

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO EL699/2018

Reportable	No
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In the matter between:

SUNEEL BELLOCHUM

Applicant

And

MINISTER OF POLICE

Respondent

JUDGMENT

NQUMSE AJ:

[1] On 27 December 2014 members of the South African Police Service (SAPS) under the Directorate for Priority Crimes Investigations also known as the Hawks, pounced on the plaintiff (also a police officer) arresting him for extortion and corruption.

[2] Following that arrest, the plaintiff is now suing the Minister of Police for damages for unlawful arrest and detention.

[3] At the commencement of the trial the parties applied formally to the court for an order to separate merits from quantum and for the matter to proceed on merits only. Their request was granted and an order made to that effect. In the result the only issue that was left for determination by the court was the lawfulness or otherwise of the arrest and detention of the plaintiff.

[4] It is common cause that the plaintiff was arrested on 27 December 2014 without a warrant. The onus to justify the legality for the arrest and the duty to begin rested on the defendant. It is also common cause that the police were acting within the course and scope of their employment as members of the SAPS when they arrested the plaintiff. The parties further agreed that a sworn statement deposed to by Mr Ali Mohammed a Pakistani National (hereinafter referred to as the complainant) which was part of the trial bundle of the plaintiff be accepted as a true statement of the said Pakistani National without the necessity to call the Commissioner of Oaths, Mr Gaika for his confirmation thereof. It was further agreed that the bank deposit slip of Capitec Bank in the amount of R9 000 contained in the plaintiff's trial bundle is a true reflection of a deposit made by the plaintiff into the bank account of the beneficiary reflected thereon.

[5] In its plea the defendant admits that the plaintiff was arrested on the aforementioned date near a parking lot in Oxford Street in East London without a warrant. Defendant denied that the arrest was wrongful and / or unlawful. It relies on the provisions of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

[6] In amplification of its denial the defendant pleaded that the arresting officer entertained a suspicion that the plaintiff had committed and was in the process of committing the crimes of extortion and corruption. The laying of charges of extortion and corruption against the plaintiff by the complainant led the police officers to believe that the plaintiff had committed the offences levelled against him.

[7] As propounded in *Duncan v Minister of Law and Order*¹ justification of a warrantless arrest where reliance is on section 40(1)(b) of the Criminal Procedure Act,² the following jurisdictional facts must exist.

1. The arrestor must be a peace officer.
2. He must entertain a suspicion.
3. It must be a suspicion that the arrestee committed an offence referred to in Schedule 1 to the Act.
4. The suspicion must rest on reasonable grounds.

¹ 1986 (2) SA 805 (A) at 818 G-H

² Act 51 of 1977

[8] Pursuant to its duty to begin, the defendant led the evidence of Zonisele Mavikela. He testified that he is a warrant officer attached to the Organized Crime Unit in East London. On 27 December 2014 he received a telephone call from a certain Captain Siko of the Fleet Police Station. Captain Siko informed him that the complainant, who was at the charge office, had opened a case of extortion and corruption against the plaintiff. He rushed to the Fleet Street Police Station and upon his arrival there, was furnished with a docket which had already been opened against the plaintiff. After he had read the complainant's statement in the docket coupled with his interview of the complainant, he gained an impression that the plaintiff had committed the offence of extortion. Whilst still at the Police Station he was joined by his colleague W/O Mosia. They took the complainant along to their offices where another colleague of theirs, W/O Rooy, was waiting for them. Rooy suggested that their senior, Captain Buys be called. Upon the arrival of Captain Buys they explained to him what was happening and he was furnished with the police docket to read.

[9] During their interview of the complainant he informed them that he is a Pakistani National who delivers tobacco and other items to shops around East London. He further informed them that the truck that he uses to deliver his consignment of tobacco was stopped by a police officer who turned out to be the plaintiff. The plaintiff accused him of selling illicit tobacco. The plaintiff further made threats that if he did not want his truck and consignment to be confiscated, he must pay an amount of R30 000. After having been given an opportunity to raise the amount that was demanded, he succeeded to collect R27 000 which he paid over to the plaintiff. The plaintiff further

allowed him to get the remaining R3 000 which he succeeded to raise and which was in his possession when they interviewed him.

