THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1319/2017

In the matter between

GEOFFREY COOK **APPLICANT**

and

MURRAY MORRISON **FIRST RESPONDENT**

SEABUSH INVESTMENTS (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Cook v Morrison* (1319/2017) [2019] ZASCA 08 (8 March 2019)

Coram: Lewis, Leach, Saldulker and Mathopo JJA and Rogers AJA

Heard: 21 February 2019

Delivered: 8 March 2019

Summary: Appeal – application for special leave – dismissal of – reconsideration in terms of 17(2)*(f)* of Superior Courts Act – such to be considered by 'court' constituted in terms of s 13(1), not by two judges of appeal who initially dismissed it.

Appeal – application for special leave – need for special circumstances – applicant not having reasonable prospects of success – even if he had such, no special circumstances justifying grant of special leave.

Prescription – meaning of 'debt' – such includes obligation by contracting party to make restitution of money or property following cancellation for repudiation.

Prescription – *semble* – if prescription adjudicated on assumption that plaintiff's pleaded allegations correct, permissible to decide matter with reference to plaintiff's primary factual allegations, disregarding alternatives.

Prescription – s 13(1)*(d)* of Prescription Act – relationship between co-shareholders in company not one of 'partnership'.

ORDER

Application for reconsideration of an order dismissing an application for special leave to appeal from: Gauteng Local Division of the High Court, Johannesburg (Meyer, Kathree-Setiloane and Twala JJ) sitting as a full court on appeal from a decision of the Gauteng Local Division of the High Court, Johannesburg (Moshidi J) sitting as a court of first instance.

The application for special leave to appeal is dismissed with costs, including the costs of two counsel where employed.

JUDGMENT

Lewis JA (Leach, Saldulker and Mathopo JJA and Rogers AJA concurring)

[1] The Superior Courts Act 10 of 2013 introduced a new remedy for applicants for leave to appeal who are dissatisfied with the outcome of their applications. Section 17(2)*(f)* provides that the decision of the majority of the judges considering an application for leave to appeal shall be final. But there is a proviso to the subsection that called for interpretation at the hearing of this application:

'Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, *refer the decision to the court for reconsideration* and if necessary, variation.' (My emphasis.)

[2] The President of the Court, Maya P, referred the application dealt with below, to a court of five judges for oral argument on reconsideration. She directed, on 30 January 2018, that the applicant was to file six copies of the record and that the parties were to comply 'with all the remaining rules relating to the prosecution of an appeal'. Members of the court and the applicant were under the impression that the merits of the appeal were to be argued at the same time as the argument for reconsideration.

[3] Counsel for the respondent, however, drew our attention to the decision of Maya P in *Hendrik Hough v Sisilana & others* [2018] ZASCA 4. Maya P dismissed the application for reconsideration under s 17(2)*(f)* in that matter and gave reasons for her order. In discussing the proviso to the section she said (para 2):

'It is readily apparent from the ordinary wording of these provisions that the relief provided relates only to the dismissal of an application for leave to appeal by the Supreme Court of Appeal. Thus the President of this Court may only direct the *appeal judges who considered the application to revisit their decision* and no more.' (My emphasis.)

[4] The respondents in this matter refer to Maya P's reasons for decision as authority for the proposition that the court constituted to hear the application for reconsideration had no jurisdiction. The proposition is not borne out by the wording of the proviso to s 17(2)*(f)*, which refers to 'the court'. That expression means a court constituted in terms of s 13(1) of the Act. The proposition is also not supported by the current practice that the issue of reconsideration is heard by a court properly constituted and not only the two judges who consider the application in the first instance. And it is contrary to the order issued by Maya P in this matter.

[5] Accordingly, in so far as *Hough* suggests that only the two or more judges who refused the application in chambers may reconsider their decision, it must be

incorrect. It really would make no sense at all for the same judges to reconsider their own decision. Counsel for the parties agreed that it would be best for the court, as it had been constituted for the oral hearing, to consider whether special leave should have been granted. The court did that and judgment on the merits of the application follows.

