



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 236/2024

In the matter between:

RUSTENBURG LOCAL MUNICIPALITY

APPELLANT

and

BURRIE SMIT ONTWIKKELAARS (PTY) LTD

RESPONDENT

Neutral citation: *Rustenburg Local Municipality v Burrie Smit Ontwikkelaars (Pty) Ltd* (236/2024) [2025] ZASCA 147 (7 October 2025)

Coram: SCHIPPERS, BAARTMAN and COPPIN JJA and STEYN and KUBUSHI AJJA

Heard: 26 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 7 October 2025 at 11h00

Summary: Expropriation – Expropriation Act 63 of 1975 (the Act) – meaning and effect of s 12(3) – interest on unpaid compensation from expropriation date – offer of compensation rejected – effect on costs – applicability of costs formula in s 15 and s 14(8)(e) of the Act – nature of court's discretion – costs to be ordered against owner if compensation determined by the court less than or equal to offer rejected – inclusion of solatium in compensation – apportionment of costs – compensation determined by court less than amount claimed by owner but exceeds amount last offered as compensation – applicability of s 15(2)(c).

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Hendricks JP, sitting as a court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The cross-appeal is dismissed with costs, including the costs of two counsel where so employed.
- 3 Paragraphs (c), (e), and (f) of the order of the high court of 3 November 2023 are set aside and are replaced with the following paragraphs:
 - '(c)(i) The defendant is ordered to pay interest on the amount of R593 690.80 at the applicable rate from the agreed date of expropriation, being 31 July 2004, until 7 August 2007, less the amount of R391 683.00 that the defendant already paid as interest on 7 August 2007;
 - (c)(ii) The interest referred to in paragraphs (b) and (c)(i) is simple statutory interest as envisaged in s 12(3)(a) of the Expropriation Act 63 of 1975 (the Act) charged at the rate determined from time to time by the Minister of Finance in terms of s 80(1)(a) of the Public Finance Management Act 29 of 1999.
 - (d) . . .
 - (e) The plaintiff is ordered to pay the defendant's costs, including the costs of two counsel where so employed, incurred after 11 November 2016, the qualifying fees of Messrs Ballack, Rudolph, Nagy and D Griffiths incurred after 11 November 2016, and the costs of the interlocutory application reserved on 17 September 2019;
 - (f) In respect of all the costs incurred until 11 November 2016 – which include the costs of the interlocutory applications reserved on 3 August 2015 and 11 October 2016, each party is to bear its own costs.'

JUDGMENT

Coppin JA (Schippers and Baartman JJA and Steyn and Kubushi AJJA concurring):

[1] This appeal engages the following issues concerning compensation for expropriation in terms of the Expropriation Act 63 of 1975 (the Act): the nature and rate of the interest payable on unpaid compensation as envisaged in s 12(3) of the Act; and the impact of a rejected offer of compensation on costs as contemplated in s 14(8)(e) read with s 15. These issues were not resolved by the North West Division of the High Court, Mahikeng (high court) that determined the amount payable for the expropriation of land. Resolving these issues involves interpreting relevant provisions of the Act. As with all expropriation laws, its provisions must be strictly interpreted.

[2] The respondent, Burrie Smit Ontwikkelaars (Pty) Ltd, a property development company, was the registered owner of a tract of land, the remaining extent of portion 43 of the farm Waterval 306, Registration Division JQ, North West Province, measuring about 87 5316 hectares (the property). It acquired the property in 1995 and designated it for township development. The appellant, the Rustenburg Local Municipality (the municipality), on behalf of the Rand Water Board, by notice of expropriation dated 6 July 2004, and acting in terms of s 79(24) of the Local Government Ordinance 17 of 1939 (the Ordinance), read with the relevant provision of the Act, expropriated a portion of the property (approximately 3 2350 hectares) for the construction of a 100 mega-litre water reservoir (the reservoir area). It also expropriated an area of the property measuring approximately 7 834 square meters (m²) to serve as a servitude for the conveyance of water by means of a pipeline(s) (the servitude area). The expropriation was urgent due to the bulk water supply needs in Rustenburg.

