

(In his capacity as Trustee of the
"LONA VENTER FAMILIE TRUST-
IT: 09635/2004"

FERREIRA MICHIEL NEL

5th DEFENDANT/RESPONDENT

LONA VENTER N. O

6th DEFENDANT/RESPONDENT

(In her capacity as Trustee of the
"LONA VENTER FAMILIE TRUST-
IT: 09635/2004"

LONA VENTER

7th DEFENDANT/RESPONDENT

LEONARD VENTER N.O.

8th DEFENDANT/RESPONDENT

(In his capacity as Trustee of the
"LONA VENTER FAMILIE TRUST-
IT: 09635/2004"

LEONARD VENTER

9th DEFENDANT/RESPONDENT

ROUAN VENTER N.O.

10th DEFENDANT/RESPONDENT

(In her capacity as Trustee of the
"LONA VENTER FAMILIE TRUST-
IT: 09635/2004"

ROUAN VENTER

11th DEFENDANT/RESPONDENT

Heard 31 October 2024

**Delivered 22 November 2024 by circulation to the parties' legal
representatives**

Coram KL PILLAY AJ

JUDGEMENT

KL Pillay AJ

Introduction:

[1] The parties are before this Court with three separate applications for leave to amend the particulars of claim in terms of Rule 28(4) of the Uniform Rules of Court, in respect of three different cases, in which the Applicant/Plaintiff has instituted proceedings against the Respondents/Defendants. The following case numbers pertain to the

relevant proceedings wherein this application is sought. The application is opposed in respect of all three cases.

[1.1] Case number 7480/2020

[1.2] Case number 7478/2020

[1.3] Case number 7472/2020

[2] In all three case it was agreed between the parties that the Defendants would file their plea after the application for leave to amend was ventilated. Prior to proceeding with the applications, it was by agreement between the parties, that the parties would argue once in respect of all three cases, as the amendments sought, as well as the objection thereto, were premised on similar facts involving the same parties, with minor differences. The request was to avoid duplicity of argument, for each individual matter. This Court ordered as per the agreement that the parties would argue on case number 7480/2020, however judgement would be handed down in respect of all three above mentioned case numbers. For ease of reference, the parties will be referred to as in the main action.

Brief Background:

[3] In the **case number 7480/2020**, on or about the 26 April 2017, and at Marble Hall, UniGro Financial Services Proprietary Ltd, a private company with limited

liability, duly incorporated and registered as such in terms of the Company Laws of the Republic of South Africa with registration number 1999/014168/07(UniGro) duly represented by an authorised employee and the 1st, 2nd, 4th, 6th, 8th and 10th Defendant (The Trust) duly represented by the 8th Defendant in his capacity as an authorised Trustee entered into a written instalment agreement, in terms of which UniGro sold to the Trust a 2017 John Deere 608 KOP, with chassis number: 1[...] (the goods). The UniGro's rights, interests and titles in terms of this agreement were ceded to the Plaintiff on 2 March 2015. The details pertaining to this cession are not relevant for the purpose of this application.

[4] It was alleged that the Trust was in breach of the agreement as it failed to pay the annual instalments and on or about 18 August 2020, was in arrears with an amount of R244 136,86. It was alleged that despite demand the arrears were not settled resulting in the Plaintiff issuing Summons against the Defendants on 26 November 2020. This was served on the Defendants on 17 August 2021. The Plaintiff gave notice to substantially amend the particulars of claim which was served on the Defendants on the 30th of August 2022. The Defendants objected to the proposed amendments which was served on 21 November 2022, resulting in the opposed application for leave to amend in terms of Rule 28(4) of the Uniform Rules of Court.

[5] In case number **7478/2020**, on or about the 26 April 2017, and at Marble Hall, UniGro Financial Services Proprietary Ltd, a private company with limited liability, duly incorporated and registered as such in terms of the Company Laws of the Republic of South Africa with registration number 1999/014168/07(UniGro) duly represented by an authorised employee and the 1st, 2nd, 4th, 6th, 8th and 10th Defendant (The Trust) duly represented by the 8th Defendant in his capacity as an authorised Trustee entered into a written instalment agreement, in terms of which UniGro sold to the Trust a 2017 John Deere CS690 Cotton Stripper with engine number R[...] and chassis number 1[...] (the goods). The UniGro's rights, interests and titles in terms of this agreement were ceded to the Plaintiff on 2 March 2015. The details pertaining to this cession are not relevant for the purpose of this application.