C H Lewis
Judge of Appeal

Rogers AJA (Lewis, Leach, Saldulker and Mathopo JJA concurring)

[6] The applicant, Mr Geoffrey Cook, was the plaintiff in an action instituted in the Gauteng Local Division of the High Court, Johannesburg. The respondents, Mr Murray Morrison and Seabush Investments (Pty) Ltd (Seabush), were the first and fifth defendants. Other defendants were cited but no relief was sought against them. I shall where appropriate refer to Morrison and Seabush collectively as the defendants.

[7] The defendants filed a special plea of prescription. They applied in terms of rule 33(4) for the special plea to be determined first. This application and the special plea came before Moshidi J who granted the separation and upheld the special plea. With his leave Cook appealed to a full court. The full court (per Meyer J, Kathree-Setiloane and Twala JJ concurring) dismissed the appeal. Cook applied to this court for special leave to appeal. Two judges of appeal dismissed the application. Still dissatisfied, Cook applied to the President in terms of s17(2)*(f)* of the Superior Courts Act 10 of 2013 for a reconsideration of the dismissal. The President made such an order. Although the President's order did not explicitly state that the parties must be ready to argue the appeal if special

leave were granted, the order directed Cook to file six copies of the full record. Both sides agreed that if we granted special leave we should simultaneously dispose of the appeal.

[8] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list (*Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-565E; *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 21).

[9] The special plea was argued on the assumption that Cook's allegations in his particulars of claim were correct. His pleaded case is in summary the following:

(i) During February 2003 Cook, Morrison and three other individuals (the second, third and fourth defendants, to whom I shall refer collectively as the Fox parties) concluded what the particulars of claim described as an oral joint venture agreement to create an ecotourism reserve to be known as the Sibuya Game Reserve. Over the period 2003 to 2007 various portions of adjacent land became part of the reserve. Two portions were owned by the Fox parties; a third portion by the seventh defendant, Hesber Impala (Pty) Ltd (Hesber), a company controlled by the joint venturers; and a fourth portion, added in 2007, by Seabush. The ecotourism business was owned by Sibuya Game Reserve & Lodge (Pty) Ltd (SGRL) while the game and various vehicles and equipment pertaining to the game farming belonged to Salisbury Trading CC (Salisbury).

(ii) In May 2008 the parties concluded written heads of agreement (heads) which were to be embodied in a formal contract. In terms of the heads the Fox parties were to sell their 50 per cent shareholding in SGRL to Cook and Morrison while the latter were to sell to the Fox parties their 50 per cent share of the game and of the vehicles and equipment belonging to Salisbury. Cook and Morrison had to pay the net balance owing to the Fox parties on these transactions by 1 June 2008.

(iii) In terms of the heads Cook and Morrison would have the sole right to operate the ecotourism camps in the reserve for 20 years against payment to the Fox parties of a monthly fee. This was in recognition of the fact that some of the properties making up the reserve belonged to the Fox parties and to Hesber.

(iv) This agreement was concluded so that the Fox parties could devote themselves wholly to game farming while Cook and Morrison could devote themselves wholly to the ecotourism business.

(v) Although a formal contract was not concluded, effect was given to the heads so that by 2010 Cook and Morrison owned all the shares in SGRL in equal shares while the Fox parties owned all the shares in Salisbury. Cook and Morrison also owned Seabush in equal shares. They each held 25 per cent of the shares in Hesber, the remaining 50 per cent of Hesber being held by the Fox parties.

(vi) In August 2010 Cook and Morrison concluded an oral agreement for Cook's exit from Seabush and SGRL (the exit agreement). The express terms were that Cook would sell his shares and claims in Seabush and SGRL to Morrison for one rand; would resign as a director of both companies; would settle a debt which Seabush owed Investec; and would pay Morrison R900 000. In return Seabush would sell to Cook the part of its land on which the 'Top House' was situated (the Top House land). Morrison was to provide Cook with a written contract for the sale of the Top House land within two days so that Cook could create the subdivision and have it transferred to himself. These terms were subject to Morrison's being able to sell his shares in SGRL to the Fox parties on acceptable terms.