[3] Although the expropriation notice is dated 6 July 2004, it is undisputed that the actual date of the expropriation was 31 July 2004. Under s 79(24) of the Ordinance, the municipality was obliged to compensate the respondent for expropriating its

property. The municipality offered the respondent compensation as follows: R1 941 000 for the reservoir area (ie, R60 per m²), plus R235 020 for the servitude area (ie, R30 per m²), and R55 000 as a solatium. On 7 August 2007, the municipality sent a cheque to the respondent as payment under s 11(1) of the Act for the total amount of R2 622 703, which included the compensation offered, plus interest up to 31 July 2007 in the amount of R391 683. The respondent deposited the cheque, but demanded further compensation: R2 249 750 for the reservoir area, R665 980 for the servitude area, with a solatium, and value-added tax (VAT).

[4] The parties were unable to agree on the amount payable. On 24 November 2008, the respondent instituted action proceedings in the high court for a determination of the quantum of the compensation. The respondent sought R85 per m² for the reservoir and servitude areas, a solatium, plus VAT, and compensation for the loss of the potential development of the remaining part of its property.

[5] The municipality defended the action and essentially argued that the compensation it had offered was fair. It also disputed the respondent's claim for alleged financial loss due to the loss of developmental potential of the remnant property. On 11 November 2016, before the trial commenced, the municipality made a written 'without prejudice' tender to the respondent of R1.5 million, which the respondent rejected.

[6] It is agreed that the trial commenced on 11 June 2018 and that substantial legal costs were incurred. It ran for three years with 37 days of hearings. On 7 June 2023, the high court determined that the respondent was entitled to the following compensation: R 2 264 500 for the reservoir area (ie, a rate of R70 m²) and R 274 190 (ie, a rate of R35 per m²) for the servitude area, plus R55 000 as a solatium. The high court reserved the questions of costs and interest for later determination. On 3 November 2023, after receiving submissions from the parties on those questions, the high court, made an order in the following terms:

'(a) The defendant is ordered to pay the plaintiff an amount of R362 670.00 as compensation in terms of Sections 12(1)(a) and (b) of the Expropriation Act (R323 500.00 for the reservoir area and R39 170.00 for the servitude area).

(b) The defendant is ordered to pay interest on the said amount of R362 670.00 at the applicable rate from 07 August 2007 until date of final payment.

(c) The defendant is ordered to pay interest at the applicable rate from the actual date of expropriation as agreed between the parties, namely 31 July 2004 until 07 August 2007, less the amount of R391 683.00 that was already paid as interest on 07 August 2007.

(d) No other amount as solatium is payable in terms of Section 12(2) of the Expropriation Act 63 of 1975.

(e) The reserved costs of the interlocutory applications of 03 August 2015; 11 October 2016; and 17 September 2019 are costs in the action.

(f) Each party is ordered to pay its own costs.'

[7] The nature and rate of the interest were not specified in paragraphs (b) and (c) of the high court's order, and the capital sum on which the interest was payable was also not stated in paragraph (c). The municipality also took issue with the costs order in paragraph (f). It alleged that the costs order was not in compliance with s 14(8)(e) of the Act and did not take into account the municipality's without prejudice tender to the respondent on 11 November 2016, before the trial commenced. It further argued that in its costs order, the high court did not mention the qualifying fees of the expert witnesses it had called. The high court granted the municipality leave to appeal its 'costs and interest' orders. It also granted the respondent leave to cross-appeal against those same orders.

[8] The municipality argues that the without prejudice tender was not more than or equal to the high court's determination of the compensation. It contends that in respect of the period up to 11 November 2016, in terms of s 15(2)(c), the high court should have awarded it 40.8% of its taxed or agreed party and party costs; and in respect of the period after 11 November 2016, in terms of s 14(8)(e)(i) of the Act, all its taxed or agreed party and party costs. The municipality further argues that the costs orders should have included the costs of two counsel, as well as the qualifying fees of Mrs Theron and Messrs Engelbrecht, Dacomb, and Griffiths. An apportionment is required under s 15(2)(c) if the difference between the offer and the award is greater than the difference between the claim and the award.¹

¹ 10(3) *Lawsa 2* ed para 150.