[6] It was alleged that the Trust was in breach of the agreement as it failed to pay the annual instalments and on or about 18 August 2020, was in arrears with an amount of R3 375 679,18. It was alleged that despite demand the arrears were not settled resulting in the Plaintiff issuing Summons against the Defendants on 26 November 2020. This was served on the Defendants on 25 March 2021. The notice to amend was served on the 30 August 2022 and objection by the Defendants were served on the 12 September 2022. The Rule 28(4) application was served on the 26 September 2022.

[7] In the **case number 7472/2020**, on or about the 26 October 2017, and at Roedtan, UniGro Financial Services Proprietary Ltd, a private company with limited liability, duly incorporated and registered as such in terms of the Company Laws of the Republic of South Africa with registration number 1999/014168/07(UniGro) duly represented by an authorised employee and the 1st, 2nd, 4th, 6th, 8th and 10th Defendant (The Trust) duly represented by an authorised Trustee entered into a written instalment agreement, in terms of which UniGro sold to the Trust a 2017 JCB 531/70 with engine number S[...] and chassis number J[...] (the goods). The UniGro's rights, interests and titles in terms of this agreement were ceded to the Plaintiff on 2 March 2015. The details pertaining to this cession are not relevant for the purpose of this application.

[8] The Plaintiff alleged that the Trust was in breach of the agreement as it failed to pay the annual instalments and on or about 18 August 2020, was in arrears with an amount of R232 660,66. It was alleged that despite demand the arrears were not settled resulting in the Plaintiff issuing Summons on the 26 November 2020, which was served on the 17 August 2021. The notice to amend was served on the 30 August 2022 and objection by the Defendants were served on the 21 November 2022. The Rule 28(4) application was served on the 29 November 2022.

[9] The objection by the Defendants in all three cases was largely premised on the following two grounds:

[9.1] That the proposed amendment sought to introduce a new claim against the 7th, 9th and 11th Defendants as sureties in terms of an alleged instalment

sale agreement, concluded between the parties in respect of all three cases and;

[9.2] That the Plaintiff's claim against the sureties namely the 7th, 9th and 11th Defendants in terms of the instalment sale agreement had prescribed in terms of the provisions of the Prescription Act 68 of 1969, and that the proposed amendments, if allowed would resuscitate a prescribed claim, which is impermissible in law in respect of all three cases.

[10] In the current particulars of claim the 1st Defendant (the Trust) is cited with the 2nd, 4th, 6th, 8th and 10th Defendants in their capacity as Trustees, and the 3rd, 5th, 7th, 9th and 11th Defendants are cited in their personal capacities. The Plaintiff sought in the prayers that the 1st Defendant returns the "goods" to the Plaintiff, with the judgement sought against the 2nd to 11th Defendants, for the amount of damages that the Plaintiff may have suffered, to be postponed sine die pending the return of the "goods" to the Plaintiff, the subsequent valuation and sale thereof, and the calculation of the amount to which the Plaintiff was entitled, once that process was finalised.

[11] The amendments that were being sought, as contained in the notice of intention to amend, pertains in part to the allegations that the 7th, 9th and 11th Defendants in their personal capacities, bound themselves in terms of Deeds of Suretyship, as sureties and co-principal debtors, to UniGro or its successors, for any and/or all amounts that were and/or may in future, become due and payable by the 1st Defendant the "Trust" to UniGro. The copies of the Deeds of Suretyship were annexed to the amended pleadings, the contents repeated and incorporated therein.