(vii) It was an implied or tacit term of the exit agreement that if the Top House land could not be subdivided and transferred to Cook because of a failure by Morrison to furnish him with a written contract of sale, Morrison would be obliged to make restitution of whatever performance he had received.

(viii) Cook fulfilled his side of the exit agreement by transferring his shares in Seabush and SGRL to Morrison; resigning as a director of those companies; and paying the amount required to settle the Investec debt. (The particulars did not allege that Cook paid Morrison the amount of R900 000.)

(ix) Morrison in turn reached agreement with the Fox parties for the sale of his shares in SGRL to them.

(x) However, no written contract for the sale of the Top House land to Cook was concluded because Morrison 'insisted on inserting additional restrictive terms that were unacceptable to the plaintiff'. On 8 September 2010 Morrison 'impermissibly' sought to 'sever and cancel part of' the exit agreement with the result that, while retaining the benefits of Cook's performance, he refused to furnish to Cook a written contract for the sale of the Top House land.

(xi) Morrison's conduct amounted to a breach or repudiation of the exit agreement.

[10] With these factual allegations as prelude, Cook made the following concluding allegations:

(i) On 29 September 2010 he accepted Morrison's breach or repudiation of the exit agreement and cancelled that agreement. Alternatively, he gave notice in his particulars of claim that he was cancelling the agreement.

(ii) He suffered damages because Morrison did not restore him to his former position. If the damages could not be agreed, he was entitled to a statement and debatement of account because he was a shareholder of Seabush and SGRL and thus entitled to the information and because he was a 'partner in the broader joint venture known as Sibuya Game Reserve'.

(iii) The reasonable market values of Seabush, SGRL and the Top House land as at 2 August 2010 were R12.6 million, R18 million and R4 million respectively.
(iv) In the alternative to his claim for damages, Cook asserted an equivalent right on the basis of unjust enrichment.

[11] The prayers for relief (excluding those for interest and costs) were in summary for orders as follows:
(i) that Morrison deliver to Cook 50 per cent of the shares in Seabush and SGRL and reinstate him as a director of those companies, and that Cook be declared to be the lawful owner of a 50 per cent shareholding in the companies and that their share registers be rectified accordingly;
(ii) alternatively, and if such restitution were impossible or impractical, that Morrison and/or Seabush pay Cook R6.3 million in respect of Seabush and R9 million in respect of SGRL or that they produce statements of account to be debated so as to establish the value of a half-share of these companies;
(iii) that Morrison and/or Seabush pay Cook R1 161 984 (the Investec debt he settled);
(iv) in the alternative to the above claims, that Morrison pay Cook R6.3 million, R9 million and R1 161 984 (presumably on the basis of unjust enrichment).

[12] Cook issued summons in April 2014. The special plea alleged that the debts enforced in the summons prescribed three years after the alleged cancellation of the exit agreement on 29 September 2010. Cook did not deliver a replication.

[13] In the courts below and in this court three points were advanced for Cook: (i) that his claims were not matched by 'debts' owed by the defendants within the meaning of the Prescription Act 68 of 1969 (the Act); (ii) that, if the first point were rejected, the completion of prescription was delayed in terms of s 13(1)*(d)* of

the Act because the relationship between the parties was one of partnership; (iii) that the special plea should not have been adjudicated separately because evidence was needed to determine the date on which the exit agreement was cancelled. The courts below rejected these contentions and upheld the special plea.

First point – no 'debts'

[14] Cook's counsel submitted that Morrison's obligation to restore half of the shares in Seabush and SGR to him was not a 'debt' within the meaning of the Prescription Act as that term was explained in *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC). In *Makate* the Constitutional Court held that Vodacom's contractual obligation to commence bona fide negotiations was not a 'debt' and that, to the extent that *Desai NO v Desai & others* 1996 (1) SA 141 (A) gave 'debt' a wide enough meaning to encompass such an obligation, it was wrongly decided. Both the majority and minority judgments (paras 85 and 187) made reference to this court's decision in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) (*Escom*), where 'debt' was said to have the following dictionary meaning:

'1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.