[10] He further testified that they took the R3 000 notes from the complainant and made photocopies *albeit* not for the full amount due to the machine that jammed. Whilst they were busy photocopying the money, the plaintiff was calling the complainant constantly on his cellphone demanding the outstanding amount of R3 000. He suggested to Captain Buys that the crime intelligence unit be involved and a trap set up. Captain Buys refused his suggestion on the basis that the suspect was in a hurry to get this money from the complainant. Instead, Captain Buys took out his personal recording device, and showed it to complainant and also gave him instructions on how to use it.

[11] He further testified that after the complainant had been shown how to operate the device, he together with W/O Mosia got into the back of the panel van of the complainant and drove to McDonalds at Fleet Street, a meeting spot that had been arranged between the complainant and the plaintiff. Upon arrival at that spot, the complainant alighted from his vehicle and walked across Oxford Street to the car of the plaintiff. He and Mosia followed from behind and saw when the complainant entered the plaintiff's vehicle. However, when they got to plaintiff's vehicle both the complainant and the plaintiff alighted from it. That time both Captain Buys and Rooy also arrived. They informed the plaintiff that there was a complaint against him and that they were police from the Hawks. They sought permission to search his vehicle, which he gave.

Rooy searched his vehicle and found in the ashtray an amount of R3 000 some of which bore the same serial numbers of the money they had photocopied.

[12] He also testified that before they took the plaintiff to their offices, he offered an explanation that he was collecting the money from the complainant on behalf of his friend who was in Pietermaritzburg. As proof thereof he showed them a Capitec Bank deposit slip which reflected a deposit amount of R9000. He never followed up on this information until 11 March 2016. He took two cellphones from the plaintiff and referred them to Cyber Crime Section for downloading of their data. Whilst they were successfully downloaded, nothing seemed to turn from that information. A few days later, he discovered that the recording device did not function properly and he did not know what eventually happened to it since it was taken by Captain Buys.

[13] Under cross-examination he conceded that after a year and a half since the arrest of the plaintiff and until the decision of the prosecutor to decline to prosecute, there had been no other piece of evidence that implicated the plaintiff. He further conceded that in all the four statements he had made, he never mentioned that he read the complainant's statement that was in the docket. Neither was it mentioned anywhere in his statement that he interviewed the complainant before effecting the arrest of the plaintiff. He did not mention that he formed the suspicion after reading the complainant's statement or after he had interviewed him.

[14] He agreed that if he had read the complainant's statement which made mention of plaintiff's name he would have known that the plaintiff was also a police officer since he knew him before the incident. When he was asked why he did he not investigate the matter first or issue summons for the plaintiff who was well known to him to attend court, he said the offence was serious and the complainant was being robbed at that moment. He also conceded that even though the complainant confessed to paying a bribe to save his truck and the illicit tobacco from being confiscated, he let him free and did not arrest him for being an accomplice. He also conceded that he never went immediately to verify to the shop owners who borrowed the complainant the R27 000 in order to verify the information that was given by the complainant. Neither did he think of calling them telephonically. He denied that their operation was a trap and accordingly there was no need to seek the approval of the Director of Public Prosecutions.

[15] He testified that they photocopied the money in order to obtain concrete evidence against the plaintiff and that the use of the recording device was to strengthen and support the evidence of the police. He denied that he heard the plaintiff when he was saying to Captain Buys, that he was glad for the recording which would prove his innocence.

[16] He also stated that he was not aware as to who placed the money in the ashtray of plaintiff's vehicle. Neither did he know what was discussed between the plaintiff and complainant whilst they were in the plaintiff's vehicle.

[17] When he was asked why he did not call the friend of plaintiff on whose behalf he was collecting the money, he said, whilst he accepting that he should have called the plaintiff's friend, he could also not advance any reason for his failure not to do so. He, however, agreed that had he done so, it might have caused them to discuss the matter with the plaintiff rather than to arrest him immediately.

