SA 609 (A) at p 616B

(v) *The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still in medias res as it were.*

(vi) *The healing balm of an appropriate order as to costs.*

(vii) *The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and opening the indeterminate way to litigation de novo in all its tedious amplitude.*

(viii) *The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client.”²*

Form of the further material

[20] When reading the application to reopen, it is unclear whether Standard Bank intends to place further material before me by way of supplementary affidavit or supplementary submissions in the form of heads of argument.

[21] The deponent to Standard Bank’s founding affidavit, who is Standard Bank’s attorney of record, states that Standard Bank seeks the reopening of the application to compel delivery of further particulars before me as it wishes to place supplementary submissions before me regarding “*pertinent and important*

² Mkwana v Van der Merwe and another 1970 (1) SA 609 (A) at p616G – 617D

developments that occurred after the hearing of the compelling application and which bear materially upon the issues for determination by this Court in the first application to compel.”.

[22] Standard Bank then proceeds to summarise the background facts leading to the institution of its application to reopen and in doing so refers to the correspondence exchanged between itself and Ad Trade in an attempt to reach an agreement regarding the further material to be placed before me. Copies of the correspondence relied on by Standard Bank is attached to the founding affidavit.

[23] In referencing the correspondence exchanged between the parties, the deponent to the founding affidavit, states that *“I note that this is an important issue which Standard Bank wishes to, and requires an opportunity to, address in the supplementary affidavit it seeks to file.”.*

[24] Throughout the correspondence exchanged between the parties’ reference is made by Standard Bank to the need to place relevant submissions before the court relating to the application to compel against The Central Bank. Standard Bank, in one of its letters, states that the filing of further affidavits are unnecessary. This is contrary to its assertion in the founding affidavit that it is necessary to file a supplementary affidavit.

[25] It was only during argument, and in response to a question directed at him regarding the form and manner in which the new material was to be placed before me, that counsel for Standard Bank confirmed that Standard Bank sought leave to file supplementary submissions in the form of heads of argument. The purpose of which is to bring further information arising from the application to compel The Central Bank to deliver further particulars to the attention of the court.

Nature and scope of the supplementary submissions

[26] Standard Bank argues that the supplementary submissions it seeks to place before me are essential to the proper adjudication of the application to compel before me for the following reasons:

[26.1] It will inform the proper interpretation and application of the provisions of Rule 21 of the Uniform Rules of Court to the application before me, particularly in view of the fact that Standard Bank is an inactive litigant who has elected to abide by the decision of the court in the main action.

[26.2] Ad Trade's request for further particulars was delivered to The Central Bank prior to delivery of The Central Bank's discovery affidavit. Ad Trade therefore could and should have launched an application to compel the delivery of further particulars against The Central Bank instead of Standard Bank.

[26.3] The fact that Ad Trade instituted an application to compel the delivery of further particulars against The Central Bank implies that the information and documentation sought from Standard Bank is in fact documentation and information within the possession of The Central Bank.

[26.4] The Central Bank's response to Ad Trade's request for further particulars, and its attitude to whether the particulars sought by Ad Trade is strictly necessary to enable Ad Trade to prepare for trial, is relevant and material to the application before me.

Request for further particulars directed to The Central Bank

[27] In developing its argument, Standard Bank relies on the delivery of a request for further particulars to The Central Bank by Ad Trade and it tabulates 14 items which it contends overlap in these requests for further particulars addressed to it and The Central Bank respectively.

[28] These overlaps relate to, *inter alia*:

[28.1] The purpose for which The Central Bank was opening the accounts.

[28.2] The source and/or origin of the funds held in these accounts as well as the nature of deposits into these accounts.

[28.3] The relationship between The Central Bank and its known depositors, who are identified in the respective notices, as well as their particulars.

[28.4] Funds received by The Central Bank from Phoenix Cit FZE and the relationship between it and The Central Bank.

[28.5] The listed signatories to the accounts of The Central Bank of the Republic of Guinea.

[28.6] Permission from the SARB to open the accounts identified in the respective notices.

[28.7] The nature of documents the banks previously possessed in relation to the accounts, and particulars of what became of these documents.

[28.8] Documents submitted to the SARB relating to the accounts and funds deposited into or paid from the accounts.

[28.9] Balance of payments documents.

[28.10] The names and details of Standard Bank employees who managed Standard Bank's relationship with The Central Bank.

[28.11] The account numbers of any accounts Guinea have with Standard Bank.

[28.12] Documentation in relation to the signatories to the accounts of The Central Bank as well as a list of past signatories.

[29] Standard Bank argues that the overlap is considerable and that under these circumstances it would be appropriate for Ad Trade to request and compel delivery of these particulars from The Central Bank, a party actively participating in the main action.

[30] Ad Trade's request for further particulars addressed to Standard Bank consists of 30 questions, the majority of which are unrelated to the request for further particulars addressed to The Central Bank. The request for further particulars addressed to The Central Bank comprises no less than 58 questions, at least 12 of which have sub-questions and most of which are unrelated to the request for further particulars addressed to Standard Bank.

[31] Standard Bank's argument based on the overlap in the requests for further particulars addressed to it and The Central Bank loses sight of the fact that further particulars which do not overlap in the requests directed to Standard Bank and The Central Bank are still sought from both Standard Bank and The Central Bank.

