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SUNDERSONS LTD & ANOR V. CRUISER SHIPPING PTE LTD & ANOR

(2014) LPELR-22561(CA)

COURT OF APPEAL

(LAGOS JUDICIAL DIVISION)

SUNDERSONS LIMITED & ANOR v. CRUISER SHIPPING PTE LIMITED & ANOR

CITATION: (2014) LPELR-22561(CA)

In The Court of Appeal

(Lagos Judicial Division)

On Friday, the 7th day of February, 2014

Suit No: CA/L/356/2011

Before Their Lordships

SIDI DAUDA BAGE	Justice, Court of Appeal
RITA NOSAKHARE PEMU	Justice, Court of Appeal
CHINWE EUGENIA IYIZOBA	Justice, Court of Appeal

Between

1. SUNDERSONS LIMITED
2. MILAN NIGERIA LIMITED

Appellants

And

1. CRUISER SHIPPING PTE LIMITED
2. UNIVERSAL NAVIGATION PTE LIMITED

Respondents

RATIO DECIDENDI

1 **WORDS AND PHRASES - "JUDGMENT/ORDER":** Meaning of "Judgment/Order"

"IN HALSBURY'S LAWS OF ENGLAND 4TH EDITION PARAGRAPH 5 AT PAGE 8, the word "JUDGMENT OR ORDER" is defined as including an award which the Court has registered for enforcement, ordered to be enforced or given permission to enforce as if it were a Judgment or order of the Court." Per PEMU, J.C.A. (P. 22, paras. C-D) - read in context

2 **JUDGMENT AND ORDER - JUDGMENT/RULING OF COURT:** Effect of every Judgment or Ruling delivered by a competent Court

"In OBULAI V. OBORO 2001 FWLR PT.47. 1004, the Apex Court held inter alia that "Every Judgment or Ruling delivered by a competent court is presumed to be right. The burden is therefore on the Appellants to show the reason why the Judgment he has appealed from in a civil case should be set aside. If he cannot clearly convince the appeal court or if all he has done merely raises a doubt whether

the Judge is right or wrong, the Judgment stays and the appeal fails" Per PEMU, J.C.A. (Pp. 21-22, paras. G-B) - read in context

3 **INTERPRETATION OF STATUTE - SECTION 52(2)(II)(A):** The provision of Section 52(2)(II)(a) of the Arbitration and Conciliation Act, 2004 with respect to grounds for Courts to refuse recognition and enforcement of Arbitral awards

"Section 52 of the Arbitration and Conciliation Act 2004 provides the Grounds for Courts refusing recognition and enforcement of Arbitral awards. In subsection 2(II)(a) of Section 52 it provides "...Any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of the award (a) if the party against whom it is invoked furnishes the Court proof (ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made." Per PEMU, J.C.A. (P. 23, paras. C-F) - read in context

RITA NOSAKHARE PEMU, J.C.A. (Delivering The Leading Judgment): This appeal is

predicated upon an interlocutory ruling of Honourable Justice C. E. Archibong of the Federal High Court, No. 8, Ikoyi, Lagos, delivered on the 14th of March, 2011, which was in favour of the Respondents in this Appeal.

FACTS: Simply put, the Respondents (Applicants at the Lower Court) filed an application at the Lower Court, which application is dated 27th September, 2010, asking the court to recognize and grant them leave to enforce in the same manner as the Judgment of the Federal Court, the final Arbitration Award rendered in the United Kingdom in a dispute between the Appellants and the Respondents.

The learned trial Judge, after taking the application, found for the Respondents. In his Ruling, the lower court held inter alia

"...The Final Award of Arbitration proceedings ...are recognizable by the court and enforceable... It shall be so enforced upon filing of a duty authenticated original award (sic) by the Applicant herein, and I so rule. 23rd March, 2011 for mention."

The Appellants are dissatisfied with this Ruling and filed a Notice of Appeal on the 22nd of March, 2011, which is dated 22nd March, 2011 - pages 112-114 of the Record of Appeal.

By a Charter party Agreement dated 4th August,

2006, the 2nd Respondent chartered to the 1st Appellant the ship **"MV CRUISER"** (of which the 1st Respondent were registered owners) to load and carry cargo of about 23,000 metric tons of rice belonging to the 2nd Appellant from Kakinada, India to Lagos and Port Harcourt in Nigeria.

