

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2021/00275

In the matter between:

SAH REAL ESTATE CC

PLAINTIFF

and

TANGENI TALENI HAINGHUMBI

1ST DEFENDANT

SHIKONGO LAW CHAMBERS

2ND DEFENDANT

FILLEMOM SHALONDA

3RD DEFENDANT

Neutral citation: *Sah Real Estate CC v Hainghumbi and Others* (HC-NLD-CIV-ACT-CON-2021/00275) [2023] NAHCNLD 124 (20 November 2023)

Coram: MUNSU J

Heard: 04 September 2023

Delivered: 17 November 2023

Reasons: 20 November 2023

Flynote: Law of agency – Estate agent – Claim by agent for commission – Effective cause – Such to be deduced from the facts of the case – Introduction by agent of eventual purchaser relevant factor – Onus on plaintiff to prove effective cause.

Summary: The plaintiff sued the first defendant for commission, for the sale of immovable property. It was alleged that in terms of the agreement between the parties, the plaintiff was to secure a buyer for the property, in return for commission. It was further alleged that the plaintiff complied with its obligations in terms of the agreement by securing a buyer, the third defendant. It was the plaintiff's case that the first defendant refused to acknowledge the plaintiff as the effective cause of the sale. Thus, the plaintiff seeks payment of the commission.

The first defendant's case was that there was no agreement concluded between the parties, and alleged a fallout between the agent and the buyer as an intervening factor.

Held, that it was common cause that the parties engaged each other verbally and continued to communicate via WhatsApp.

Held, that the communication between the parties demonstrate that they agreed on the price for the property and the agent's commission.

Held, that the plaintiff introduced the buyer, being the third defendant to the first defendant.

Held, that in circumstances of intervening factors, the question that arises is whether the agent's introduction was the effective cause of the sale going through. This would depend, inter alia, upon whether the agent's introduction still operated to influence the purchaser to buy the property.

Held, that other than the mere say so by the first defendant that there was a fallout between the plaintiff's representative and the buyer, there was no evidence presented to sustain such claim. The buyer did not testify, nor did the first defendant discover any communication from the buyer to that effect.

Held, that there was no new factor introduced to the chain of events.

Held, that this was not a case where one agent introduced the property to the purchaser and another agent finally negotiated the transaction and produced the written offer which the seller accepted.

Held, that the first defendant contradicted himself on the role played by the plaintiff's representative. On the one hand, he stated that the plaintiff's representative did not carry out her entire mandate, presupposing that she is not entitled to payment. On the other hand, he stated that he did not pay the plaintiff's representative because the proceeds of the sale were held by the lawyers, and that he had no problem paying her, just not the 7% commission.

Held, that the issue regarding the plaintiff not carrying out its mandate was only raised by the first defendant during the defendant's case.

Held, that it was undisputed and common cause that the plaintiff's representative took the buyer to the property in order to view it. She then sent through the buyer's details to the first defendant in order to start the paper work. Further, there was evidence that she also took the buyer to the bank for a pre-approval. The plaintiff discovered communication between the plaintiff's representative and an employee of the bank in respect of the pre-approval.

Held, that the plaintiff proved on a balance of probabilities that its introduction of the purchaser to the property was the *causa causans* of the resultant sale, and thereby entitled to the commission.

ORDER

1. Judgment in favour of the Plaintiff in the amount of N\$74,756.22 against the First Defendant.

2. In the event that the First Defendant fails and/or refuses to pay the aforesaid amount, Second Defendant is directed to pay over Plaintiff's commission from the proceeds of the sale.
3. Interest on the aforesaid amount at the rate of 20 percent calculated from date of judgment to date of final payment.
4. Costs of suit.
5. The matter is removed from the roll: Case Finalised.

JUDGMENT

MUNSU J

Introduction

[1] This is an action for the payment of estate agent's commission. The plaintiff (Real Estate Agent) sues the first defendant (seller of immovable property) for a sum of money (commission), allegedly due to it for securing a buyer for the first defendant's Erf 3**6, Extension 16, Ondangwa (the property).