[32] The request for further particulars addressed to The Central Bank was delivered on or about 17 April 2023, well before the application to compel against Standard Bank was argued before me on 16 and 17 May 2023.

[33] At the time the application to compel was argued before me, this request for further particulars fell within the knowledge of Standard Bank and an application by Ad Trade for an order compelling The Central Bank to deliver the further particulars sought fell within the contemplation of Standard Bank.

[34] This is clear from the arguments made before me by Standard Bank at the hearing of the application to compel. The arguments advanced by Standard Bank and to which I refer are briefly summarised as follows:

[34.1] Standard Bank has no case to answer or present at the trial of the main action and can therefore not be compelled to provide further particulars as requested by Ad Trade.

[34.2] Ad Trade has delivered a request for further particulars to The Central Bank and in view thereof, Ad Trade launched the application to compel Standard Bank to deliver the further particulars requested prematurely.

[34.3] The request for further particulars was correctly delivered to The Central Bank and Ad Trade ought to allow the proceedings against The Central Bank for the delivery of the further particulars sought to be finalised.

[34.4] The fact that the requests for further particulars addressed to Standard Bank and The Central Bank overlap, and that the particulars sought from The Central Bank is far more extensive than the particulars sought from Standard Bank, is an indication that the particulars are correctly sought from The Central Bank and that Ad Trade clearly has other remedies available to it other than compelling Standard Bank to produce the further particulars sought by Ad Trade.

[35] As I understand it, Standard Bank's contention is that the request for further particulars directed to The Central Bank and the application to compel the delivery of further particulars against The Central Bank, as well as the effects thereof on the application to compel against it, is a new development which occurred after I had heard argument in the application to compel before me.

[36] For the reasons appearing from paragraphs [29] to [35] above, I do not agree.
The application to compel further particulars against The Central Bank

[37] It was further argued by Standard Bank that The Central Bank's response to and its attitude in relation to Ad Trade's requests for further particulars is another new development in respect of which it seeks to submit supplementary submissions.

[38] According to Standard Bank, The Central Bank's response and attitude to Ad Trade's request for further particulars is material to the adjudication of the application to compel before me, particularly in view of the novel issue raised by Standard Bank in the application to compel before me.

[39] This novel issue being whether or not Standard Bank, a party who has elected to abide by the decision of the court in the main action, can be compelled to deliver further particulars in terms of Rule 21 of the Uniform Rules of Court. (I deal with this argument hereinbelow.)

[40] Standard Bank did not disclose The Central Bank's response to Ad Trade's request for further particulars, and simply argued that the views and attitude of The Central Bank, an active litigant in the main action, as to whether the particulars sought by Ad Trade are strictly necessary for trial, is material and relevant to the application to compel before me.

[41] As stated above, I have access to The Central Bank's response to Ad Trade's request for further particulars. The Central Bank responded to Ad Trade's request for further particulars simply by stating that '*These contentions are noted.*' or:

"The plaintiff's requests:

- 1. are irrelevant to the disputed issues;*
- 2. do not seek particularity in relation to any averment made in the first defendant's plea;*
- 3. concern matters in respect of which the plaintiff bears the onus;*
- 4. amount to the putting of interrogatories;*
- 5. are not strictly necessary for the preparation for trial; and*
- 6. constitute and abuse of the process of court."*

[42] The Central Bank has not provided any of the further particulars sought by Ad Trade and has not stated why it is of the view that the particulars sought by Ad Trade are irrelevant to the disputed issues or not strictly necessary for the preparation of trial.

[43] Without The Central Bank providing the basis for its reasoning, the attitude of The Central Bank to the particulars sought by Ad Trade cannot be ascertained or determined with any degree of certainty. Any argument that Standard Bank wishes to advance in relation to The Central Bank's attitude to the further particulars sought by Ad Trade will be nothing other than conjecture and, in my view, cannot appropriately impact on the application before me.

Discussion

[44] In the proper exercise of my discretion, I am enjoined to consider the nature and materiality of the new matter sought to be placed before me, and why this material was not placed before me timeously.

[45] I am also obliged to consider any prejudice either of the parties may suffer as a result of allowing or refusing the introduction of such new or further material.

[46] In determining what would be fair to all concerned, the materiality, relevance and effect of the new material sought to be introduced as well as the stage the litigation has reached when the application to introduce such new material is made, plays a significant role.

[47] The application to reopen comes before me after conclusion of the argument in the application to compel before me and shortly before judgment was handed down.

[48] In its application and the annexures thereto, Standard Bank simply states that the supplementary submissions it seeks to place before me are relevant and material and will support and strengthen its case.

[49] Standard Bank fails to identify and describe the supplementary submissions it seeks leave to place before me, save for the submissions in respect of the request for further particulars and the application to compel against The Central Bank, which I have specifically addressed under separate headings hereinabove. These submissions relate to arguments already advanced before me, and it appears that Standard Bank seeks to elaborate and expand on the arguments already advanced before me in an attempt to support and strengthen its case.

[50] Any other supplementary submissions relating to the application to compel launched against The Central Bank were insufficiently identified by Standard Bank in its application.

[51] In the absence of Standard Bank identifying or outlining any other supplementary submissions it seeks to make in relation to the application to compel

launched against The Central Bank, I am unable to determine, as is required, whether such supplementary submissions are in fact material and relevant to the application before me, and to what degree.