[9] The parties have in writing agreed on a statement of issues and facts regarding this appeal in terms of rule 8(8) and rule 8(9) of this Court's rules. They agreed as follows:

'1. The appeal hinges on the following issues arising from the "ORDER/JUDGMENT ON VALUE-ADDED TAX, VAT, INTEREST AND COSTS" made on 3 November 2023 by [the high court], namely:

1.1 From paragraph (b) and (c) of the Order with regard to the interest payable, the issue arises whether on a proper interpretation of s 12(3)(a) of the Expropriation Act 63 of 1977 ("Act")

1.1.1 the interest is compounded at 11.5% the Government Gazette Notice 25778 from 7 August 2007 to date of payment, or

1.1.2. whether the interest payable in terms of the said section is simple statutory interest at the rate determined from time to time by the Minister of Finance in terms of s 80(1)(a) of the Public Finance Management Act 29 of 1999: and

1.1.3. whether the amount of R2 538 690 should be inserted in paragraph (c). (Common cause between the parties.)

1.2 From the Order with regard to costs, the issue arises whether the Court a quo was correct to order each party to pay its own costs; or

1.2.1. whether the Court was bound by s14(8) of the Act to award costs of suit to the defendant (the present appellant) from 12 November 2016, including the costs of two counsel and the qualifying fees of its expert witnesses; or

1.2.2 whether the Court should have apportioned the costs?'

Interest

[10] We were informed from the bar that the nature and rate of the interest were no longer in issue between the parties and they agree that paragraph (c) of the high court's order should be amended as follows:

'The defendant is ordered to pay interest on R 2 593 690.80 at the applicable rate from the actual date of expropriation as agreed between the parties, namely 31 July 2004 until 7 August 2007 less the amount of capital R391 683.00 that was already paid as interest on 7 August 2007.'

And that a sub-paragraph be inserted after the existing paragraph (c) that reads as follows:

'(c)(i) The interest payable as referred to in paragraphs (b) and (c) above is simple statutory interest in terms of s 12(3)(a) of the Expropriation Act 63 or 1975 ('the Act') at the rate

determined from time to time by the Minister of Finance in terms of s 80(1)(a) of the Public Finance Management Act 29 of 1999.’

[11] Section 12(3) provides that ‘[i]nterest at the standard interest rate determined in terms of section 26(1) of the Exchequer Act, 1975 (Act 66 of 1975), shall, subject to the provisions of subsection (4), be payable from the date on which the State takes possession of the property in question in terms of s 8(3) or (5) on *any outstanding portion of the amount of compensation payable* in accordance with subsection (1)...’ (Emphasis added.)

[12] In *Community Development Board v Mahomed and Others NNO*,² this Court interpreted the portion of s 12(3) of the Act, emphasised in the previous paragraph, as follows:

‘The expression “the amount of compensation payable” must have been intended by the Legislature to refer to the amount as ultimately determined . . . of that amount [and] “any outstanding portion” must mean any part of it not yet paid as at the date of taking possession of the property and for as long as it remains unpaid thereafter. If the whole amount in question is paid only after it has been determined, interest will be payable on it from the date of taking possession until the date of payment.’³

[13] In *Davehill (Pty) Ltd and Others v Community Development Board (Davehill)*,⁴ this Court held the following regarding the liability to pay compensation and interest upon expropriation of property:

‘The liability to pay statutory interest arises from considerations of equity, and was designed to compensate a person whose property has been expropriated for his loss of possession and fruits of the property up to the time that compensation was paid. . . . In effect, statutory interest runs from day to day on the outstanding portion of the amount of compensation payable (whether it be the full amount or a reduced amount because of an interim payment in terms of s 11(1)), and ceases the moment compensation is paid in full. At that date, the amount of statutory interest due can be computed at the rate prescribed in s 12(3), ie, “at the standard interest rate determined in terms of s 26(1) of the Exchequer and Audit Act 1975” ...’⁵

² *Community Development Board v Mahomed and Others NNO* 1987 (2) SA 899 (A).

³ *Ibid* at 909H-J.

⁴ *Davehill (Pty) Ltd and Others v Community Development Board* [1988] 1 All SA 388; 1988 (1) SA 290 (A).