A dispute arose between the parties, and pursuant to the Charter Party
Arbitration Clause which was incorporated in the Bills of Lading, London arbitration was provided for. Both parties appointed one arbitrator each with a 3rd arbitrator to be chosen by the appointed two.

At the end of the Arbitral proceedings, a final Award was made on the 15th of October, 2009.

On the 27th of September, 2010, the Respondents, by application, applied to the lower Court to register and enforce the Award.

The Appellants challenged the registration and enforcement of the Award on the grounds that the Respondents failed to put sufficient materials before the Court to warrant the granting of the application.

The Appellant filed a Notice of Appeal on the 22nd of March, 2011 with three (3) Grounds of Appeal.

Simply put the Grounds can be safely reproduced, shorn of its particulars.

GROUND 1

"THE LEARNED TRIAL JUDGE ERRED IN LAW WHEN IN SPITE OF THE POSITION OF THE LAW ON THE ROLE OF A JUDGE HE PROCEEDED TO GIVE ADVISORY OPINION TO THE APPLICANTS/RESPONDENTS"

GROUND 2

"THE LEARNED TRIAL JUDGE MISDIRECTED HIMSELF WHEN HE CONCLUDED THAT ''IT SHALL BE SO ENFORCED UPON FILING OF A DULY AUTHENTICATED ORIGINAL AWARD (SIC) By THE APPLICANTS HEREIN"

GROUND 3

"THE LEARNED TRIAL JUDGE ERRED IN LAW, WHEN IN SPITE OF THE LAW IMPOSING A DUTY ON THE COURT TO PRONOUNCE ON THE ISSUES RAISED BEFORE IT, HE DECLINED TO RULE ONE WAY OR THE OTHER ON THE ISSUES CANVASSED BY THE PARTIES AND THE ADMISSIBILITY OF THE CHARTER PARTY BEFORE HIM"

The Appellants filed their Brief of Argument on the 14th of September, 2011, but same was deemed filed on the 24th of May, 2012. It is settled by Maimuna Belgore-Alao Esq.

A The Respondents on their part filed their Brief of Argument on the 28th of June, 2012. It is settled by G.A. Daniel Esq.

B There is a Reply brief filed by the Appellant on the 6th of November, 2012, but same was deemed filed on the 17th of April, 2013. The Reply brief is settled by Abubakar Sulu-Gambari Esq.

C The Appellants had distilled just one issue for determination from the three (3) Grounds of Appeal. It is

D ***"WHETHER, HAVING NOT MADE A SPECIFIC PRONOUNCEMENT ON THE ISSUES RAISED BEFORE IT, THE LEARNED TRIAL IUDGE WAS RIGHT IN RULING THAT THE AWARD DATED 15/10/2009 WAS "-- REGISTRABLE AND***

E ***ENFORCEABLE--UPON FILING OF A DULY AUTHENTICATED ORIGINAL AWARD (SIC)..."***

F The Respondents had adopted word for word, the issue for determination raised by the Appellants.

I can safely treat this Appeal based on the sole issue for determination proffered by the Appellants in this Appeal.

G

Arguing the Appeal, the Appellants had submitted in his brief of argument that parties are in agreement that the authenticity or otherwise of the

arbitration award was never in contention (but the Original Charter Party), paragraph 2.0.6.

A

They submit that the correct interpretation of Section 51(2) of the Arbitration and Conciliation Act Cap. A. 18, Laws of the Federation of Nigeria 2004 is apposite.

B

The provision has this to say

C

"(2) The party relying on an award or applying for its enforcement shall supply -
(a) the duly authenticated original award or a duly certified copy thereof.

D

(b) the original arbitration agreement or a duly certified copy thereof; and
(c) where the award or arbitration agreement is not made in English Language, a duly certified translation thereof into the English

E

Language"

They submit that by an application dated 27th September, 2010, to register and enforce an

F

arbitral award, Respondents exhibited materials which they sought to rely on, in satisfaction of the provisions of Section 51-(2) of the Arbitration and Conciliation Act Cap. A. 18 Laws of the Federation of Nigeria 2004. The materials included a duly

G

certified copy of the arbitration award and a fax copy of the arbitration agreement (the Charter Party). The Appellants opposed the said application on the ground that Respondents had neither

exhibited an original nor duly certified copy of the Charter Party as provided by law and as such were not deserving of the registration and enforcement of the Award.