[52] The degree of materiality of the supplementary submissions directly impacts the assessment of prejudice to the parties which in turn informs the question of fairness to the parties.

[53] The application before me which Standard Bank seeks to reopen is an interlocutory application to compel the delivery for further particulars which has already been argued before me over a period of two days.

[54] Allowing Standard Bank to place supplementary submission before me on aspects already addressed before me in argument, and which were sufficiently ventilated, will simply have the effect of allowing the parties to reargue the matter before me. This is not justified under the circumstances.

[55] For these reasons I decline to reopen the hearing before me.

Application to strike out and application for leave to file supplementary affidavit

Application to strike out

[56] Standard Bank has applied for paragraphs 5 to 12 of Ad Trade's replying affidavit in the application to compel further particulars to be struck out on the grounds that these paragraphs raise new matter alternatively make out a case in reply.

[57] In response to Standard Bank's notice of application to strike out, Ad Trade launched an application for leave to file a supplementary affidavit. Standard Bank opposes this application.

[58] Paragraph 5 of the replying affidavit refers to two authorised signatories to The Central Bank's bank accounts with Standard Bank, this list having been provided by Standard Bank in the process of discovery.

[59] In the remaining paragraphs, paragraphs 6 to 12 of the replying affidavit, Ad Trade raises the following:

[59.1] The jailing and prosecution of the two authorised signatories, referred to in paragraph 5 of the replying affidavit, for alleged corrupt activities;

[59.2] Standard Bank's refusal to answer questions in relation to these and other signatories; and

[59.3] The far-reaching obligations which Standard Bank, in its view, has to ensure the propriety of its clients and their transactions and the resultant duty to respond to questions posed to Standard Bank by creditors of its clients.

[60] The inclusion of the allegations in paragraphs 5 – 12 of Ad Trade's replying affidavit is explained by Ad Trade in the supplementary affidavit it seeks leave to file. It is also explained therein that Ad Trade only became aware of the jailing and prosecution of the authorised signatories on 14 December 2022, after filing its founding affidavit, and shortly before the filing of its replying affidavit on 11 January 2022.

[61] Standard Bank had the opportunity to respond to the allegations set out in Ad Trade's supplementary affidavit and it did so, only to the extent that it considered necessary.

[62] The general rule is that an applicant must make out a case for the relief it seeks in its founding affidavit.³ This ensures that a respondent is informed of the case it is required to meet and to allow a respondent to answer to the case against it.

³ *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H–369B; *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd* (Centre for Environmental Rights and others as amici curiae) [2021] 2 All SA 1 (SCA) at paragraph [96]

This in turn results in a proper ventilation of the disputed issues and the resolution of such disputes in an orderly manner.⁴

[63] A court may, in the exercise of its discretion, which discretion is to be exercised judicially, allow new matter in a replying affidavit.⁵ New matter will not be allowed when no case has made out in the founding affidavit at all.

[64] As appears from the commentary in Erasmus, a court, in exercising this discretion, should have regard to:

[64.1] whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court;

[64.2] whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement, costs, or allowing the respondent to file a further affidavit addressing the new matter raised in reply;

[64.3] whether the new matter was known to the applicant when the application was launched; and

[64.4] whether the disallowance of the new matter will result in an unnecessary waste of costs.⁶

[65] In its founding affidavit Ad Trade explains that the action between itself and the various defendants concerns the nature of the relationship between Guinea and the funds held in the accounts of The Central Bank, which accounts it holds with Standard Bank.

[66] Ad Trade states that Standard Bank, as an accountable financial institution in terms of the Financial Centre Intelligence Act 38 of 2001 (**FICA**), has a duty to know

⁴ Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 10984 (2) SA 261

⁵ Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd 2013 (2) SA 204 (SCA) at 212B–C; Mostert v FirstRand Bank Ltd t/a RMB Private Bank 2018 (4) SA 443 (SCA) at 448D–F

⁶ RS 22, 2023, D1 Rule 6-29

and understand its client and the particulars of the various large transactions which Standard Bank transacted on behalf of the Central Bank, and to answer questions in relation to its clients and these transactions, which questions are posed to it by a judgment creditor of its client.

[67] From the timeline and explanation provided by Ad Trade, it is apparent that Ad Trade became aware of the jailing and prosecution of the authorised signatories after filing its founding affidavit. This information regarding the signatories could therefore not have been disclosed in the founding affidavit.

[68] Standard Bank's failure to respond to Ad Trade's request for further particulars in relation to the authorised signatories and the duties which rest on Standard Bank as an accountable financial institution in terms of the provisions of FICA, have been disclosed and addressed by Ad Trade in the founding affidavit.

[69] Save for the averments in relation to the jailing and prosecution of the authorised signatories, the content of paragraphs 5 to 12 of the replying affidavit does not introduce new material. In these paragraphs, Ad Trade has simply expanded on its contentions in the founding affidavit.

Application to file supplementary affidavit

[70] In so far as Ad Trade's application to file a supplementary affidavit is concerned, Ad Trade seeks to place the bank statements of the accounts held by The Central Bank, which were discovered by Standard Bank, and to which reference is made in the application to compel, before the court.

[71] These bank statements are not new to Standard Bank and the introduction thereof is not prejudicial to Standard Bank.