⁵ *Ibid* at 297G-J.

[14] Although the section refers to ‘the Exchequer Act 66 of 1975’, that statute has been repealed and replaced with the Public Finance Management Act 1 of 1999 (PFMA). Section 80 of the PFMA is the applicable provision. In *Davehill*, this Court also stated when interest due becomes payable.⁶

[15] That leaves the question of costs. The matter has not been rendered moot as contemplated in s 16(2)(a) of the Superior Courts Act 10 of 2013. The parties correctly submitted that there are exceptional circumstances in this case, since the high court failed to exercise a discretion at all in respect of the costs. This ordinarily constitutes exceptional circumstances for the purposes of s 16(2) of the Superior Courts Act.⁷ The fact that the hearing in the high court took place over an extensive period in which substantial costs were incurred, is another factor that justifies the hearing of this appeal on the issue of the costs only.⁸

Costs

[16] The municipality argues that the high court was compelled by s 14(8) of the Act to take into account its without prejudice tender made on 11 November 2016 in the amount of R1.5 million. This, combined with the payment of R2 231 020 made to the respondent on 3 August 2007, totals R3 731 020, which is more than the compensation of R2 593 680 determined by the high court. The municipality submits that because the high court was bound by s 14(8), it should have been awarded its taxed or agreed party and party costs after 11 November 2016, including the qualifying fees of its experts.

[17] Counsel for the respondent argued, in essence, that the without prejudice offer must be considered separately, and not in addition to the payment that the municipality had already made in terms of s 11(1) of the Act. So construed, the amount determined by the high court as compensation was much higher than the offer. According to this

⁶ *Ibid* at 298.

⁷ *Naylor and Another v Jansen* [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) para 10; *Van Staden & Others NNO v Pro-Wiz Group (Pty) Ltd* [2019] ZASCA 7; 2019 (4) SA 532 (SCA) para 8.

⁸ *Oudebaaskraal (Edms) BPK en Andere v Jansen van Vuuren en Andere* 2001 (2) SA 806 (SCA) 812C-F.

argument, the municipality's contention 'does not accord with' the wording of the offer of R1.5 million, which was 'in full and final settlement'.

[18] The Act prescribes the costs orders that must be made in respect of proceedings where compensation is determined in the absence of an agreement.⁹ Section 15(2) of the Act provides as follows:

' . . .

(2) if the compensation awarded by the court in any proceedings contemplated in section 14(1) –

(a) is equal to or exceeds the amount last claimed by the owner one month prior to the date for which the proceedings were for the first time placed on the roll, costs shall be awarded against the Minister;

(b) is equal to or less than the amount last offered by the Minister one month prior to the date contemplated in paragraph (a), costs shall be awarded against the owner in question;

(c) is less than the amount last so claimed by the owner in question, but exceeds the amount last so offered by the Minister, so much of the costs of the owner shall be awarded against the Minister as bears to such costs the same proportion as the difference between the compensation so awarded and the amount so offered, bears to the difference between the amount of compensation so awarded and the amount so claimed.'

[19] Section 15(3) of the Act grants the court a limited discretion in relation to costs. It provides:

'(3) Notwithstanding the provisions of subsection (2), the court shall in its discretion decide as to the costs –

(a) In a case not mentioned in subsection (2);

(b) if any party did not within a reasonable time comply with reasonable requests under section 10 (7);

(c) if any party abused the provisions of section 10(7); or

(d) if, in the opinion of the court, the conduct of any party during or prior to the proceedings, justifies a deviation from subsection (2).'

[20] Since s 14 of the Act also contains provisions about the determination of the costs, s 15(3A) provides as follows:

⁹ A Gildenhuys *Onteieningsreg* 2 ed (1976) at 392-394.

‘(3A) In the case of a conflict between the provisions of this section and the provisions of section 14 the provisions of the last-mentioned section shall prevail.’