He submits that arguments were taken from counsel on the 15th of February, 2001, after which the Ruling, the subject matter of this appeal was delivered.

Appellants submit that the question that arose for determination at the lower Court was "Had Respondents satisfied all the conditions set out under Section 52(1) of the Act entitling them to the registration and enforcement of the Award?"

They submit that the learned trial Judge misdirected himself when he failed to pronounce on the issues before him and ruled that the Award would become registrable and enforceable upon the performance of an act, which at the material time had not been performed.

They submit that the lower Court failed to consider and pronounce on the issue and materials placed before it. Citing **WILSON V. OSHIN (2000) 9 NWLR (PT.673) AT 462** where the Apex Court had this to say

"....the principle of adjudication that is fundamental to the administration of justice is that a court is bound to consider every

material aspect of a party's case validity put before it, particularly where the issue is fundamental and critical to the determination of the case".

They submit that in the present case, the learned trial Judge completely ignored the issues raised by the parties before him. They contend that having heard counsel on behalf of the parties, the learned trial Judge ought to have determined the Appellants' objection by pronouncing on the issue one way or the other. In other words, the learned trial Judge should have granted or refused the application, but not to make it registrable or enforceable upon the filing of an authenticated Charter Party.

That had the lower Court made a specific pronouncement on the issue before it (i.e the interpretation of the provisions of Section 52(2) of the Act setting out the conditions for the registration and enforcement of foreign arbitration awards) it would have come to a totally different conclusion.

They contend that by directing the Claimants on what course of action to take, the lower Court by its Ruling embarked on giving advisory opinion to the Respondents. The Court does not have power to do this, they submit - citing **AGBAJE v. FASHOLA (2008) 6 NWLR (Pt.1082) 130; WAPANDA v. WAPANDA (2008) 1 NWLR (Pt.1068) 391**.

A They submit that the lower Court ought to have either struck out, dismissed or granted the application as it was, but not to make it enforceable upon the filing of an authenticated award (sic).

B The Respondents submit that in line with the Provisions of Section 51(2) of the Arbitration and Conciliation Act Cap. A.18 LFN 2004, referred to by the Appellants, having attached to their originating C motion at the Lower Court, both documents, which are the authenticated original award and the original arbitration agreement, but that the award was duly authenticated but the Arbitration Agreement which was the charter party was not.

D

They submit that the learned trial Judge then ordered (while recognizing that the said Award as "registrable and enforceable...upon the filing of a E duly authenticated original award (sic)..." (as the learned trial Judge meant to say Charter Party).

The Respondents submit that the following F documents were filed in the Court below when the application as argued. They are

G **(a) The Respondents' originating motion with written address thereto found at pages 3-54 of the Record of Appeal.**
(b) The Appellants' counter-affidavit to the said motion as well as a written address thereto found at pages 72-77 of the Record of

Appeal and

(c) The Respondents' reply on points of law and facts found at pages 70-81 of the Record of Appeal.

They submit that there is nowhere in the counter-affidavit filed at the Lower Court that the issue of non compliance with Section 51(2) was raised by the Appellants.

Submits that it is trite that parties are bound by their pleadings and any facts at variance with the pleadings go to no issue, and same should be disregarded by the court citing **ANIEMEKA EMEGOKWUE v. JAMES OKADIGBO (1973) S.C. AT PAGE 302.**

That to allow such would amount to springing surprises at the other party.

That the Appellants' counsel only raised the issue of non-compliance to Section 51(2) verbally in Court when concluding its submission on its said counter-affidavit.

They submit that the learned trial Judge was right in not making any specific pronouncement on that issue which was merely made orally before the Court and therefore the ruling of the lower Court was not perverse but correct.