[72] Additionally, Ad Trade seeks to inform the court of the sale of a property owned by Guinea in partial satisfaction of the debt owed to Ad Trade by Guinea.

[73] Standard Bank was afforded an opportunity to respond to the allegations contained in Ad Trade's supplementary affidavit, which it did, only to the extent that it considered necessary.

[74] Standard Bank's supplementary answering affidavit, filed in response to Ad Trade's supplementary affidavit, contains no answer to the allegations relating to the sale of a property owned by Guinea.

[75] Permitting the filing of further affidavits falls within the discretion of this court. Any prejudice Standard Bank may have suffered has been allayed by the fact that Standard Bank has had the opportunity to answer to the allegations set out in the supplementary affidavit, which Standard Bank did.

[76] In the absence of any prejudice to Standard Bank and in view of the nature of the material sought to be introduced by way of the supplementary affidavit, I see no reason why leave to file the supplementary affidavit should not be granted.

Application to compel further particulars

[77] Ad Trade seeks to compel Standard Bank to provide an adequate response to its request for trial particulars in terms of the provisions of Rule 21 of the Uniform Rules.

[78] The relevant provisions of Rule 21 provide as follows:

“(1) Subject to the provisions of subrules (2) to (4) further particulars shall not be requested.

(2) After the close of pleadings any party may, not less than 20 days before trial, deliver a notice requesting only such further particulars as are strictly necessary to enable him or her to prepare for trial. Such request shall be complied with within 10 days after receipt thereof.

(3) ...

(4) If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an

order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as to it seems meet.”

[79] The rule allows any party to request such further particulars that are strictly necessary to enable it to prepare for trial. The purpose being to prevent surprise at trial and to inform the requesting party of the case it has to prove at trial.⁷

[80] In determining what particulars fall within the scope of Rule 21, and whether the particulars sought are strictly necessary to enable a party to prepare for trial, one would ordinarily look at the pleadings.⁸

[81] The pleadings however do not always contain sufficient information to determine whether or not a party may be taken by surprise and what the other party intends to prove. When this is the case, it is permissible to go beyond the pleadings and to look at matter forming part of the record.⁹

[82] Ad Trade’s action is for declaratory relief relating to ownership of and claims to the funds held in the accounts of The Central Bank. Ad Trade seeks that it be declared that:

1.1 The Central Bank holds the funds on behalf of Guinea; alternatively

1.2 Guinea holds a claim to the funds; further alternatively

1.3 Guinea is the beneficial owner of the funds; further alternatively

1.4 The Central Bank owes a debt to Guinea subject to attachment by the plaintiff; further alternatively

1.5 The separate legal personalities of the Central Bank and Guinea fall to be disregarded.”

[83] The action therefore concerns the ownership of, and Guinea’s rights to and its relationship to the funds held in the bank accounts of The Central Bank which accounts are held at Standard Bank.

⁷ Ruslyn Mining & Plant Hire (Pty) Ltd v Alexkor Ltd [2012] 1 All SA 317 (SCA) at para 18

⁸ Hardy v Hardy 1961 (1) SA 643 (W) at 646; Guardrisk Insurance Company Ltd v IFS Risk Consultants CC (unreported, GP case no 11799/2021 dated 7 November 2022) at paragraph [12]

⁹ Schmidt Plant Hire (Pty) Ltd v Pedrelli 1990 (1) SA 398 (D) at 402 – 403

[84] The requests for further particulars directed to Standard Bank relate to the following:

[84.1] The purpose of The Central Bank opening its accounts and the legal and compliance steps taken by Standard Bank in the process of opening The Central Bank's accounts.

[84.2] The origin, source and/or nature of deposits into and payments from The Central Bank's accounts.

[84.3] The relationship between The Central Bank and various identified entities to who payments were made from The Central Bank's accounts and who deposited funds into The Central Bank's accounts.

[84.4] Who certain payments made from The Central Bank's accounts were intended for, these payments being identified in the request for further particulars.

[84.5] Information and account details of the entities listed in the request for further particulars, these entities having received funds from or having deposited funds into the account of The Central Bank.

[84.6] Why the accounts were used as conduit for the disbursement of foreign currency.

[84.7] Legal and compliance steps taken by Standard Bank in relation to a €200 million transaction as well as the reason for the deposit into the account of The Central Bank, the purpose of the funds and the particulars of the transaction resulting in the deposit.

[84.8] Whether Standard Bank provides banking facilities to the signatories to the Central Bank's accounts and/or to Guinea.

[84.9] Whether SARB's permission to open the accounts were requested, and if so, documents in relation to the request.

[84.10] The nature of documents Standard Bank did not disclose and which it no longer has in its possession in relation to The Central Bank and/or Guinea and/or the signatories and/or the transactions into and out of the accounts.

[84.10] Documents submitted to SARB relating to transactions into and out of The Central Bank's accounts.

[84.11] The names of individual employees who managed the relationship between Standard Bank and The Central Bank and the division of Standard Bank that handled the transactions listed on the bank statements provided.

[84.12] The period of time for which Standard Bank retains old records of its clients.

[84.13] The submission of suspicious transaction reports.

[84.14] A list of past authorised signatories, documentation in relation to the authorised signatories and whether Standard Bank considers any of the signatories Politically Exposed Persons.