2. A liability or obligation to pay or render something; the condition of being so obligated.'

Because Vodacom's duty to commence negotiations did not answer this description, it was not a 'debt'.

[15] *Makate* did not overrule *Escom*, and this court has continued to apply the *Escom* test (see, eg, *Bondev Midrand (Pty) Limited v Puling and Another, Bondev Midrand (Pty) Limited v Ramokgopa* [2017] ZASCA 141; 2017 (6) SA 373 (SCA) para 21; *Brompton Court Body Corporate v Khumalo* [2018] ZASCA 27; 2018 (3) SA 347 (SCA) para 11.) Morrison's alleged obligation to deliver shares in Seabush and SGRL to Cook fits comfortably within the *Escom* definition of

'something (as money, goods or service) which one person is under an obligation to pay or render to another'. When a contract is cancelled because of repudiation, the obligation to make restitution is a personal one resting on the indebted party to pay money or deliver assets which he received as performance under the contract.

[16] Cook's counsel submitted that the remedy was not one arising from the contract but rather a duty of restitution imposed by the law. It is unnecessary to engage with this semantic distinction. The simple point is that the cancellation gave rise to a personal obligation to pay or deliver. If counsel's argument were correct, it would mean that a personal obligation to pay damages following cancellation of a contract, or upon the commission of a delict, is not a 'debt', an untenable proposition.

[17] Cook's counsel referred us to *Absa Bank Ltd v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA), where this court held that the right of an owner to recover his property by the rei vindicatio is not matched by a 'debt' owed by the person sued. The difference between that case and the present one is that in a rei vindicatio the claimant does not seek to enforce a personal obligation owed by the possessor. He seeks to vindicate an asset of which he is the owner. His right to recover the asset from whomsoever is in possession of it is an incident of his real right of ownership, not the result of a personal obligation owed to him by the possessor (see also *eThekwini Municipality v Mounthaven (Pty) Ltd* [2017] ZASCA 129; 2018 (1) SA 384 (SCA) paras 11-16). In the present case, by contrast, Cook's allegations disclose that pursuant to the exit agreement he transferred the shares to Morrison who thereupon became their owner. Morrison's obligation to deliver them back to Cook was a personal obligation resting on him as the counterparty to a contract which Cook had lawfully cancelled. The same applies to the obligations allegedly resting on Morrison to pay damages or to pay money by virtue of unjustified enrichment.

Second point - partnership

[18] In regard to s 13(1)*(d)* of the Act, Cook did not file a replication alleging that completion of prescription was delayed by virtue of a relationship of partnership between himself and the defendants. Although the onus rested on the defendants to establish when prescription began to run, the onus was on the plaintiff to allege and prove that the completion of prescription was delayed (*Naidoo NO & others v Naidoo & another* 2010 (5) SA 514 (KZP) para 16 and authorities there cited).

[19] I accept that a replication may be unnecessary where the facts giving rise to the delay in completion of prescription are sufficiently alleged in the creditor's particulars of claim. That was not the case here. Indeed, in the light of the allegations in his particulars of claim I do not think Cook could have filed a non-excipiable replication based on s 13(1)*(d)*. In order for that provision to apply the relationship between the creditor and debtor must be one of 'partners' and the debt must be one arising out of the 'partnership relationship'. The words 'partners' and 'partnership' have their ordinary common law meaning. The legal relationship of partnership arises from a contract between two or more persons by which each agrees to make a contribution (whether in money, property or service) to a venture to be carried on jointly by them with a view to making a profit and on the basis of sharing the profits and losses (*Lawsa* 'Partnership' 2 ed vol 19 (replacement volume 2016) paras 263-264).

[20] Where persons agree to conduct a venture through a company and become co-shareholders, the company is not a 'partnership' and the shareholders are not 'partners'. For some purposes – for example in determining whether it is just and equitable to wind up a company – the courts have drawn on partnership principles, sometimes describing the relationship between the shareholders in a small domestic company as one of 'quasi-partnership'. This does not mean, however,

that in law the shareholders are partners, a point Lord Wilberforce was at pains to stress in his seminal judgment in *Ebrahim v Westbourne Galleries Ltd* [1973] AC 360 (HL) at 379H-380B (see also *Apco Africa (Pty) Ltd & another v Apco Worldwide Inc* [2008] ZASCA 64; 2008 (5) SA 615 (SCA) paras 17-18).

