



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 9026/2022P

In the matter between:

CELESTE ESTELLE HUBENER N.O.

FIRST APPELLANT

NATASHA HUBENER N.O.

SECOND APPELLANT

SHANE GILBERT HUBENER N.O.

THIRD APPELLANT

and

HJ PEPLER & PJ HUMAN SHARE BLOCK

FIRST RESPONDENT

t/a RIDGE ROYAL

SECOND RESPONDENT

THE COMMUNITY SCHEMES OMBUD SERVICE

ADV R T REDDY

THIRD RESPONDENT

ORDER

The following order is granted:

- 1. Condonation is granted for non-compliance with the time frames for the noting of the appeal.**
- 2. The unsigned copy of Agreement of Use and Occupation is declared a true reflection of the content of the agreement concluded between the first respondent and Steven William Hubener in 2008.**
- 3. The appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld.**
- 4. The order by the third respondent in terms of section 54 of the Community**

Schemes Ombud Service Act 9 of 2011 is set aside.

- 5. The matter is remitted to the second respondent for proper consideration of the applicable legislation, the agreement between the parties, and any other relevant evidence.**
- 6. The first respondent is ordered to pay the costs.**

JUDGMENT

Shoba AJ:

Introduction

[1] **This is an appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 ('the CSOS Act') against the adjudication order granted in favour of the first respondent against Mr Steve William Hubener ('the deceased') by the third respondent on 23 March 2021. The adjudication order ordered the deceased to pay R371 695.48 comprising of outstanding levies.**

Parties

[2] The first appellant is an adult female pensioner, residing at Lavender Road, Anlin, West Pretoria, and the wife of the deceased who passed away on 22 June 2021. The first, second, and third appellants are the duly appointed executrices and executors of the deceased's estate. The second and third appellants are the children of the first appellant and the deceased.

[3] The first respondent is H J Pepler & PJ Human Share Block (Pty) Ltd t/a Ridge Royal, a company duly registered in terms of the relevant statutes of the Republic of South Africa. The second respondent is the Community Schemes Ombud Service, a statutory body established in terms of the CSOS Act established to regulate the conduct

of parties within community schemes. The third respondent is the adjudicator who was appointed by the second respondent to adjudicate the dispute.

[4] In terms of the notice of motion, the appellants seek the following relief:

1. That the time period contemplated by Section 57 of the Community Schemes Ombud Service Act, Act 9 of 2011, for the filing of an appeal against an Adjudication Order, be extended and that the late filing of this appeal against the Adjudication Order by the 3rd Respondent on 23 March 2021 under reference number CSOS 03487/KZN/19 be condoned.
2. That the unsigned copy of the Agreement of Use and Occupation, annexed to the Founding Affidavit as ANNEXURE "B", be declared a true reflection of the content of the Agreement concluded between the 1st Respondent and Steven William Hubener in 2008.
3. That the Appellants be permitted to present the unsigned copy of the Agreement of Use and Occupation, annexed to the Founding Affidavit as ANNEXURE "B", as new evidence in the appeal.
4. That this appeal . . . be upheld and that the Adjudication Order be rescinded and set aside.
5. Costs of this application/appeal, only if- and against those Respondent/(s) opposing.
6. . . .'

Factual background

[5] The deceased was a holder of shares in the first respondent and was entitled to the exclusive use and occupation of certain units, namely flats 13 and 14, and garages 10 and 11. The deceased allegedly failed to make a levy contribution for several years. The first respondent approached the second respondent in terms of section 38(1) of the CSOS.

[6] The deceased, according to the report by the third respondent, did not deny that the monies were owing but indicated that he was denied the use and enjoyment of the property, in part by the second respondent after the premises were declared dangerous to inhabit by the eThekweni Municipality. The third respondent found that there was no lawful reason for the deceased to withhold levies and that he was liable to pay the amounts claimed as well as interest on the amounts.

[7] On 23 March 2021, the third respondent issued an order. A copy thereof was sent via email on 23 March 2021. It ordered the deceased to pay the outstanding levies as from 1 March 2021, in the amount of R376 695.48, within 60 days of the service of the award on him ('the adjudication order'). On 26 May 2021, the deceased's attorney sent a letter informing the second respondent of the deceased's intention to appeal against the adjudication order.

[8] On 23 June 2021, the deceased's attorney served the notice of appeal on the respondents, unaware of the deceased's passing. On 1 September 2021, the second and third respondents delivered the record of proceedings by email to the deceased's attorney, which excluded the agreement between the parties. On 6 October 2021, the appellants' attorney informed all parties involved about the passing of the deceased.