[85] Standard Bank responded to each of Ad Trade's requests for further particulars in one of the following ways:

[85.1] The information requested is no longer in its possession due to an effluxion of time;

[85.2] The particularity sought are irrelevant, alternatively not required for the purposes of preparing for trial, further alternatively in an impermissible interrogatory;

[85.3] The information requested is not in its possession;

[85.4] The information in its possession has been discovered.

[86] Standard Bank opposes the relief sought by Ad Trade on the grounds that:

[86.1] Where it had answers to provide to Ad Trade it did so;

[86.2] Where it had no knowledge of the information requested, it stated so;

[86.3] All the information in its possession had been discovered; and

[86.4] It complied with the request of Ad Trade in so far as it is required to. Any information or documentation not provided was not provided as it is either no longer in Standard Bank's possession, due to an effluxion of time, or Ad Trade is not entitled thereto as the information and documentation sought are irrelevant, alternatively not required for the purposes of preparing for trial further alternatively not permissible interrogatories.

[87] Before me Standard Bank argued that:

[87.1] Ad Trade was not entitled to compel it to deliver further particulars for trial as it is a non-partisan litigant who has indicated that it intends abiding by the decision of the court in the main action.

[87.2] Its position as a defendant who has not delivered a plea is akin to that of a defendant who has filed a plea of bare denial.

[87.3] The particulars sought by Ad Trade are entirely irrelevant to Ad Trade's cause of action.

[88] Before I turn to the question of relevance, and whether the particulars sought by Ad Trade are strictly necessary for trial, it is apposite to consider Standard Bank's arguments regarding its position as defendant in the main action, and whether the provisions of Rule 21 apply to it as a non-partisan litigant, who has not filed a plea.

Application of Rule 21 to non-partisan litigants

[89] The background to Ad Trade's action evinces a dispute regarding the ownership of money held by The Central Bank in its accounts with Standard Bank. The ownership of these funds is obscure.

[91] The purpose of the Uniform Rules of Court is to facilitate litigation, not to create obstructions.¹⁰

[92] Whether further particulars may be sought by one party from another, between who there is no *lis*, was considered in the matter of *Control Instruments Finance (Pty) Ltd (In liquidation) v Mercantile Bank Ltd*.¹¹ Josman J stated the following:

"A further alternative would be to consider whether the third defendant might not be entitled to request particulars for trial from the first defendant notwithstanding the absence of any lis between them. Rule 21(2) deals with the situation after the close of pleadings and provides that 'any party may . . . deliver a notice requesting only such further particulars as are strictly necessary to enable him to prepare for trial' (emphasis added). The Rule does not specify from whom the particulars may be requested and neither expressly sanctions nor forbids a request for particulars for trial between two parties such as the first and the third defendants in this case. Considering the purpose of furnishing further particulars and considering the spirit of the Uniform Rules of Court I can see no reason why the third defendant might not require the first defendant to disclose the information.

*Mr Suttner referred me to the case of Geduld Lands Ltd v Uys and Others 1980 (3) SA 335 (T) in which the plaintiff had sued one defendant and that defendant had joined certain third parties against whom it claimed an indemnity. Such joinder took place in terms of Rule 13. Myburgh J held that this did not create a *lis* between the plaintiff and the third parties and accordingly the plaintiff was not entitled to request further particulars for the purposes of pleading from the third parties. In my opinion,*

¹⁰ *Control Instruments Finance (Pty) Ltd (In liquidation) v Mercantile Bank Ltd: In re Mercantile Bank Ltd v M M Laubscher Rustasie (Pty) Ltd and other* 2001 (3) SA 645 (C) at 649F

¹¹ 2001 (3) SA 645 (C)

this case takes the matter no further since it was not dealing with a request for further particulars for the purposes of preparing for trial, which serves an entirely different purpose from particulars for the purposes of pleading.”

[93] The opinion and interpretation of Rule 21(2) expressed by Josman J in the matter of *Control Instruments Finance (Pty) Ltd (In liquidation)* were endorsed and applied by Willis J in the matter of *Pangbourne Properties (Pty) Ltd v Van der Merwe du Toit & others*.¹²

[94] I have carefully considered the judgments of Josman J and Willis J, being mindful of the submissions made by Standard Bank in respect thereof, and that set out above. I consider myself bound by these judgments, and I see no reason to deviate therefrom.

[95] The provisions of Rule 21 entitle any party to proceedings to direct a request for further particulars to any other party to those proceedings. The provisions of Rule 21 therefore find application to Standard Bank who views itself as a non-partisan litigant.

Is Standard Bank's position akin to that of a defendant who has deliver a bare denial plea?

[96] In principle, a party cannot be required to give particulars in relation to a mere denial, in other words, where a party has denied an allegation, such a party cannot be required to give particulars of any aspect it has placed in issue by the denial.¹³

[97] It may however be that when a party denies an averment, such a denial may imply a positive averment. In such a case, further particulars may be sought in relation to thereto.

¹² Unreported Judgment (29968/08) [2012] ZAGPJHC 253 (17 October 2012)

¹³ PJ v HJ (unreported, FB case number A55/2022 dated 10 November 2022 – decision by the full bench) at par [16]

[98] Standard Bank argues that its decision not to file a plea places it in a position akin to that of a defendant who has filed a bare denial plea. It further argues that Ad Trade requests further particulars from it in relation to allegations made by other parties. This, in my view and having found that Rule 21 applies to all parties to litigation, is permitted when the party from whom the particulars are sought is able to provide such particulars, and provided that such particulars are strictly necessary for trial preparation.