[2] The second defendant is the appointed conveyancer in the matter, currently in possession of the proceeds of the sale. The third defendant is the buyer of the property and no order is sought against him.

[3] Where reference is made to both the plaintiff and the first defendant, they shall be referred to as 'the parties'.

[4] The plaintiff is represented by Ms. Amupolo, while the first defendant is represented by Ms. Mainga. The second and third defendants did not defend the matter.

Particulars of claim

[5] It is alleged that on 12 June 2021 at Ondangwa, the plaintiff represented by Ms Aili Shikongo and the first defendant in his personal capacity, entered into a partly oral and partly written agreement, the written part comprising of WhatsApp communications between the parties.

[6] It is further alleged that the terms of the agreement were that:

- (a) The plaintiff would secure a buyer for the property in the amount of N\$ 1, 076 946.00.
- (b) The first defendant would pay the full agent's commission of 7% of the purchase price, amounting to N\$ 74, 756.22.

[7] Furthermore, it is alleged that on 16 June 2021, the plaintiff, in compliance with its obligation in terms of the agreement, secured a buyer of the property, being the third defendant, in the agreed amount of N\$ 1,076 946.00.

[8] In addition, the plaintiff claims that the first defendant has failed to acknowledge the plaintiff as the sole and effective cause of the sale agreement between the first defendant and the third defendant.

[9] Consequently, the plaintiff seeks, among others, the following relief:

- (a) Confirmation that the plaintiff is the effective cause of the sale agreement between the first and third defendant.
- (b) Payment by the first defendant to the plaintiff, the amount of N\$ 74, 756.22, being 7% of the purchase price of the property.
- (c) In the event that the first defendant fails and/or refuses to pay the aforesaid amount, the second defendant (conveyancer) be directed to pay over the plaintiff's commission from the proceeds of the sale.

First defendant's plea

[10] The first defendant pleaded that there was no agreement reached between the parties. He however, acknowledged that there were discussions between the plaintiff's representative and the first defendant.

Plaintiff's case

[11] Ms. Aili Shikongo, the sole member and representative of the plaintiff, testified that, she was enlisted by the first defendant to find a buyer for the property, and that the parties agreed on the full commission of 7% of the purchase price.

[12] Ms. Shikongo went on to narrate how she went to view the property with the first defendant and took pictures, which she shared on her WhatsApp status, as she would do with other properties for sale. Through that, the third defendant got to learn about the property, which led to their meeting.

[13] According to Ms. Shikongo, she negotiated with the third defendant and took him to view the property. She related that they continued to chat about the property on WhatsApp. The conversations between the two were discovered and presented in evidence.

[14] The witness further related that she assisted the third defendant to get a pre-approval from the bank. She testified that once all the arrangements regarding the sale were in place, she introduced the first and third defendant to one another. Additionally, Ms. Shikongo narrated that the first and third defendant then entered into their own agreement to her exclusion, although she was the sole and effective cause of the agreement.

First defendant's case

[15] The first defendant Mr. Tangeni Hainghumbi testified that the plaintiff's representative is known to her as a real estate agent and that she has previously

assisted him find buyers for his immovable properties. He went on to say that the plaintiff's commission was never based on a percentage but rather on a fixed amount.

[16] Mr. Hainghumbi acknowledged that he approached the plaintiff to assist find a buyer for the property, and further acknowledged that the plaintiff introduced him to the third defendant.

[17] According to Mr. Hainghumbi, the plaintiff's representative and the third defendant had a fall out during the process of finalising the specifics of the transaction. He related that the first and third defendant decided to complete the business deal without the plaintiff's representative since she was causing delays and wasn't acting in the best interests of the first and third defendants.