Condonation

[9] The appeal was not prosecuted in time due to a number of reasons, which included *inter alia* the death of the deceased, a change in attorneys and the finalisation of practice directives by Judge President of the KwaZulu-Natal Division of the High Court, relating to the process to be followed in bringing these types of appeals before the court.

[10] Section 57(2) of the CSOS Act provides that '[a]n appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator'.

[11] It is trite that a court may on good cause shown, condone non-compliance. The approach in determining whether good cause has been shown, is the oft-quoted passage enunciated by Holmes JA in *Melane v Santam Insurance Co Ltd*:¹

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these

¹ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-D.

facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion. . .’

[12] The court in *Academic and Professional Staff Association v Pretorius NO and others* summarised the principles for consideration in an application for condonation as follows:²

‘[17] The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. . .’

[18] It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.’

[13] In this case, the intention to appeal the order was communicated two months after the order was delivered and two days in excess of 60 days within which the payment was expected to be made. The order of the adjudicator was thus not given effect to. This was not objected to by the respondents. What then transpired was a number of events which led to the delay in prosecution of the appeal, as previously mentioned.

[14] These, I find, taken cumulatively amount to a reasonable, acceptable and satisfactory explanation for the delay. Condonation is therefore granted.

Appeal

[15] The appeal grounds are as follows:

(a) The relationship between the deceased and First Respondent was allegedly governed by an agreement – which is unsigned. The most relevant clause was clause

² *Academic and Professional Staff Association v Pretorius NO and others* [2007] ZALCJHB 4; (2008) 29 ILJ 318 (LC) paras 17-18.

17 which provided that

‘. . . [t]he obligation of a Holder to pay a levy shall cease upon the lawful termination of the Holder’s right of occupation, save for any arrear levies to the date of such a termination. No excess levies paid by Holders shall be repayable by the Company on the termination of Holder’s right of occupation’.

(b) The appellants aver that there were no outstanding levies at the time of the termination of the deceased’s right to occupation. To the contrary, the deceased’s levies were paid in full until nine months after termination of his rights to occupation.

(c) The deceased was not liable to pay levies to the first respondent subsequent to the lawful termination of his right to occupation in terms of the agreement or any other breach.

(d) The first respondent had no basis on which to claim levies from the deceased after August 2016. The third respondent misdirected himself in deciding the matter by failing to consider the contractual relationship between the deceased and the first respondent.

(e) The third respondent erred in failing to consider the contractual relationship between the deceased and the first respondent, and erred in:

(i) **Holding that the deceased was liable for payment of levies to the first respondent even after the lawful termination of the deceased’s rights;**

(ii) **Holding that it was common cause between the deceased and the first respondent that the deceased was liable for payment of levies to the first respondent; and**

(iii) **Failing to recognise that no levies became due by the deceased to the first respondent after 26 August 2016.**

(f) The findings and order in the adjudication order are clearly wrong and ought to be set aside.

[16] **The first respondent opposed the appeal for the following reasons:**

(a) In accordance with section 57(1) of the CSOS Act, an appeal of an adjudication order is restricted to issues of law, while section 52 states that in the ordinary course, parties are not entitled to legal representation during the adjudication process.

(b) The basis of the appeal is that the client did not have the benefit of legal counsel at the hearing and some important issues were not raised. This, in essence, being the unsigned agreement.

(c) The unsigned agreement now sought to be relied on, was in possession of the deceased and/or appellants at all times. The appellants are therefore attempting to have a second bite at the cherry, which is not in accordance with the CSOS Act nor the appeal procedures and rules.

Legal framework

[17] **The right to appeal an adjudication order is provided for terms of section 57. Section 57(1) provides that ‘an applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law’.**

[18] **The powers of the court in these types of reviews are limited. In *Trustees, Avenues Body Corporate v Shmaryahu and another*³ it was held that**

‘What may be sought in terms of s 57 is an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 is closely analogous to that which might be sought on judicial review. The appeal is accordingly one that is most comfortably niched within the third category of appeals identified in *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590–591.’ (Footnote omitted.)

In *Kingshaven Homeowners’ Association v Botha and others*⁴ it was also held that:

‘The third category of appeal in *Tikly* was defined by Trollip J in these terms: “a review, that is a limited rehearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly”.’