[99] A denial is the express contradiction of an allegation of fact in the opponent's pleading. Standard Bank has not delivered a plea and can therefore not be said to have placed any of the averments made in the particulars of claim in issue. In circumstances where a denial is not clear, a court may hold that certain facts were not put in issue.

[100] In circumstances where Standard Bank has not placed any of Ad Trade's averments in issue, Standard Bank cannot argue that it is excused from giving further particulars in respect of those averments. This is so especially in circumstances where Standard Bank has adhered to Ad Trade's request to deliver a discovery affidavit and has responded to Ad Trade's request for further particulars, albeit insufficiently according to Ad Trade.

[101] Standard Bank, in responding to Ad Trade's request for further particulars, did not deny that Ad Trade was entitled to direct a request for further particulars to it in view of its election not to file a plea and that it therefore made no allegations in respect of which Ad Trade could direct such a request for further particulars to it. This was only raised by Standard Bank in its answering affidavit in the application to compel it to deliver further particulars.

[102] In considering Standard Bank's discovery affidavit and Standard Bank's involvement in the main action, it disclosed transaction reports, certificates of balance and a list of authorised signatories to Ad Trade.

[103] Standard Bank, although it has to a limited extent participated in the main action, is not an adversary of Ad Trade in the main action. It has willingly participated

in the process of discovery and delivered a response to Ad Trade's request for further particulars.

[104] As stated above, the provisions of Rule 21 are available to any party to proceedings and does not expressly prohibit a party, such as Ad Trade, from requesting further particulars from a party such as Standard Bank, who has not filed a plea but has elected to participate in the proceedings.

[105] The purpose of Rule 21 is to prevent surprise, and for the parties to be informed of the case the other parties are going to advance and prove at trial.

[106] If Standard Bank, as a party to the proceedings, can provide the further particulars sought by Ad Trade, and these particulars are strictly necessary for trial preparation, I see no reason why Ad Trade cannot request further particulars for trial from Standard Bank, even when it has not filed a plea.

Are the particulars sought strictly necessary for trial preparation?

[107] Having found that Ad Trade can request further particulars from Standard Bank and that Standard Bank can, in terms of the provisions of Rule 21, be compelled to deliver such particulars, if the particulars sought are strictly necessary for trial, the only questions remaining are whether the particulars sought are strictly necessary for trial and whether, in my discretion, Standard Bank ought to be compelled to deliver the requested particulars to Ad Trade.

[108] Ad Trade pleads the following in paragraph 10 of its particulars of claim:

"10. [The Central Bank] holds funds on behalf of [Guinea] in the accounts alternatively [Guinea] holds a claim to the funds in the accounts further alternatively [Guinea] is the beneficial owner of the funds in the accounts further alternatively [the Central Bank] owes a debt to [Guinea] subject to attachment by the plaintiff furth alternatively:

10. 1 [Guinea] and [the Central Bank] use the accounts in order to defeat

the claims of creditors of [Guinea];

10.2 Such conduct constitutes an abuse of the separate legal personalities of the first and second defendants; and

10.3 The court may disregard the separate legal personalities of [Guinea] and [The Central Bank].”

[109] The Central Bank denies these averments and in general terms pleads that it is an independent authority with its own legal standing and what its functions are.

[110] From the pleadings, it is evident that Ad Trade’s claim turns on the ownership of, and Guinea’s rights to and its relationship with, the funds held in the accounts of The Central Bank.

[111] Knowing where the funds in the accounts of The Central Bank originates from, what purpose the funds are held in the accounts for, for what purpose money flows into and out of the accounts, and who controls these funds on behalf of The Central Bank is pivotal to the determination of Ad Trade’s claim and the issues in dispute in the main action.

[112] From The Central Bank’s bank statements, which Standard Bank disclosed to Ad Trade, Ad Trade was able to ascertain that large amounts of money were deposited into and disbursed from The Central Bank’s accounts.

[113] Pursuant hereto, Ad Trade directed a request for further particulars to Standard Bank. Standard Bank responded to this request and did not provide the further particulars for the reasons already set out in paragraphs 86 and 87 hereinabove.

[114] In its answering affidavit, Standard Bank elaborates hereon, stating that it owes a duty of confidentiality to its clients and where it is no longer in possession of the requested documents, it said so, where it did not know the particulars requested, it stated so, and it discovered all available information in its possession.

[115] Standard Bank expressed the view that the particulars sought would result in the disclosure of evidence and, in view of the fact that Ad Trade is the plaintiff and therefore bears the onus in relation to its claim, it is not entitled to delivery of the particulars sought.

[116] Standard Bank further asserts in its answering affidavit that any duty to know and understand its clients, and any duty imposed upon it in terms of FICA, is a duty it owes to the State and not Ad Trade.

[117] A party may be ordered to provide further particulars if such particulars are necessary to enable the requester to know the nature of the evidence it will have to lead at the trial.¹⁴

[118] A request for further particulars which may involve the disclosure of evidence does not disentitle the requester from delivery of such particulars in the event that the requester will be embarrassed and prejudiced in the preparation for trial if the further particulars sought are not provided.¹⁵

[119] Standard Bank has denied being in possession of many of the particulars requested by Ad Trade. It has stated this in its response to Ad Trade's request for further particulars and in its affidavit opposing the application to compel it to deliver the further particulars requested.