[18] He also could not refute the version put to him that the plaintiff was requested by his friend, a certain Mr Jogger from Pietermaritzburg, to collect his money from the complainant. He also could not refute that the complainant had confirmed to plaintiff's friend that he was in possession of the said money and ready to meet with the plaintiff at Nandos in order to hand it over to him. He also did not dispute that the only time the plaintiff made a call to the complainant was after 16h00 when the plaintiff could not see the complainant at their meeting spot as per information that was recorded in the tracker profile of plaintiff's vehicle. When he was also confronted with the complainant's statement that it had no mention of a threat to confiscate complainant's vehicle and its consignment, he said that is what had been told by the complainant.

[19] Captain Raymond Buys also testified. He is attached to the Hawks. In the afternoon of 27 December 2014 he was contacted by Warrant Officer Rooy who requested his assistance in relation to an operation involving an alleged commission of corruption or extortion. In response to that call, he went to their offices and upon his arrival there found W/O Mavikela, W/O Mosia, W/O Rooy as well as the complainant.

[20] After they reported to him what had happened, he interviewed the complainant and also read his statement that was in the docket. The complainant informed him that he was stopped by the plaintiff whilst driving his panel van. The plaintiff informed him that he was transporting illegal cigarettes. The plaintiff further demanded an amount of R30 000 failing which he would report him to people who dealt with the so-called illegal cigarettes. The complainant further informed him that he managed to organize an amount of R27 00 from friends and gave it to the plaintiff. They also exchanged contact details for him to be able to advise the plaintiff as soon as he was in possession of the outstanding balance of R3 000.

[21] He further testified that whilst busy assisting W/O Mavikela in making photocopies of the R3 000 notes, he overheard a telephonic conversation between the complainant and the plaintiff. In that communication the plaintiff was demanding the amount of R3 000 from the complainant.

[22] He denied that their operation was a trap. He instead referred to it as a “control delivery procedure”, which excludes the element of enticement that is normally found in undercover operations. In support of this contention he referred to a similar situation that was discussed in the case of *Lachman*, a judgment of the Supreme Court of Appeal. He contended strongly that he had no need to apply for a section 252A approval from the Director of Public Prosecutions, especially given the time constraints then prevailing which made it impossible to make all the necessary arrangements that were required for a trap. He decided to make use of his private recording device which

he placed in the console of the complainant's panel van for the purpose of capturing the transaction that was to take place and to take a video footage thereof.

[23] He further testified that the complainant together with his wife and their two children left with the panel van to the meeting spot, between Nandos and McDonalds, whilst W/O Mavikela and W/O Mosia boarded the back of the panel van. He and Rooy followed in an unmarked police vehicle. Upon their arrival at the scene they parked their vehicle next to a checkers building which is separated by the Fleet Street from Nandos and McDonalds. The complainant parked his vehicle and between Nandos and McDonalds. Complainant alighted from his vehicle walked and to the plaintiff's vehicle which was parked between Buffalo City Municipality parking area and KFC. W/O Mavikela and W/O Mosia also followed the complainant and walked towards the plaintiff's vehicle. When he approached the plaintiff he enquired from the complainant about the recording device. He found it in the possession of complainant and he handed it over to him. At that time Rooy and Mavikela were searching the plaintiff's vehicle and they found the money that bore serial numbers that matched the photocopied notes they had made.

[24] He further testified that upon the plaintiff seeing what was happening, he remarked and said he had done nothing wrong and the video footage that was taken would assist him in proving his innocence. However, he contends that the events caused him to form an opinion that the plaintiff committed and was still continuing to commit offences of corruption and extortion.

[25] When they returned to their offices he discovered that the recording device was only able to record the events from when the complainant left their offices up until the time he reached Nandos and McDonalds, and thereafter it was blank and with no audio recording.