[19] **In *Stenersen & Tulleken Administration CC v Linton Park Body Corporate*⁵ the court held the following:**

³ *Trustees, Avenues Body Corporate v Shmaryahu and another* 2018 (4) SA 566 (WCC) para 25.

⁴ *Kingshaven Homeowners’ Association v Botha and others* 2023 (4) SA 187 (WCC) para 11.

[33] Put differently, the appeal court is limited to considering whether the adjudicator —

[33.1] applied the correct law;

[33.2] interpreted the law correctly, and/or

[33.3] properly applied the law to the facts as found by the adjudicator.

[34] The conclusions drawn from the evidence (ie the 'findings of fact') by the adjudicator cannot be reconsidered on appeal.

[35] In essence, by limiting the scope of an appeal to questions of law only, the court of appeal is only tasked with deciding whether the conclusions of law reached by the adjudicator were right or wrong. This determination can only be made based on the facts in existence at the time the order was given, and as they appear from the record. This demonstrates not only the need to finally resolve disputes of fact at adjudication level, but also the necessity of avoiding or limiting the number of appeals brought to the High Court, thereby alleviating the burden of the High Court in dealing with matters of this nature. This ensures that cases are dealt with in an uncomplicated and expeditious manner. To conclude otherwise would defeat the purpose of what the CSOS Act seeks to achieve.'

[20] In *Nuwekloof Private Game Reserve Farm Owners' Association v Hanekom N.O and others*⁶ the court held that

'Whether the [adjudicator] committed an error of law is a matter that falls to be determined with reference to the reasons he gave in support of the order he made.'

Analysis

[21] **The first respondent does not dispute that there was a binding agreement between the parties. It avers that the original copy was, however, misplaced. The appellants have a copy of the agreement, which bears the names of the parties, the property description, and the terms and conditions of the contract. The only thing that is missing is the signatures of the parties. The deceased, it would appear, was in possession of the said agreement at the time of the adjudication of the matter by the third respondent. He, however, did not present it as authority for his assertion that he was not liable to pay levies.**

⁵ *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and another* 2020 (1) SA 651 (GJ) paras 33-35.

⁶ *Nuwekloof Private Game Reserve Farm Owners' Association v Hanekom N.O and others* [2023] ZAWCHC 10 para 24.

[22] In the email dated 3 December 2019 which was sent to the second respondent, the deceased indicated that he had issues with the fact that he was unable to occupy the flat due to it being declared unsafe to occupy and that he was expected to pay for services he has not received. He also lamented the fact that he was losing income as he was not able to use or to rent the flat out. The letter reads as follows:

'I, Mr. S.W. Hubener, bought unit 13 of Ridge Royal for an amount of R1 300 000, we have upgraded the flat by taking out all the old wooden window frames and replacing them with aluminium window frames, but the directors of Ridge Royal neglected to maintain the roof and in turn resulted in damaging out (sic) ceiling and wooden floors in the main bedroom and the passage way. We requested that they repair the damage, but they would not, eventually they did attempt to fix it and we paid levies.

On the 26 August 2016 we were told that our flat was unsafe for occupation. My Wife and I bought this unit 13 (we also have a second unit No 7 where the levies are totally up to date) for the sole purpose of having accommodation for us and to rent out to family and friends when they needed accommodation, whilst on holiday.

As stated we bought the unit 13 for R1 300 000 and in all this time of not being able to use or rent out the flat we have had to continue paying the loan back, and have had to pay for accommodation for our own holidays (we are a family of 6 so we would be unable to all stay in the bachelor unit No 7.)

Through our lawyer's we requested compensation for loss of income both from Caron Smith representing Ridge Royal - who never answered our lawyers and the Rio Construction Company (see attached letter received from there (sic) lawyers). We would like to state that we have never received a letter from any lawyer representing Ridge Royal, we have only received emails on behalf of the Directors from Lumen Rock.

Our question is why has it taken so long (26 August 2016 to date almost 3 and half years later and still ongoing) for the Directors of Ridge Royal to sort out this problem. From letters received it seems the Rio Construction is putting all the blame on Ridge Royal, but the problem only occurred when Rio Construction started excavating next to Ridge Royal, the building was fine before this, for many years.

The Rio Construction Company should be made to pay for the damages and loss of income.

Ridge Royal requests that we pay all outstanding amounts - for services we have not received, no accommodation, no water, no electricity, and interest which would not have been there if this had been sorted out expeditiously. We request to be paid loss of income.