[12] The relevant, material terms of the Deeds of Suretyship were the following;

[12.1] "The 7th, 9th and 11th Defendants (the Sureties) bound themselves jointly and severally, as sureties and co-principal debtors for the punctual payment of all sums due to UniGro by the Trust;(clause2.1)

[12.2] The "Sureties" Deeds of Suretyship constitutes continuing security for the whole amount that the Trust may now or in the future, become owing to UniGro; (clause 2.2)

[12.3] The Sureties obligations to UniGro in terms of the suretyship would be unlimited; (clause 3)

[12.4] The Sureties expressly waive the benefits of the exceptions non numeratae pecuniae, non causa debiti, errore calculi and beneficia excussionis et divisionis; (clause 4.2)

[12.5] The Sureties accepted liability for payment of all legal cost incurred by UniGro on a scale between attorney and client in respect of the recovery of any amounts owing by the Trust and secured by the Deeds of Suretyship;(clause 6.1,6.1.1and 6.1.2)

[12.6] UniGro is entitled to, at any stage, without the consent of the sureties, either cede any of its rights against the sureties to another person/entity, or delegate its obligations towards the sureties to another person/entity, in which event the suretyships will be available to such person/entity in relation to all obligations due by the Trust to UniGro and such person/entity;(clause8.1)

[12.7] Certificates signed by any one director or manager of UniGro as to the extent of liabilities and obligations of the 1st Defendant towards UniGro will be *prima facie* evidence of the Trust's and the Sureties' liabilities and obligations in terms of the Deeds of Suretyship;(clause10.1)

[12.8] The Sureties respectively elected as the domicilium addresses; the addresses reflected on page 1 of the respective Deeds of Surety under their names. (clause12.1)"

The Arguments before Court:

[13] According to the Plaintiff, the particulars of claim should contain averments alleging all material facts necessary to give rise to an enforceable claim, failing which it will be excipiable for failing to disclose a cause of action. It was for those reasons that the need arose for the amendments, so as to place the relevant factual matrix before the Court.

[14] The Plaintiff submitted that the primary objectives of these amendments were "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done."¹

[15] It was submitted by the Plaintiff that the amendment sought would neither prejudice the Defendants, nor would they suffer any injustice, for they would be in no worse position than they would have been, if the pleadings in its amended form, had been filed in the first instance.²

[16] The Defendants objected to the amendments sought as highlighted above indicating that the Plaintiff did not file an affidavit motivating the grounds for the amendment sought and putting all the facts and circumstances before Court.

[17] The Defendants indicated that amendments will always be allowed, unless the application to amend is *ma/a tide* or unless such amendments, would cause an injustice to the other side, which could not be compensated by an order for costs.

[18] The Defendants opposition to the application to amend was based on the failure by the Plaintiff to show *bona fides* and the Plaintiff's failure to provide a proper explanation for the extremely late amendments that the Plaintiff sought the Court to grant.

[19] The Defendants objected to the additional paragraphs that made specific reference to the suretyship agreement which according to the Defendants were an attempt to introduce new claims wherein the Plaintiff sought to have the 7th, 9th and

¹ Cross v Ferreira 1950(3) SA 443(C) at 447

² Moolman v Estate Moolman 1927 CPD 27 at 29

11th Defendants liable, in respect of the damages portion of the claim, personally, jointly and severally, the one paying the other to be absolved.

[20] The Defendants believed this was an attempt to resuscitate or remedy a prescribed claim by way of an amendment which was prejudicial to the Defendants, and this could not be compensated for, with an appropriate cost order. This was further exacerbated by the lack of any affidavit before Court, to explain why these amendments were to be granted. The Plaintiff also failed, when seeking to amend their pleadings to offer costs for the indulgence sought, displaying a lacklustre approach to the proceedings and the Defendants. The Defendants heads of argument and relevant case law were relied upon to enable the Court, to best understand the position, in respect of Rule 28 and the applicability of the relevant case law, to these principles and the cases at hand.

[21] The Defendants indicated that the Plaintiff's argument that the issue of damages were being postponed *sine die*, still equated to a money debt and was within the ambit of the Prescription Act³ and therefore according to the Defendants this debt, in respect of the suretyship had prescribed and the Court should dismiss all three applications to amend, with costs on attorney and client scale, Scale B in terms of the Uniform Rule 67A in respect of each case. The Defendants indicated that if the Court was inclined to grant the application to amend, then costs be costs in the cause, in respect of all the three cases.