[21] Section 14(1) of the Act essentially provides that the amount of compensation payable for the expropriation of property shall, in the absence of an agreement, be determined by the high court with jurisdiction. Section 14(8) addresses written offers made regarding the compensation, as discussed above, but more importantly s 14(8)(e) deals with the consequences of not accepting an offer to settle the dispute. Subsections (e), (f), and (g) provide:

‘(e) if such an offer to settle the dispute is not accepted and the court determines the compensation at an amount –

(i) which is equal to or more than the amount of the offer by the owner, the court shall order the Minister to pay the owner’s costs incurred after the date of the offer; and

(ii) which is equal to or less than the amount of the offer by the Minister, the court shall order the owner to pay the Minister’s costs so incurred.

(f) The court shall in its discretion decide on costs incurred prior to the date of an offer.

(g) If a court has made an order as to costs without knowledge of an offer which had not been accepted and non-acceptance thereof is brought to the notice of the court within five days from the date of the judgment, costs shall be reconsidered in the light thereof.’

[22] In terms of s 5(1) of the Act, for the purposes of applying subsection (1), any reference to ‘the Minister’ and ‘the State’ in the Act, is to be interpreted as a ‘reference to the local authority concerned’. It is not in dispute that the municipality is a ‘local authority’ as defined in the Act and that it had the power to expropriate the respondent’s property in accordance with the provisions of the Act.

[23] In this instance, to settle the compensation issue, the municipality served a settlement offer on the respondent on 11 November 2016. The written notice, embodying the offer, is headed ‘Defendant’s without prejudice tender’ and reads as follows:

‘TAKE NOTICE THAT the Defendant hereby tenders without prejudice payment of the sum of R 1 500 000.00 (ONE MILLION FIVE HUNDRED THOUSAND RAND) in full and final settlement of the Plaintiff’s claim against the defendant.

TAKE FURTHER NOTICE THAT the Defendant does not tender any interest or any contribution to the legal costs in addition to the aforesaid amount.

TAKE FURTHER NOTICE THAT the Plaintiff is hereby provided notice that it may accept the tender within 10 (ten) days from the date of service of this Notice.' (Without prejudice offer)

[24] When the municipality made the without prejudice offer, it had already paid the respondent a total amount of R2 622 703 around 6 August 2007, in terms of s 11(1) of the Act. The payment included R2 176 020 as compensation (R1 941 000 for the reservoir area and R235 000 for the servitude area), and R55 000 as a solatium, plus R391 683 as interest. This payment was made after the municipality sent a notice under s 10(2) and s 11(1) of the Act, which included the offer to the respondent along with a cheque for R2 622 703. The respondent did not accept the offer in final settlement, but banked the cheque and proceeded to claim what it considered to be the compensation due to it. In doing so, the respondent acted within the law, since the municipality had already accepted its liability to compensate the respondent for the expropriated property.¹⁰ The fact that it was part payment of compensation cannot be ignored.

[25] The ultimate dispute between the parties is whether the municipality made the without prejudice offer in respect of the balance of compensation owed to the respondent, taking into account the part payment, or whether the offer represented the total amount of compensation. It is clear on the facts and the law that the part payment of compensation was made in terms of ss 10(2) and 11(1) of the Act. The notice of expropriation contained no offer of compensation and the municipality paid compensation in its letter of 10 November 2016, as it was obliged to do under s 11(1). The without prejudice tender was made after the first payment of compensation to the respondent. The municipality did not demand the return of the latter; neither did it request that the first offer of compensation be replaced with the without prejudice offer. It is clear from the wording of the without prejudice offer that it was merely in respect of the respondent's claim against the municipality, ie, the balance that the respondent maintained it was still owed taking into account the s 11(1) payment. It was not in respect of the municipality's total liability.

¹⁰ See *ABSA Bank Ltd v Van De Vyver NO* [2002] 3 All SA 425; 2002 (4) SA 397 (SCA) paras 13-14.

[26] Although the high court subsequently determined that the total amount of compensation was R2 538 690, it undoubtedly understood that the amount of R2 176 020 which had been paid by the municipality in terms of s 10(2) and s 11(1) of the Act had to be deducted from the amount of R2 538 690, leaving a balance owing of R 362 670. (As an aside, that amount ought to have been less, because the amount awarded as a solatium, namely, R55 000, should also have been deducted, because in applying the formula in s 15 and 14(8), any solatium payable in terms of the Act must be included in the compensation in terms of s 12(2)). The solatium is part and parcel of the compensation.¹¹ However, the high court did not grant leave to appeal on this aspect.