...'⁷

[23] There is no way that the content of the email could have been construed to mean that the deceased was not disputing owing levies. The finding of the third respondent that it was common cause that the deceased owed levies was, therefore, incorrect. The third respondent held that '*I am satisfied* that the Respondent has no lawful reason to withhold the levies, as levies are controlled by legislation as well as *contract ...*'.⁸

[24] An adjudicator is empowered by section 51 to call for further information and/or documents from any relevant person which may assist him in arriving at an appropriate decision. This section provides that

'51. Investigative powers of adjudicator.—

(1) When considering the application, the adjudicator may—

(a) require the applicant, managing agent or relevant person—

(i) to give to the adjudicator further information or documentation;

(ii) to give information in the form of an affidavit or statement; or

(iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;

(b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time. . .'

[25] The relevant person could be any person; it does not have to be the person who is relying on the document as a defence. It is, therefore, incumbent upon an adjudicator to obtain as much relevant information as possible to enable him to make a reasoned decision, especially when one considers the fact that adjudicators frequently deal with lay litigants who may not be in a position to know what documents will be relevant in

⁷ Founding affidavit, annexure 'C'.

⁸ Adjudication order para 20.3.

arriving at the appropriate decision.⁹

[26] I agree, therefore, with the argument by the appellants that the first respondent was also expected to furnish the agreement to the third respondent regardless of the fact that it was not relying on its terms in asserting its claim.

[27] The first respondent argues that the relationship between the parties was not only governed by the contract, but was also governed by other laws, in particular the Share Blocks Control Act 59 of 1980 ('the Share Blocks Act'), the Memorandum of Incorporation, the purchase agreement, the signed cession and the House Rules of Ridge Royal. What is puzzling is that none of these were indicated as having been considered by the third respondent. The Share Blocks Act in section 13 makes provisions for payment of levies between a Share Block Company and its members. Section 13(2) specifically indicates that it is applicable if no provision is made in the memorandum or articles of a Share Block Company or in any agreement or arrangements between the company and its members.¹⁰ In this case, there is an agreement between the parties, which governed the relationship of the parties in relation to the payment of levies.

⁹ *Naidoo v Chicktay NO and others* [2022] ZAGPJHC 929 paras 26-27.

¹⁰ Section 13 of the Share Blocks Act reads as follows:

'(1) A share block company shall in respect of the share block scheme it operates establish and maintain a levy fund sufficient, in the opinion of its directors, for the repair, upkeep, control, management and administration of the company and of the immovable property in respect of which it operates the share block scheme, for the payment of rates and taxes and other local authority charges on the said immovable property, any charges for the supply of electric current, gas, water, fuel and sanitary and any other services to the said immovable property, and services required by the company, for the covering of any losses suffered by the company, for the payment of any premiums of insurance and of all expenses incurred or to be incurred to effect the opening under section 5 of the Sectional Titles Act of a sectional title register in relation to the said immovable property, and for the discharge of any other obligation of the company.

(2) Save as otherwise provided in the memorandum or articles of a share block company or in any agreement or arrangement between the company and its members, every member of the company shall contribute monthly to the levy fund in the proportion of the number of his shares to the total number of issued shares of the company or, if the company does not have a share capital, all its members shall so contribute equally.

(3) All contributions received in terms of subsection (2) shall forthwith—

(a) be deposited in a separate account which the company shall open and keep with a bank or building society; or

(b) be entrusted to a practitioner or to an estate agent, in his capacity as such.

(4) The moneys in the levy fund shall be utilized to defray the expenses referred to in subsection (1).

[28] The terms of the unsigned agreement are not disputed, nor is it disputed that it is a true reflection of the misplaced signed agreement between the deceased and the first respondent and that it was in force since 2008.

[29] The deceased challenged the allegation that he was obligated to pay the levies before the matter was referred to adjudication for the main reason that he was not occupying the property. The contract governing their relationship was therefore important in making a determination as to whether or not he was liable for levies. Reaching a decision without properly analysing its terms and conditions was therefore improper.

[30] Section 54(1)(c) provides that the order of an adjudicator must include a statement of the adjudicator's reasons. Section 54(1) reads as follows:

'(1) If the application is not dismissed, the adjudicator must make an order—

- (a) granting or refusing each part of the relief sought by the applicant;
- (b) in the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;
- (c) including a statement of the adjudicator's reasons for the order; and
- (d) drawing attention in the prescribed form to the right of appeal.

(2) An order may require a person to act, or refrain from acting, in a specified way.'