[120] South Africa is a member of the Financial Action Task Force (**FATF**) and as such, the South African Financial Intelligence Centre (**FIC**) regularly publishes FATF policies.

[121] FATF has compiled a set of international best practices in preventing money laundering,¹⁶ which includes heightened scrutiny of accounts managed by politically exposed persons and in higher risk countries.

¹⁴ Smith v Clark 1935 NPD 459; Hardy v Hardy 1961 (1) SA 643 (W) at p 646

¹⁵ Annandale v Baits 1956 (3) SA 549 (W) at p 551

¹⁶ International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, FATF, accessed at <https://www.fatfgafi.org/content/dam/recommandations/pdf/FATF%20Recommendations%202012.pdf>.

[122] FATF also recommends customer due diligence to ensure knowledge of beneficial ownership of funds and the nature of the banking relationship, ongoing scrutiny of transactions taking place during the banking relationship, ongoing record-keeping, and processes to ensure adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons.

[123] FICA prescribes conduct that constitutes money laundering and makes provision for various control measures which have the objective of enabling the suppression, detection, and investigation of money laundering.

[124] These measures are based on three basic principles of money laundering detection and investigation, namely that:

[124.1] Intermediaries in the financial system must know with whom they are doing business;

[124.2] Record must be kept of transactions through the financial system; and

[124.3] Transactions which could possibly involve money laundering must be reported to the investigating authorities.

[125] Guidance provided by the FIC is authoritative and all accountable institutions must apply guidance issued by the FIC or demonstrate an equivalent level of compliance with the relevant obligations under FICA. The authorised signatories to The Central Bank's accounts, as appears on the list of authorised signatories provided by Standard Bank, are politically exposed persons and Standard Bank is obliged to comply with the abovementioned FATF policies.

[126] Standard Bank, who by its own admission is as an accountable institution, is, in terms of FICA obliged:

[126.1] In terms of section 21C(a)(ii) thereof to monitor transactions throughout the course of its relationship with the respondent, including the background and purpose of all complex and unusual large transactions which have no lawful purpose;

[126.2] In terms of section 21(1)(a) and (b) thereof to establish and verify the identity of the client (and specifically if the client is acting on behalf of another person, establish and verify the identity of that other person); and

[126.3] To report electronic transfers of funds into and out of South Africa above a certain threshold and size. It is not disputed that numerous transfers of funds in excess of such threshold took place on the accounts of The Central Bank.

[127] In terms of section 22 of FICA, Standard Bank is required to keep a record of its client's identity and the identity of persons on behalf of whom its client acts. It is also obliged to keep records of:

[127.1] The nature of transactions;¹⁷

[127.2] The parties to transactions;¹⁸

[127.3] The name of the person who obtained information about the client's identity and on whose behalf the client is acting;¹⁹

[127.4] Identity-verification documents.²⁰

[128] In terms of Section 23 of FICA, Standard Bank is obliged to retain account opening documents for at least five years after the termination of its relationship with The Central Bank. The relationship between Standard Bank and The Central Bank has not been terminated.

¹⁷ S 22(2)(f)

¹⁸ S 22(1)(f)

¹⁹ S 22(1)(h)

²⁰ S 22(1)(i)

[129] Section 31 of FICA requires Standard Bank to report foreign exchange transactions above a particular threshold, together with the prescribed particulars of the transactions.

[130] All the transactions in the accounts of The Central Bank are foreign exchange transactions above the prescribed threshold, and accordingly Standard Bank, being FICA compliant, would have reports regarding all of the transactions it transacted on The Central Bank's accounts.

[131] Despite these obligations imposed on Standard Bank in terms of FICA, Standard Bank, who by its own admission is FICA compliant, states under oath that it discovered and provided Ad Trade with all the documents and information in its possession and/or that the particulars sought by Ad Trade are no longer in its possession due to an effluxion of time.

[132] Standard Bank argues that its obligations under FICA do not create rights in the hands of Ad Trade. Whether or not FICA creates such rights is irrelevant for purposes of a request for further particulars in terms of Rule 21 of the Uniform Rules of Court. This is so because Ad Trade, as a party to pending litigation in which Standard Bank is a defendant, is entitled to request further particulars from Standard Bank, and it becomes entitled to delivery of the further particulars, when it is established that the particulars requested is strictly necessary for trial preparation.

[133] Standard Bank only discovered the following documents:

[133.1] A 1-page Bankers Almanac & Due Diligence Repository results for the Banque Centrale de la République de Guinée;

[133.2] An 11-page transaction report for account number 0[...] in the name of Banque Centrale de la République de Guinée for the period 1 November 2013 to 28 March 2022;

[133.3] A 2-page transaction report for account number 0[...] in the name of Banque Centrale de la République de Guinée for the period 7 November 2012 to 20 January 2017;

[133.4] A 4-page transaction report for account number 0[...] in the name of Banque Centrale de la République de Guinée for the period 1 November 2013 to 28 March 2022;

[133.5] A certificate of balance for accounts 0[...] and 0[...] as at 31 March 2022; and

[133.6] An undated list of authorised signatories for the Banque Centrale de la République de Guinée.