[27] In any event, assuming that the high court was correct in its conclusion that R362 670 was owing, that amount is obviously less than the without prejudice offer of the municipality (ie, of R1.5 million). Or looked at differently, the amount of R3 676 020 (made up of the municipality's first payment of R2 176 020 – leaving aside the solatium for the moment – plus the offer of R1.5 million) is obviously much more than the amount determined by the high court as compensation (ie, R 2 538 690).

[28] Since the amount of compensation determined by the high court was less than the amount the municipality offered as compensation for what it had expropriated – and in circumstances where the respondent did not accept the offer of 11 November 2016 of R1.5 million - in terms of s 14 (8)(e)(ii) of the Act the high court was obliged to order the respondent to pay the costs of the municipality incurred after that date.¹² In the absence of any acceptable justification, as provided in s 15(3), for deviating from the costs formula, the high court was obliged to comply with the formula. In respect of determining the costs until 11 November 2016, under s 14(8)(f), the high court could exercise a discretion. The high court did not consider s 15 or s 14(8), and determined the liability for costs without reference to those sections. That was a misdirection that entitles this Court to determine the question of costs afresh.

¹¹ *Dormehl v Gemeenskapsontwikkelingsraad* 1979 (1) SA 900 (T) at 911B-912A. 10(3) *Lawsa* 2 ed para 150. See also A Gildenhuys *Ontheeningsreg* 2 ed (1976) at 186.

¹² See s 14 (8)(e) and 15(2)(b) of the Expropriation Act 63 of 1975.

[29] This is not a matter where, as outlined in s 15(2)(c), or s 14(8)(e)(i) of the Act, the compensation set by the high court was less than the amount claimed by the respondent but more than the amount offered by the municipality, requiring the high court to apportion the costs. It was not open to the high court, nor is it open to this Court, to apportion the costs incurred after the without prejudice offer. The submissions by the respondent's counsel to the contrary are incorrect.

[30] In terms of s 15(2)(b) read with s 14(8)(e)(ii) of the Act the respondent must pay the costs of the municipality incurred from the date of the without prejudice offer, ie, after 11 November 2016, and such costs are to include, the costs of two counsel, where so employed, and the qualification fees of those expert witnesses of the municipality who testified from 11 November 2016. In respect of the costs up to and including 11 November 2016, it is fair that each party bear its own costs, including the costs of its expert witnesses who had testified by 11 November 2016. One cannot establish from the record on what date any particular expert testified, but there is nothing to indicate that the calling of any expert was otherwise not reasonably necessary.

[31] In the result:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The cross-appeal is dismissed with costs, including the costs of two counsel where so employed.
- 3 Paragraphs (c), (e), and (f) of the order of the high court of 3 November 2023 are set aside and are replaced with the following paragraphs:
 - '(c)(i) The defendant is ordered to pay interest on the amount of R593 690.80 at the applicable rate from the agreed date of expropriation, being 31 July 2004, until 7 August 2007, less the amount of R391 683.00 that the defendant already paid as interest on 7 August 2007;
 - (c)(ii) The interest referred to in paragraphs (b) and (c)(i) is simple statutory interest as envisaged in s 12(3)(a) of the Expropriation Act 63 of 1975 (the Act) charged at the rate determined from time to time by the Minister of Finance in terms of s 80(1)(a) of the Public Finance Management Act 29 of 1999.
 - (d) . . .

(e) The plaintiff is ordered to pay the defendant's costs, including the costs of two counsel where so employed, incurred after 11 November 2016, the qualifying fees of Messrs Ballack, Rudolph, Nagy and D Griffiths incurred after 11 November 2016, and the costs of the interlocutory application reserved on 17 September 2019;

(f) In respect of all the costs incurred until 11 November 2016, which shall include the costs of the interlocutory applications reserved on 3 August 2015 and 11 October 2016, each party is to bear its own costs.'

P COPPIN
JUDGE OF APPEAL

Appearances

For the appellant:

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Honey Attorneys, Bloemfontein

For the respondent:

RF De Villiers with SM van Vuren

Instructed by:

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