[21] Cook's pleaded allegations concerning the 'joint venture agreement' concluded in February 2003 and implemented over the period 2003-2007 do not cover the essentialia of partnership. His allegations are in fact irreconcilable with such essentialia. He alleges that the land comprising the reserve continued to belong to the pre-existing registered owners; that the game, vehicles and equipment were owned by Salisbury; and the ecotourism business by SGRL. The expenses and profits of the ecotourism business were those of SGRL. The expenses and profits of the game-farming business were those of Salisbury. To the extent that there were expenses and profits from land ownership, they were incurred and made by the individual land-owning companies. Cook, Morrison and the Fox parties might have benefited indirectly through dividends received as shareholders in one or more of the companies but there is no pleaded arrangement in terms of which the companies and/or shareholders inter se were to conduct a single venture in which they would share profits and losses.

[22] The 'joint venture' was thus a mixture of relationships. Save in relation to the land, the parties were associated as shareholders of companies. The particulars of claim make no allegations regarding the relationship between SGRL, Salisbury and the various persons who owned the portions of land making up the reserve. Parties may cooperate with each other to enhance their individual businesses. Such cooperation does not mean they are partners.

[23] Following the implementation of the heads in May 2008, Cook and Morrison ceased to be associated with the Fox parties save that each continued to

hold 25 per cent of Hesber. The relationship between Cook and Morrison in relation to the ecotourism business was as 50:50 shareholders of SGRL. In regard to the portion of land belonging to Seabush, their relationship was again as 50:50 shareholders of that company. SGRL had the right to operate the camps on land belonging to or controlled by the Fox parties in return for a monthly fee. That was an ordinary contract for use between SGRL and the Fox parties.

[24] Accordingly, when the exit agreement was concluded in August 2010 the relationship between Cook and Morrison in connection with the business operated and property owned by SGRL and Seabush was one of co-shareholding, not partnership. There was also no partnership between them and the Fox parties. The exit agreement was merely an arrangement by which the plaintiff would dispose of his shares in SGRL and Seabush to Morrison and receive a subdivided portion of land belonging to Seabush.

[25] Cook thus failed to plead allegations disclosing the existence of a partnership between himself and Morrison. In view of this conclusion it is unnecessary to decide whether an obligation arising from a contract by which a partnership is terminated is a debt arising 'out of the partnership relationship' for purposes of s 13(1)*(d)*.

Third point – date of cancellation

[26] Cook's counsel rightly conceded that if the first point were unsound, prescription in respect of the 'debts' owed by Morrison began to run from the date on which Cook elected to cancel the exit agreement. If that date was 29 September 2010, the rejection of Cook's second point would mean that the debts prescribed about six months before summons was served. To escape this conclusion Cook's counsel placed emphasis on the alternative allegation that the exit agreement was only cancelled when summons was issued. Particularly since

the defendants denied the cancellation of the agreement, a court could only determine the commencement date of prescription after hearing evidence and deciding when the agreement was cancelled.

[27] Regarding the defendant's denial, it is right to add that the defendants amplified their denial by pleading that Cook was not entitled to cancel the agreement, Cook himself being the person who was in breach of his obligations. In the light of this amplification, the defendants were not necessarily disputing that Cook had *purported* to cancel the exit agreement on 29 September 2010 but nothing turns on this.

[28] In the present case the defendants, who denied the existence of any valid claims on the merits, asked the trial court to adjudicate the special plea of prescription on the assumption that Cook's pleaded facts were correct. Where inconsistent facts are pleaded in the alternative, both facts cannot simultaneously be assumed to be correct. Although Cook's counsel resisted the characterisation of the relevant paragraph of the particulars of claim as comprising a primary and an alternative allegation, the long-standing conventions of pleading would so regard it. The first allegation represents the pleader's primary case, the alternative a fallback position if he fails on the primary case. If the other party admits the primary allegation, that disposes of the issue – the alternative falls away. An admission of the alternative allegation, by contrast, will not do so.