The Respondents urge this Honourable Court, that

in deciding this appeal, it is duty bound to look at the various documents placed before the lower court as well as the Record of Appeal. Citing **AFRICAN CONTINENTAL SEAWAY LTD VS. NIGERIAN DREDGING ROADS AND GENERAL WORKS LTD (1977) S.C. 235.**

That assuming, but without conceding that the Appellants by their affidavit had raised the issue under determination, would the ruling of the learned trial Judge be said or seen to be incorrect and perverse with regards to having ordered that the said award was registrable and enforceable "UPON THE FILING OF AN AUTHENTICATED ORIGINAL AWARD (SIC)...? They answer this question in the affirmative. This is because the pronouncement of the learned trial Judge amounted to a consequential order to give efficacy to his Ruling, having considered probably, the oral submission of Appellants' counsel, which submission should have been discountenanced by the Court.

Citing **OSUJI v. OKEOCHA (2009) 16 NWLR PT.1166. PAGE 94,** they submit that a consequential order is an order which would make the principal order effective and effectual.

The Respondents submit that, the Appellants, having not denied the contents of the Arbitral award nor denied participating in the arbitration proceedings, the learned trial Judge was right in recognizing the said award "in the interest of

Justice" and thereby made a consequential order thereto for the Respondents to regularize their position despite the Appellants' objection.

Urges this Honourable Court to dismiss this Appeal, as the findings of the learned trial Judge were specific findings of facts against the Appellants, on the documents before him and this decision should not be disturbed by this Honourable Court.

Replying on point of law, the Appellants submit that in their written submission in support of their counter affidavit of 8/12/2010 (page 77 of the Record of Appeal) they deposed to the fact that:

"I further submit that the Appellants' case does not comply with the provisions of the Arbitration and Conciliation Act, thereby making the Arbitral Award of 15th October, 2009 unregistrable and unenforceable"

They submit that when the learned trial Judge ordered that the Award dated 15/10/2009 was "unregistrable and enforceable...upon the filing of a duly authenticated original award, this cannot be a consequential order. This is because decidedly, a consequential order is not one merely incidental to a decision but one necessarily flowing directly and naturally from, and inevitably consequent upon from it - **LIMAN v. MOHAMMED (1999) NWLR PT. 617. 134**. They submit that this order made by the learned trial Judge is not one flowing directly

and naturally from, and inevitably consequently upon this matter, but one allowing the Respondents the opportunity of putting their house in order after the Ruling of the court.

In considering this Appeal, the order which is being attacked comes to focus.

Simply put, the Appellants' case is that the lower Court should have either granted, struck out, or dismissed the Respondents' application to register and enforce the Arbitral Award, after entertaining same and not to make the Award "...registrable and enforceable...upon the filing of a duly authenticated original award" which the lower Court will never have the opportunity of assessing and authenticating because it became functus officio after its Ruling. That the learned trial Judge had no power to do same.

The originating motion filed by the Applicants seeks an order of the Federal High Court:

"recognizing and granting leave to the Applicants to enforce in the same manner as the Judgment of this Honourable Court, the final Arbitration Award rendered in the United Kingdom in the dispute between the Applicants and Respondents herein, by the Arbitration panel comprising Bruce Harris and David Barnett published on the 15th day of October, 2009..."

It is supported by a (14) fourteen paragraphs affidavit - pages 3 - 6 of the Record of Appeal.

The final Arbitration Award is reflected at pages 22 - 25 of the Record of Appeal. The reasons for the Arbitration Award are at pages 26-43 of the Record of Appeal, while the Partial Final Arbitration Award (costs) is at pages 50 - 54 of the Record of Appeal.

On the 28th day of February, 2011, the application was finally moved.

The Ruling of the learned trial judge can be gleaned at pages 100-102 of the Record of Appeal.

I deem it pertinent to reproduce same verbatim:

RULING

"The Originating Motion seeks an order of Court recognizing and granting leave to the Applicants to enforce in the same manner as the judgment of this Honorable Court, the Final Arbitration Award rendered in the United Kingdom in the dispute between the Applicants and Respondents herein, by the Arbitration Panel comprising Bruce Harris and David Barett published on the 15th day of October, 2009.

The Originating Motion is brought pursuant to

order 52, Rule 17 of the Federal High Court Civil Procedure Rules. Attached to the Affidavit in support are the Charter Party incorporating the Arbitration Clause; and a copy of Arbitral Award notarized before a Notary Public in England.

The Respondent does not dispute the contents of Charter Party nor contents of the Final Arbitral Award.