[134] Standard Bank submitted in its answering affidavit, under oath, that it is FICA compliant. This submission was repeated before me in argument.

[135] In view of the obligations imposed on Standard Bank in terms of FICA, and Standard Bank's compliance therewith, Standard Bank cannot genuinely assert that the particulars sought by Ad Trade are not in its possession.

[136] Generally, statements in discovery affidavits of documents are conclusive with regard to the documents that are in the possession of the party deposing to such an affidavit.

[137] Before a court will go behind statements contained in affidavits regarding documents of which production is sought, the allegations must be shown to be wrong to a reasonable degree of certainty. In the matter of *Makate v Vodacom (Pty) Ltd*²¹, Spilg J reaffirmed this principle:

"[16] The contents of a discovery affidavit are regarded prima facie to be conclusive with regard to the existence of documents and accordingly a court will be reluctant to

²¹ 2014 (1) SA 191 (GSJ)

go behind the affidavit. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 317E – G. The courts require a sufficient degree of certainty that the documents exist (see *Continental Ore Construction v Highveld Steel & Vanadium Corporation Ltd* 1971 (4) SA 589 (W); and *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749A – B ('a degree of conviction approaching practical certainty'). This is hardly surprising. The consequence of a court order being de facto impossible to implement exposes the offending party to contempt proceedings for not procuring something he did not have in the first place, and exposes the order to ridicule. Accordingly it is necessary to be circumspect before directing production in the face of a denial of a document's existence.

[17] Nonetheless it is also recognised that a party cannot rely on his denial under oath of a document's existence if, for instance, mala fides can be shown (*Swissborough* at 321E), or the discovery affidavit itself, a document referred to in discovery, the pleadings or an admission evidences the document's existence to the requisite degree (*Federal Wine* at 749G – H). Similarly, statutory or professional obligations, such as tax legislation or basic accounting requirements, regarding the retention of the records may also suffice if no acceptable explanation is provided for their non-production.”

[138] Ad Trade has established, with sufficient certainty, that Standard Bank is, at the very least, in possession of:

[138.1] particulars regarding the identity of its client and documents verifying the identity of its client and the identity of the party on whose behalf the client is acting.

[138.2] reports and particulars of all electronic funds into and out of South Africa above the threshold published by FIC;

[138.3] records in respect of (1) the nature of the transactions on the accounts of The Central Bank; (2) the particulars of the parties to these transactions; and (3) the names of the person who obtained information about the client's identity and about the identity of the party on whose behalf the client is acting;

[138.4] account opening documents in relation to The Central Bank's accounts;

[138.5] reports in respect of all foreign exchange transactions, which in the case of The Central Bank will include all its transactions, as well as particulars of these transactions.

[139] These documents, despite Standard Bank's claims, are not protected from disclosure as a result of alleged confidentiality.

[140] It remains to be determined whether the particulars sought by Ad Trade are strictly necessary for trial preparation. If the particularity sought is required by Ad Trade to properly prepare for trial, its production must be ordered.

[141] As established from the pleadings, and as already stated above, Ad Trade's claim turns on the ownership of, and Guinea's rights to and its relationship with, the funds held in the accounts of The Central Bank.

[142] Who the funds in The Central Bank's accounts were received from, to who the funds were disbursed, what the purpose of these funds are, and the identities of the signatories and Standard Bank employees directly dealing with The Central Bank's accounts, are particulars that are relevant to the disputes in the main action, and which are strictly necessary for Ad Trade trial preparation.

[143] The particulars sought in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28 and 30, including subparagraphs, of Ad Trade's request for further particulars will disclose information about the relationship between Guinea and the funds in The Central Bank's accounts.

[144] Should these particulars be provided to Ad Trade now, it will be in a position to determine the source and purpose of these funds and transactions, and it will be in a position to determine which witnesses to call in relation thereto and what evidence it has to secure for trial.

[145] Having to elicit this information at the trial will inevitably result in a postponement of the trial as Ad Trade will be unsure of which witnesses to call or subpoena and will only be provided with particulars during the course of the trial which it and the other parties would not yet have had the opportunity to peruse, consider and prepare on. The particulars sought, should it be provided now, will in all likelihood also limit the duration of the trial.

[146] There is little doubt that Ad Trade is entitled to the information requested in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28 and 30, including subparagraphs, of its request for further particulars in order to enable it to prepare for, and to prevent surprise, at trial.

[147] I grant the following order:

1. The application to reopen is dismissed, with costs.
2. The application to strike out is dismissed, with costs.
3. Ad Trade Belgium SPRL Private Ltd is granted leave to file its supplementary affidavit in the application to compel delivery of further particulars. Ad Trade Belgium SPRL Private Ltd and Standard Bank are each to pay its own costs.
4. Standard Bank is ordered to furnish Ad Trade Belgium SPRL Private Ltd with an answer to paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28 and 30, including subparagraphs, of its request for further particulars dated 20 June 2022 within 15 (fifteen) days of this order.
5. Standard Bank is to pay the costs of the application to compel the delivery of further particulars, including the costs of two counsel.

Z MARX DU PLESSIS
Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 16 and 17 May 2023 and 7 December 2023

Judgment delivered: 5. April 2024

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