[29] There is thus much to be said for the proposition that when the prescription of the alleged debts came to be tested on the assumption that Cook's allegations were correct, the trial court and full court were entitled, in the absence of an abandonment by Cook of his primary case, to confine their attention to that case and to disregard the alternative. The defendants were effectively saying: 'Although we deny the merits of your claims altogether, we are willing to admit,

for purposes of prescription only, your primary case.' If the defendants had not advanced a defence on the merits, had admitted Cook's primary case and pleaded only a defence of prescription, Cook could not have escaped the consequences of his primary case by pointing to the existence of an alternative. I do not see why it should be different where a plaintiff's primary case is assumed to be true for purposes of prescription.

[30] It is, however, unnecessary to express a final opinion on this point. Even if it were not strictly correct to disregard the alternative, it by no means follows that an injustice has been done to Cook. Here I digress to considerations relating to special circumstances rather than prospects of success. First, Cook has not alleged in his application for special leave that he did not cancel the agreement on 29 September 2010 and that he has thus unjustly been denied the opportunity to run a case based on a cancellation as at April 2014. Second, an acceptance by Cook that he only cancelled the agreement in April 2014 would have presented him with significant difficulties. Although the statement that a party must exercise an election to cancel within a reasonable time may not be technically accurate, a lengthy delay in exercising the election may nonetheless, and usually will, lead to a conclusion that the party waived the right, ie elected not to cancel (*Mahabeer v Sharma NO & another* 1985 (3) SA 729 (A) at 736D-I). In the present case, Cook would need to explain a delay of three and a half years. Third, it is doubtful that a party may cancel an agreement for non-performance of obligations which have prescribed by the time the election is exercised. A cancellation as at April 2014 might thus simply attract a different plea of prescription, namely that the obligations, the non-performance of which constituted the breach or repudiation, had prescribed before Cook elected to cancel.

[31] To sum up. There are no reasonable prospects of success in an appeal challenging the finding that, on Cook's primary case, the debts sought to be

enforced prescribed before summons was served. While there is an argument to be made that the courts below erred in not taking into account the alternative case, Cook's prospects of success on that point case can at best be described as modest. In assessing whether special circumstances exist, we may take into account the absence of any evidence in the application for special leave to suggest that the alternative case represents a realistic and plausible one rather than a mere theoretical possibility.

[32] The proposed appeal does not raise a substantial point of law. The characterisation of the defendants' alleged obligations as 'debts' does not fall within any penumbra of uncertainty which *Makate* might be thought to have created. The requirements for the existence of a partnership are trite, their application to the facts alleged in the particulars of claim straightforward.

[33] Apart from prospects of success, which Cook in his application optimistically described as 'extremely good', the only other factor relating to special circumstances which he alleged was that it would be 'a terrible injustice' to him if he were not permitted to pursue his claims; Morrison's behaviour had been 'unconscionable' – he had 'retained everything for himself and left me with nothing'. I accept that Cook feels aggrieved. Most cases are regarded by the litigants themselves as very important. This is not in itself a special circumstance. Something beyond the natural interest which every litigant has in his case is needed. Although Cook's monetary claims are substantial, we know nothing of their relative importance to him.

[34] While it may seem unjust (on Cook's case) for the defendants to have been substantially benefited without making the promised counter-performance, this is a result inherent in the law of prescription. The fact is that Cook had three years, as from 29 September 2010, to launch proceedings. We do not know why he

waited three and a half years. The law tolerates the extinction of debts through prescription because of the public interest in finality.

[35] Accordingly, to any limited extent that Cook's prospects of success might rise to the level of being 'reasonable', there are no special circumstances which make it just to permit a second appeal.

[36] The following order is made:

The application for special leave to appeal is dismissed with costs, including the costs of two counsel where employed.

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O L Rogers

Acting Judge of Appeal

APPEARANCES

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