The Respondent does not dispute participating in the Arbitrations proceedings thus waiving any stipulations as to the number of Arbitrations to have adjudicated the claims with regard to clause 50 of the Charter Party.

We also note that the decision of three Arbitrations "or any two of them shall be final and for the purpose of enforcing any award this agreement may be made a rule of the Court".

I do not consider it against public policy to recognize and enforce Arbitral Awards rendered in foreign venues agreed upon by the parties provided in the circumstances it is just and proper.

See M.V. LUPEX v. NIGERIAN OVERSEAS ENTERING (2003) 15 NWLR (PT.846) 469.

The Final Award of the Arbitration proceedings under reference here are

recognizable by this court and enforceable as a Judgment of this Court.

It shall be so enforced upon filing of a duly authenticated original award by the Applicant herein, and I so rule. 23rd March, 2011 for mention.

Signed
C. E. ARCHIBONG
JUDGE
14TH MARCH, 2011"

It is apparent on the face of the Ruling complained of that the learned trial judge declared that the final award shall be enforced, upon filing of a duly authenticated original award by the Applicant.

Curiously in the Appellants' brief of argument in paragraph 5.0.8 at page 6 he submits that the Ruling of the lower Court directing Respondents to file a duly authenticated Charter party poised potential problems.

With respect this is not the order of the Court. That submission is misconceived, as the Order says "upon filing of a duly authenticated original award..."

Moreso in paragraph 5.0.9 of the Appellants' brief they somersaulted in their submissions when they submitted that

A ***"it is clear that upon hearing the parties through counsel, the lower court ought to have either struck out, dismissed or granted the application as it was but not to make it "...enforceable...upon the filing of an***
B ***authenticated award (sic)..."***

Thus the Appellants contradicted themselves in their submission.

C However as earlier observed, and at the expense of repetition, the Lower Court's order was that the final award shall be enforced upon filing of a duly authenticated original award by the Applicant.

D When the Applicants (Respondents in this appeal) sought the application in the lower Court, they exhibited materials which included a duly certified copy of the arbitration award pages 21-25 of the
E Record of Appeal; a fax copy of the arbitration agreement (the Charter party) pages 15-20 of the Record of Appeal. But Appellants opposed the said application on the ground that Respondents had
F neither exhibited an original nor duly certified copy of the Charter party as provided by law. Therefore they were not deserving of the registration and enforcement of the Award.

G It seems to me that all that the lower Court had to do was to enforce the final Arbitration Award dated 15th October, 2009, made in the United Kingdom in the dispute between the parties.

The Court in its wisdom, having acknowledged that the Final Award of the Arbitration Proceedings, being recognizable by the Nigerian Court, it is enforceable, and the Court went on to grant the order sought which was one:

"....recognizing and granting leave to the Applicants to enforce in the same manner as the judgment of this Honourable Court, the Final Arbitration Award rendered in the United Kingdom in the dispute between the Appellants and Respondents herein by the Arbitration panel, comprising Bruce Harris and David Barnett published on the 15th day of October 2009...." - Page 3 of the Record of Appeal.

On the 28th of February, 2011, the parties argued the motion in open Court - pages 96 -98 of the record of Appeal.

In Court, the Respondents submits that the question is whether Exhibit "UNVI" (which according to them) is the document contemplated by Section 51 (2) (b) of the Act. They further submit that the question is whether Exhibit "UNVI" is an original or a Certified True Copy. They submitted that it is neither of the two. That Exhibit "UNVI" is a fax copy. It is not an original nor a certified true copy, submitting that the Applicants have not satisfied the requirements of section 5

1-(2) (b) of the Arbitration and Reconciliation Act 2004, which stipulates that the party relying on an award or applying for its enforcement shall supply:

(a) "……
(b) the original arbitration agreement or a duly certified copy thereof."

The learned trial Judge, in my view considered what was before him. He recognized the fact that the parties are ad idem concerning the proceedings in the Foreign Court and indeed that the Respondents does not dispute the fact of Charter party nor contents of the Final Arbitral Award. The Court also observed that the Respondents did not dispute participating in the Arbitration proceedings. He also observed that the decision of three Arbitrators or any two of them shall be final and for the purpose of enforcing any award and that the agreement may be made a rule of the Court.