[26] Under cross-examination it was put to him that in the disciplinary enquiry against the plaintiff he was adamant that he got involved in the arrest of plaintiff during the morning whereas the statement of the complainant was obtained only in the afternoon of that day. He said that he realised the mistake he made in the disciplinary hearing and his memory was refreshed after he read the statement of the complainant. He conceded that he did not have an independent recollection of the events when he testified at the hearing. In that regard his testimony at the hearing was false. He admitted that nowhere in their police statements is it mentioned that the docket was already available when they interviewed the complainant. He also could not explain the entry in the docket which indicated that the only time they received the docket from Fleet Street police station was at 20:20 in the evening, more particularly according to him he had read it earlier.

[27] When asked why he did not mention in his statement the recording and footage that was found in the recording device *albeit* up to Nandos, he said it was because the information that was recorded did not incriminate the plaintiff. He also conceded that the plaintiff's reaction that he was glad for the recording was not consistent with

someone caught in a trap. He also accepted that when W/O Mavikela was furnished with the contact details of the plaintiff's friend who was in Pietermaritzburg, it was expected of him to call that friend immediately. He also conceded that when the plaintiff alighted from his vehicle shouting and beckoning the plaintiff to his vehicle, plaintiff's actions were not consistent with a person who was about to commit the crime of bribery as suggested.

[28] He could not offer a reply to the assertion that the plaintiff believed that he deleted the recordings from the device only because it exonerated the plaintiff from any wrong doing. He also said he did not know why the complainant was not treated as a suspect seeing that he was in possession of a consignment containing illegal cigarettes. He confirmed that had been given the deposit slip he would have phoned for verification. If it turned out to be a proof of what the plaintiff was claiming, the arrest could or could not have followed since it would have required W/O Mavikela to reconsider the situation.

[29] At the closing of the defendant's case, the plaintiff elected to close its case and not to testify.

[30] Mr Swartbooi for the defendant argued that whilst it may be accepted that this is a matter in which more could have been done by the police he, however, invited the court to consider the totality of the evidence and to find that the circumstances that

prevailed in this matter justified the reasonable suspicion that was held by the police that an offence of corruption or extortion had been committed. He further submitted that the failure of Captain Buys to obtain the section 252A approval for a trap was of no consequence given the urgency within which the police had to act. He further submitted that the actions of Captain Buys should be seen as reasonable under the circumstances.

[31] Mr Taljaard for the plaintiff argued that the defendant failed to discharge its onus to prove that there were reasonable grounds to form a suspicion that the plaintiff had committed or was about to commit an offence under Schedule 1 to the Criminal Procedure Act. He further argued that the two sources of information *viz*, the contents of the docket and the interview of the complainant, was not sufficient information to actuate the suspicion relied upon. He further argued that the chronology of events pointed to the fact that at the time the police interviewed the complainant, they were not in possession of the docket. They only became in possession of the docket in the evening after the plaintiff had been arrested. The information at the disposal of the police, so he argued, was insufficient to result in a reasonable suspicion.

[32] In *Minister of Law and Order v Hurley and Another*³ it was stated that “an arrest constituted an interference with the liberty of the individual concerned, and it therefore seems fair to require that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified.”

³ *Minister of Law and Order v Hurley and Another* 1986 (3) 586 (A) at 589 E – F.

[33] In *Duncan*⁴ the court stated that the suspicion that must be held, in order to be a reasonable one, must be objectively sustainable in the sense that it must rest on reasonable grounds.

[34] I agree fully with counsel for the defendant that this is a matter where before the arrest of the plaintiff, a lot could have been done by the police officials without any difficulty. It bears mentioning that a few out of a number of things could have been done by the police to assist them in their evaluation of the evidence and assessment of its quality.