[22] The Plaintiff in response, indicated that the allegation of the claim prescribing in respect of the suretyship agreement was baseless, and this objection to the amendments was without merit. The proceedings before Court were for the rei vindicatio, the return of the goods sold to the Defendants, who have failed to make consistent payments on the three accounts, resulting in the Plaintiff seeking the cancellation of the agreement, and the return of the goods. The rest of the proceedings in respect of the damages component would be postponed sine die pending the return of the goods, for subsequent valuation and sale to occur. It is only once this has been finalized, would the Plaintiff be in a position to approach the

³ Act 68 of 1969

Court for relief with precise calculated amounts of damages. The Plaintiff noted that all 11 Defendants were cited, at time of Summons being issued clearly indicative of the Plaintiff's intention to hold all the Defendants liable including the 7th, 9th and 11th Defendants.

[23] The Plaintiff conceded that there were incorrect and insufficient information, as was contained in the particulars of claim, warranting the amendment. It was indicated that the Summons did not contain averments, alleging all the material facts necessary, to give rise to an enforceable claim, therefore the amendments were being sought.

[24] The Plaintiff highlighted that the practical rule was that an amendment would not be allowed if the application to amend was made *mala fide* or if the amendment would cause the other party such prejudice as cannot be cured by a cost order and where appropriate the granting of a postponement.

[25] The Plaintiff confirmed that an application to amend would not be granted if it would resuscitate a prescribed claim or defeat a statutory limitation as to time⁴. The Plaintiff motivated that a claim for repossession of a vehicle, because it is a claim based on ownership of a thing, is not a debt as contemplated by Section 10 of the Prescription Act and does not prescribe in 3 years⁵.

[26] The Plaintiff only sought the return of its property, with damages only to be established at a later stage, prescription played no role, as the Plaintiff was not claiming damages from the Defendants in general and against the 7th, 9th and 11th Defendants specifically. This portion of the proceedings would be postponed and be ventilated at the relevant time. The Plaintiff's motivated that the Defendants could if the amendments were allowed file a special plea of prescription, therefore there could be no prejudice claimed by the Defendants.

[27] The Plaintiff maintained that prescription was interrupted once Summons was served on the principal debtor, and in respect of a surety, in which a claim for

⁴ Trans-African Insurance Co Ltd v Maluleka 1959(2) SA273 (A) at 279(8)

⁵ ABSA Bank Ltd v Keet 2015 (4) SA 474 (SCA) at 481C-484A; par [20] to [25]

damages against the surety, was made contingent upon the outcome of the litigation, against the principal debtor. This would be sufficient to interrupt prescription against the surety, even in circumstances, where the nature of the relief (for example the quantum of damages claim against the principal debtor) against the sureties was only clarified by an amendment made, more than three years, after the debt became due.⁶ Therefore relying on the case of *Jans v Nedcor Bank Ltd*⁷ the Plaintiff indicated that an interruption or delay in the running of prescription against the principal debtor, also interrupted or delayed the running of prescription in favour of the surety.

[28] The Plaintiff maintained that a Court had the power to grant material amendments in circumstances where the Court considered prejudice or injustice to an opponent. The Plaintiff submitted that the amendments sought by the Plaintiff was justified and necessary, "to obtain a proper ventilation of the dispute between the parties to determine the real disputes between them, so that justice may be done" as per the case of *Cross v Ferreira*.⁸ The Plaintiff sought the Defendant's objection to the proposed amendments be dismissed with costs on an opposed scale and that the Plaintiff be granted leave to amend its particulars of claim as per the notice to amend dated the 24 August 2022. The Plaintiff was to deliver its amended pages within 10 days after such leave, having been granted, in respect of all the three cases.

The Issues:

[29] The crisp issues to be determined were:

[29.1] Whether the application to amend by the Plaintiff was made *ma/a fide* or could cause an injustice to the Defendants.

⁶ *First Rand Bank v Shosholozza Steel Suppliers (Pty)Ltd* 2014 JDR 0623 (GSJ) paras 19-35

⁷ [2002]3 AllSA11(SCA)

⁸ 1950(3) SA 443 (c) at 447

[29.2] Whether the application to amend was, as alleged by the Defendants, an attempt to introduce new claims, resuscitating the prescribed deed of surety, in respect of the 7th, 9th and 11th Defendants?

[29.3] Whether the amendments sought would have the effect of obtaining a proper ventilation, of the dispute between the parties, to determine the real issues between them?

[29.4] The question of costs in respect of the three applications to amend in terms of Rule 28.