To say that the learned trial Judge did not consider the issues raised in the application is misconceived, and that submission is hereby discountenanced.

For the learned trial judge to enforce the Foreign Arbitral Award upon the filing of a duly authenticated original award by the Appellants is in order.

In **OBULAI V. OBORO 2001 FWLR PT.47. 1004**, the Apex Court held inter alia that

"Every Judgment or Ruling delivered by a competent court is presumed to be right. The burden is therefore on the Appellants to show the reason why the Judgment he has appealed from in a civil case should be set aside. If he cannot clearly convince the appeal court or if all he has done merely raises a doubt whether the Judge is right or wrong, the Judgment stays and the appeal fails"

IN HALSBURY'S LAWS OF ENGLAND 4TH EDITION PARAGRAPH 5 AT PAGE 8, the word "JUDGMENT OR ORDER" is defined as including an award which the Court has registered for enforcement, ordered to be enforced or given permission to enforce as if it were a Judgment or order of the Court.

At page 21 of the Record of Appeal is a testimony that the award and partial final arbitration award (costs). The copies, having been carefully collated and compared with the originals, they were found to be the same - page 21 of the Record of Appeal. This informed the Final Arbitration Award - pages 22-25 of the Record of Appeal.

All the learned trial Judge at the lower Court was to do, was to enforce this Arbitral Award in the Nigerian Court.

I am of the view that failure to attach an original copy of the Agreement to the application does not

render the application incompetent. The Court, instead of striking out the application, exercised its discretion to enforce the Award, but subject to the production of an original copy of the award. In other words, what was granted was a conditional enforcement of the Arbitral Agreement.

I do not think, this order of the lower court would cause injustice to the Appellants neither is it violative of either the principles of fairness and equity.

Section 52 of the Arbitration and Conciliation Act 2004 provides the Grounds for Courts refusing recognition and enforcement of Arbitral awards. In subsection 2(II)(a) of Section 52 it provides

"...Any of the parties to an arbitration agreement may request the Court to refuse recognition or enforcement of the award
(a) if the party against whom it is invoked furnishes the Court proof
(ii) that the arbitration agreement is not valid under the law which the parties have indicated should be applied, or failing such indication, that the arbitration agreement is not valid under the law of the country where the award was made."

Indeed there are eight instances which would enable the Court refuse recognition or enforcement, but none of these is applicable in this case.

In the present appeal, there is nothing to suggest that any arbitration agreement is not valid. The grouse is that the arbitral award is not in its original.

This is not, in my view enough to void the award. To order to file a duly authenticated original award can be safely made, as the learned trial Judge did. To strike out, or dismiss the award would have been prejudicial to the Applicant. What he did was to protect the interest of the parties and I cannot reverse same in the circumstances.

The lone issue for determination is resolved in favour of the Respondents and against the Appellants.

The result is that the Appeal fails and same, is hereby dismissed. The Ruling of **C.E. Archibong J.** delivered on the 28th of February 2011, in **Suit No.FHC/L/CS/1174/2010** at the Federal High Court Lagos is hereby affirmed.

SIDI DAUDA BAGE, J.C.A.: I have had the privilege of reading in draft the lead judgment just delivered by my learned brother **RITA NOSAKHARE PEMU, JCA.**

I agree with the reasoning and conclusion reached therein and have nothing extra to add.

This appeal fails and same is also hereby dismissed by me. The ruling of C. E. Archibong J. delivered on the 28th of February, 2011, in Suit No: FHC/L/CS /1174/2010 at the Federal High Court, Lagos is hereby affirmed.

CHINWE EUGENIA IYIZOBA, J.C.A.: I read before now the judgment just delivered by my learned brother, RITA NOSAKHARE PEMU JCA. I am in full agreement with the reasons given and the conclusions reached in the judgment. Accordingly, I also hereby dismiss the appeal as unmeritorious. I affirm the ruling of Archibong J. of the Federal High Court Lagos in suit no. FHC/L/CS/1174/2010 delivered on the 28th day of February, 2011.

Appearances

Abubakar Sulu-Gambari Esq., Chinwe Nwodili (Miss)	**For Appellants**
G. A. Daniel Esq.	**For Respondents**

LAWpavilion

POWERED BY:

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