[31] The statement of the adjudicator's reasons is not intended to be as detailed as a court judgment. In my view, however, when it is read, it should enable the reader to ascertain:

- (a) The parties;
- (b) The nature of the dispute;
- (c) The witnesses that testified or were consulted;
- (d) The summary of their evidence, and where affidavits were considered, the relevant parts thereof;

(5) The directors of the share block company shall ensure that such accounting records as are necessary fairly to reflect and explain the state of affairs in respect of the moneys received and expended by or on behalf of the company in respect of the share block scheme operated by the company, are kept in one of the official languages.'

- (e) Documents that were considered and the relevant parts thereof;
- (f) Common cause issues;
- (g) Issues in dispute;
- (h) Legal framework applied which does not have to be in detail;
- (i) A brief account of how the evidence was analysed and the rationale behind the decision taken (which is the most important part);
- (j) The final order; and
- (k) A party's right to appeal.

[32] In this case, the third respondent merely makes mention of the fact that 'levies are controlled by legislation as well as contract' and this was the basis upon which his findings were based. He, however, does not explain which provisions were considered and how he reached his conclusion. His order should have at least, in my view, indicated which terms were considered, to explain how he reached his conclusion, and the rationale for the order handed down.

[33] Under the headings of the relevant statutory provisions and the summary of evidence, there is no indication of what contract and which of its terms were considered in reaching the decision that the deceased was liable to pay the amounts claimed, as well as interest on the amounts. The only contract between the parties is the unsigned copy of the original that was presented by the appellants. It is a valid and binding agreement, in my view, since the parties' relationship was governed by it from 2008 to date. There is no doubt that they had and still have the intention to be bound by it.

[34] For the above reasons, the adjudication order stands to be set aside as it was reached without any judicious consideration of relevant statutes, contracts, and other relevant evidence.

Remedy or Substitute Order

[35] The order made by the adjudicator constitutes administrative action. Once the

administrative action is set aside, the court has a wide discretion to grant any order that is just and equitable or to remit the matter back to the administrator for proper consideration. In *Livestock and Meat Industries Control Board v Garda*¹¹ the court held that

'the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that, although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides'.

[36] In deciding whether to grant an order of substitution or to remit the matter back to the administrator, a number of factors are to be considered. In *Johannesburg City Council v Administrator, Transvaal, and another*¹² the court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts will depart from the usual course in two circumstances:

(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.

(ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.'

[37] In *Trencon Construction*¹³ the court held that

'The Supreme Court of Appeal in *Gauteng Gambling Board* seems to have added another consideration, whether the court was in as good a position as the administrator to make the decision. For this it noted that the administrator is "best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision".'

[38] The court further held that '[j]udicial deference, within the doctrine of separation

¹¹ *Livestock and Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at 349G-H.

¹² *Johannesburg City Council v Administrator, Transvaal, and another* 1969 (2) SA 72 (T) at 76E-G.

¹³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 40.

of powers, must also be understood in the light of the powers vested in the courts by the Constitution'.¹⁴

[39] In this case, I have been asked that if I find that the decision by the third respondent was wrong and that the unsigned copy of the agreement is valid, I should engage in the interpretation of the agreement and make a determination whether the deceased was correct in his decision not to pay levies.

[40] The basis for the order by the third respondent is not clear, to the extent that I cannot properly assess the decision. To engage in the process of interpreting the terms of the contract will tantamount to retrying the matter and usurping the powers of the adjudicator, which is not envisaged by section 57.

[41] I am also of the view that the second respondent is in the best position to access all the relevant information required to make an appropriate decision, as empowered by the CSOS Act.

[42] Therefore, I find it appropriate that the matter be remitted to the second respondent for reconsideration.

Order

[43] In the premises, the following order is made:

1. **Condonation is granted for non-compliance with the time frames for the noting of the appeal.**
2. **The unsigned copy of Agreement of Use and Occupation is declared a true reflection of the content of the agreement concluded between the first respondent and Steven William Hubener in 2008.**
3. **The appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 is upheld.**
4. **The order by the third respondent in terms of section 54 of the Community**

¹⁴ Ibid para 45.

Schemes Ombud Service Act 9 of 2011 is set aside.

5. **The matter is remitted to the second respondent for proper consideration of the applicable legislation, the agreement between the parties, and any other relevant evidence.**
6. The first respondent is ordered to pay the costs.

SHOBA AJ

Appearances

Date of hearing: 19 April 2023
Date of Judgment: 25 October 2023

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