The Legal Principles and Applicability:

[30] Rule 28 of the Uniform Rules of Court regulates amendments to pleadings. The Court has a discretion whether to grant same based on various considerations. Regard was had to the case of Vinpro NPC v President of the Republic of South Africa and Others (1741/2021) [2021] ZAWCHC 261 (3 December 2021) at paragraph 25 where the full Court succinctly noted;

"On this score, it is trite law: that a court is vested with a discretion as to whether to grant or refuse an amendment: that an amendment cannot be granted for the mere asking thereof- that some explanation must be offered therefor: that this explanation must be in the founding affidavit filed in support of the amendment application: that if the amendment is not sought timeously, some reason must be given for the delay: that that party seeking the amendment must show prima facie that the amendment has something deserving of consideration: that the party seeking the amendment must not be mala fide: that the amendment must not be the cause an injustice to the other side which cannot be compensated by costs: that the amendment should not be refused simply to punish the applicant for neglect and that mere loss of time is no reason, in itself, for refusing the application."

[31] The object of granting an application to amend is to obtain a proper ventilation of the real issues in dispute between the parties. When an applicant seeks to bring

an application to amend the pleadings, there should be valid justifiable reasons to support the application. Both parties drew the Courts attention to the case of *Moolman v Estate Moolman*⁹ wherein the Court noted that amendments would always be allowed, unless the party seeking the amendment was *mala fides* in the application or it would result in an injustice to the other side, which could not be compensated by a cost order.

[32] The Defendants objection to the amendments sought was premised on the argument that the Plaintiff was seeking to introduce a new claim against the 7th, 9th and 11th Defendants as sureties in terms of the instalment sale agreement. It is not disputed that the suretyship agreements were signed by the three Defendants particularly in respect of the sale agreement, concerning the said goods, in all three cases and that the averments currently in the particulars of claim, specifically the prayers sought, was judgement against the 2nd to 11th Defendants, for the amount of damages, that the Plaintiff may have suffered, to be postponed sine die pending the return of the "goods" to the Plaintiff, the subsequent valuation and sale thereof, and the calculation of the amount to which the Plaintiff was entitled, once that process was finalised.

[33] The Defendants contended that the Plaintiff was not litigating in good faith by the amendments sought, on account that this suretyship agreement signed by the 7th, 9th and 11th Defendants had prescribed. Moreover, if the Court granted the application to amend, it would in effect be resuscitating the claim, based on the suretyship agreement. This was prejudicial to the Defendants and no cost order would suffice to offset that prejudice.

[34] The Defendants indicated that there was no substantial application, by the Plaintiff, before the Court explaining why these amendments were not included in the initial particulars of claim when Summons was issued, and why the amendments were being sought, so extremely late in the proceedings.

⁹ 1927 CPD 27

[35] In response the Plaintiff drew the Court's attention to the case of Swartz v Van der Walt t/a Sentraten,¹⁰ where the Court dealing specifically with motion proceedings and applications to amend in terms of Rule 28(4) did not require an affidavit in support of the application unless substantial amendments for example, a withdrawal of admissions, required a detailed explanation for the said withdrawal. According to the Plaintiff therefore, there was no need for a supporting affidavit and the amendments sought were self-explanatory and sought in good faith.

[36] When considering the argument raised by the Defendant this Court agrees that the original Summons and particulars of claim lacked averments which were relevant for the Defendant's to properly, be able to plead to those allegations. It might have been due to an oversight on the part of the drafter, but the Court could find no malice, on the part of the Plaintiff, to seek to have all the relevant aspects, placed before the Court, by way of the amendments. The Defendants refusal of the amendments, based on the conduct of the Plaintiff being malicious, holds no weight. If anything, this Court noted that the initial omission, place the 7th, 9th and 11th Defendants in a difficult position to plead to the allegations, in that their liability, through the suretyship agreement, was not totally ventilated. It is these types of circumstances, wherein the amendment sought to be granted, would not be prejudicial for the Defendants were in no worse position, than they would have been in, if the pleadings in its amended form, had been filed in the first instance.