[35] According to the police the complainant informed them that he was stopped by the plaintiff for dealing in illegal tobacco. After a demand was made for him to pay a bribe, he was allowed by the plaintiff to leave with his panel van with the consignment of illegal tobacco. Not only is this account improbable. The very police failed to enquire from the complainant if he was in fact dealing with illegal tobacco and whether he was carrying illegal tobacco in his panel van. Had this issue been canvassed, it is most likely that the complainant would have confirmed that he was indeed dealing with illicit tobacco and his consignment was illegal tobacco. Alternatively, he could have given a response denying that he was dealing in illicit tobacco and was therefore not in possession of same. If that was the case, the police would have had to ask him why he

⁴ *Supra*

got into the trouble of raising an amount of R30 000 if he was not carrying illegal tobacco and was not dealing with same.

[36] The further lack of the police to assess the evidence at their disposal is more demonstrated when regard is had to the affidavit of Mohammed Amir Hossain who is one of the friends who assisted the complaint with the amount of R27 000. Mr Hossain's affidavit that was deposed to on 23 January 2015 was discovered and formed part of the plaintiff's trial bundle which was handed into evidence by agreement. The relevant parts of the affidavit are paragraphs 4, 5, 6 and 10.

[37] In paragraph 4 he states "On Saturday 2014-12-27 at approx. (*sic*) 10h00 I was at my place of employment, I was met by my supplier Mr Mohammed Ali. He had just arrived from Johannesburg driving a white mini truck. He introduced me to his wife and children whom was sitting inside the truck and he came and sat inside the shop. (*sic*) Mr Mohammed Ali supplies our business with bulk sweets, biscuits and other items."

[38] In paragraph 5 he states "On this day and approximately 11h00 time (*sic*) Mr Mohammed Ali approached me and asked for the money of the purchased stock I requested he wants as I gather the money. (*sic*) I notice (*sic*) Mr Mohammed Ali was walking in and out the shop and was shouting on the phone."

[39] In paragraph 6 he states “He then came to the side of the counter where we counted the money together. He was complaining about someone that sent a person to collect money from him. I counted the R27 000,00 together with Mr Mohammed Ali. I then placed the money in three bank plastic packets, containing of R9000,00 each . . .” (my own emphasis)

[40] In paragraph 10 he states “. . . when I was in the office I was together with Mr Mohammed Ali, his wife and the policeman. This policeman asked me if I could speak English properly and I said no but broken English. Mr Mohammed Ali wife (*sic*) said that she will translate for me but she can’t speak Bengali and she is a South African Xhosa. So we spoke in English. At that moment Mr Mohammed Ali said to me in Urdu that I must say, I gave him R30 000,00 as that’s what he gave in his statement (*sic*). When the police asked my statement I also said that it was R30 000,00 that I gave to Mr Mohammed Ali. Although the truth is that I gave him R27 000,00.” (my own emphasis)

[41] In light of the affidavit of Mr Hossain, it is clear that had the police contacted Mr Hossain upon them being furnished with his details by the complainant, they would have noticed the apparent discrepancies between the account given by the complainant and the one given by Mr Hossain. Particularly on the aspect when complainant said to Mr Hossain, someone had been sent to collect money from him. This account corroborates the plaintiff who informed the police that his friend had sent him to collect money from the complainant. It is also curious to note the amount of R9 000 mentioned in the

affidavit of Mr Hossain if regard is had to the deposit slip of the same amount that was furnished by the plaintiff to W/O Mavikela and his colleagues by the plaintiff.

[42] What I also find remarkably glaring are the apparent discrepancies between the statement made by the complainant and what he told W/O Mavikela. According to W/O Mavikela the complainant told him that whilst he was driving his sprinter bus he was stopped by police at Buffalo Street. After he was stopped he was informed that he was dealing in illegal cigarettes and his vehicle as well as its consignment would be confiscated unless he paid an amount of R30 000.

[43] Whereas according to the statement of the complainant which is alleged to have been in the docket when he was interviewed, it gives a different account of events. In the statement the complainant said, he had parked his vehicle at Gilwell Street next to Alimacar Supermarket. Whilst he was inside a certain shop, the plaintiff appeared and asked for the driver of the sprinter bus in which his wife and two children were passengers. In response to the plaintiff he advised him that he was the driver of the sprinter bus. Thereafter he was informed that he was going to be arrested for possession of illegal cigarettes. The statement further alleges that the plaintiff informed the complainant that he would be investigated by officials from South African Revenue Services and was likely to be detained for a number of days and as a result he would lose his business.

[44] The statement states further that the complainant went back inside the shop and after he explained to Mr Amiri the shop owner as to what was happening, he gave him R27 000 and gave it to the plaintiff who was waiting for him outside.

[45] What is patently absent from the plaintiff's statement is the allegation that the plaintiff had threatened to confiscate his vehicle as well as his consignment. Also, no mention is made that he was stopped by the plaintiff whilst driving his vehicle at Buffalo Street. Instead, according to his statement, his vehicle was parked next to a shop at Alimacar Supermarket.

[46] It is also worthy to note that the statement of Mr Hossain differs from that of the complainant. According to Mr Hossain's statement he was not informed by the complainant that that he was being harassed by the plaintiff who was demanding a bribe. Instead, he was complaining about "someone" who had sent a person to collect money from him.

[47] It has also to be borne in mind that according to the complaint, when he encountered the plaintiff, his wife and 2 children were in his sprinter bus. However, no attempt had been made by W/O Mavikela or his colleagues to obtain a statement from the wife to confirm what had been reported by the complainant. This in my view was an obvious thing to do by the police before effecting the arrest.

[48] In *Mabona*⁵ Jones J dealing with a reasonable suspicion held:

“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 but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.”

[49] The remarks in *Mabona*, were amplified further by Mbenenge J (as he then was), in *Sibuqashe v Minister of Police*⁶ where he stated:

⁵ *Mabona and Others v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 658 E – H.

⁶ *Sibuqashe v Minister of Police and Another* 527/2011 [2015] ZA ECBHC 32 (22 September 2015) at para 57.

“It is trite law that police officers who purport to act in terms of section 40(1)(b) of the CPA should investigate exculpatory explanations offered by a suspect before they can form a reasonable suspicion for the purposes of a lawful arrest. It is expected of a reasonable man to analyse and assess the quality of the information at his disposal critically and not to accept it lightly 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”

[50] In this matter the suspect tendered an explanation in the form of a Capitec bank deposit slip. He also furnished them with details of the friend for whom he was collecting the money. None of this information was investigated and assessed to aid the police in forming a suspicion to arrest. This failure is exacerbated further by the failure of the police to obtain a statement from the wife of the complainant who was present at all material times when this incident occurred.

[51] In *Mhaga v Minister of Safety & Security*⁷ Zilwa AJ after considering what was said in *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) and *R v Van Heerden* 1958 (3) SA 150 (T) at 152, the learned Judge remarked as follows:

“From the foregoing cases it emerges clearly that the requirement that the reasonable belief on the part of the arresting officer must be that the arrestee has committed a schedule 1 offence, before he can be arrested without a warrant, is of paramount importance. This clearly implies that before plaintiff’s arrest by

⁷ 2001 (2) All SA 534 (Tk).

Inspector Duma can be clothed with legality, it must be shown, not only that Inspector Duma suspected plaintiff of having committed an offence, but that he must have reasonably suspected plaintiff of having committed a schedule 1 offence”.

[52] From the facts in this matter, the plaintiff’s arrest by the police officers, W/O Mavikela and his team, cannot be clothed with legality. It is my view that the police have failed to analyse critically the information at their disposal which was ostensibly the complainant’s statement only. Nothing prevented the police from obtaining information which was readily available and reachable. Such as the information of Mr Hossain who borrowed the complainant the amount of R27 000 and to make a telephonic call to the plaintiff’s friend who was in Pietermaritzburg.

[53] In the absence of credible information that could have been easily ascertained in order to assist the police to satisfy the requirements as envisaged in section 40(1)(b) of the CPA, I am unable to find that their suspicion was based on reasonable grounds.

[54] In the result I find that the plaintiff’s arrest and resulting detention were unlawful.

V NQUMSE

ACTING JUDGE OF THE HIGH COURT

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Date Heard:	26 – 28 August 2019
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