[37] In so far as the allegation pertaining to the resuscitation of the prescribed claim this Court had regard to Section 15(1) of the Prescription Act¹¹ which is headed "**Judicial interruption of prescription**" and it provides:

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

[38] The Plaintiff as highlighted earlier demanded and issued Summons against all the Defendants, in respect of the cancellation of the agreement and the return of the

¹⁰ 1998 (1) SA 53(W)

¹¹ Act No. 68 of 1969

goods. These proceedings emanated from the breach of contract by the Defendants in their non-compliance in respect of the timeous and consistent payments. This resulted in the institution of proceedings, against the Defendants and the Plaintiff seeking return of the good sold to the Defendants.

[39] The application to amend contains the averments pertaining to the suretyship agreement which was being objected to. The Court needs to determine whether as alleged by the Defendants, this is an introduction of a new claim against the Defendants specifically the 7th, 9th and 11th Defendants. This Court cannot see how this argument can hold weight, as already from the onset the three specific Defendants were cited, in respect of the damages component, which would only come into play once the returned goods were evaluated, so that damages could be ascertained if any.

[40] This Court took cognisance of the argument made by the Plaintiff, to the effect that there would be greater prejudice suffered by the Plaintiff, if the amendments were not granted, offset against the Defendants who still had the opportunity to plead to the amended particulars of claim, where prescription could still be raised as a defence, by the Defendants. The Plaintiff drew the Courts attention to the case of *First Rand Bank Limited v Shosholoza Steel Suppliers (Pty)Ltd*¹² where the Court noted,

"The amendment does not introduce a new course of action. This is for two simple reasons, and these are that;

(a) at the time when the applicant instituted the claim it could not define the damages without first repossessing the item, for valuation and sale of the items, and the ultimate calculation of the shortfall for each item.

(b) The suretyship agreement have already been alleged and proved in the unamended particulars of claim. While it is a claim based on the suretyship agreement, it does not have independent existence in that it is

¹² 2014JDR 0623 (GSJ)paragraph 29.

reliant on the breach, of the instalment sale agreements by the Second to Fifth Respondent's."

[41] The Defendants argued that this case materially differed from the case before Court, on the basis that the suretyship was already pleaded, which is not the case here. This may well be partly true, but the prayer concerning the postponement of the damages portion, applied to all 11 Defendants. This Judgment fortified the principle that damages could only be established, once the repossessed item was sold and the outstanding damages determined, this interrupted the running of prescription in terms of Section 15(1) of the Prescription Act which puts to rest the objection raised by the Defendants. This Court is satisfied that this objection must therefore fail.

Ruling:

[42] In light of the fact that the Court was unable to find that the Plaintiff was mala fide, in launching the application and having weighed up the prejudice of both parties in respect of the application in terms of Section 28, the Court's ultimate goal is to ensure that the parties have the opportunity to properly ventilate the dispute between them, and for the Court to be able to adjudicate on the real issues so that justice is done. The discretion that the Court has to refuse or grant such an application, is not taken lightly, and having considered the issues in all three cases the granting of this application would be in the interest of all the parties, so that the real dispute can be ventilated.

Costs:

[43] Both parties sought costs on a higher scale, if they were successful in the litigation of these proceedings. The Court takes cognizance of the fact that costs are at the discretion of the Court. The Defendants alleged that no tender for costs were made by the Plaintiff, even though it was the Plaintiff, who sought an indulgence. The Defendants maintained their justification for seeking costs on a higher scale, if they were successful and the application to amend was dismissed. The Plaintiff argued that there was no merit in the objection to the amendment and therefore cost

should be awarded to the Plaintiff on a higher scale. Having taken these arguments into consideration I believe it would be just and equitable that there is no order as to costs.

Order:

[44] In the premise the application succeeds in respect of all three cases namely:

Case number 7480/2020

Case number 7478/2020

Case number 7472/2020

The following order is made:

[44.1] The application in terms of Rule 28 is granted.

[44.2] The Plaintiff is to deliver the amended pages within 10 days of receipt of the Court Order.

[44.3] No order as to costs.

KL PILLAY
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE, LIMPOPO DIVISION

APPEARANCES

FOR THE PLAINTIFF : Adv Bresler
INSTRUCTED BY : Hack Stupel and Ross Attorneys

FOR THE DEFENDANT : Adv J Prinsloo
INSTRUCTED BY : Tiaan Smuts Attorneys
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