[18] Mr. Hainghumbi maintained that he and the plaintiff never concluded an agreement in respect of payment. He denied the existence of a written agreement between the parties in so far as it related to payment for the plaintiff's limited participation in the transaction.

[19] Mr. Hainghumbi concluded by saying that, to date, he has not been paid in respect of the property as the plaintiff stopped the payment of the monies due to him.

Submissions by the parties

[20] The parties agree on the legal principles applicable to the matter. Each, presented compelling reasons in support of their respective contentions. The court is indebted to counsel for their able submissions.

[21] The gist of the plaintiff's case is that an agreement was concluded between the plaintiff and the first defendant, in terms of which the plaintiff was to secure a buyer for the property.

[22] Ms. Amupolo for the plaintiff submitted that the plaintiff's representative advertised, and took the third defendant to view the property. It was further contended

that the plaintiff's representative then introduced the first and the third defendants to one another, which eventually led to the sale of the property. Because of this, it was argued that the plaintiff was the effective cause of the sale agreement between the first and the third defendant, and therefore entitled to the payment of the commission.

[23] Ms. Mainga for the first defendant argued that in order to succeed, the plaintiff must prove the existence of an agreement as well as its terms, entitling it to the commission of 7%. Additionally, it was submitted that the plaintiff must show was the effective cause of the transaction that led to the signing of the sale agreement between the first and third defendant.

[24] Counsel further argued that, not only should the parties intend to enter into an agreement, but they must also be *ad idem* in respect of the terms of the agreement. It was forcefully submitted that:

- (a) There is no expression, in the text messages between the parties that the purchase price would be N\$ 1,076,946.00, but rather reference is made to N\$ 1.1 million;
- (b) It is incumbent upon the plaintiff to prove that there is a written agreement between the first and third defendants. The written agreement signed by the first and third defendant was not produced;
- (c) There is no express mention of the commission being 7%. Rather, there is reference to full commission, while in the plaintiff's evidence it was indicated that full commission could be anything between 7% and 11%. It was imperative for the parties to have reached consensus on the exact percentage payable by the first defendant to the plaintiff;
- (d) There is no evidence that the first defendant had agreed to pay 7% commission.
- (e) The plaintiff did not indicate when the said commission would be payable, as this factor is an important term of the agreement;
- (f) There is no evidence on record pointing to the fact that the plaintiff facilitated the sale of the property. The only evidence on record is that the plaintiff's representative introduced the first and third defendants to one another. On the

plaintiff's evidence, a separate agreement was concluded between the first and third defendant without the involvement of the plaintiff's representative;

- (g) There is no evidence to prove that the introduction by the plaintiff's representative of the first and third defendants operated up to the execution of the deed of sale. There were other intervening factors such as the fallout between the plaintiff's representative and the third defendant;
- (h) There was no indication of when the agreement between the first and third defendant was concluded after the fallout, as this is an important factor in the consideration of whether intervening factors exist;
- (i) There is no evidence that the introduction by the plaintiff's representative of the parties persuaded the third defendant to enter into the sale agreement. Despite a subpoena being served on him, the third defendant did not testify. His evidence was imperative in the determination of whether the introduction led to the execution of the deed of sale;
- (j) It is not clear on whose mandate the plaintiff was acting after the first and third defendants excluded its representative from the transaction;

[25] Thus, the first defendant contended that there was no agreement between the plaintiff and first defendant and that the plaintiff was not the sole and effective cause of the sale transaction ultimately concluded between the first and the third defendant.

The pre-trial order

[26] In terms of the pre-trial order, the following are the issues of fact to be resolved:

- (a) Whether there was an agreement entered into between the plaintiff and the first defendant;
- (b) What were the terms of the agreement;
- (c) Whether the plaintiff introduced the first defendant to the third defendant;
- (d) Whether the plaintiff facilitated the sale of the property;
- (e) Whether the plaintiff was the sole and effective cause of the sale transaction ultimately concluded between first and third defendant;

- (f) Whether the first defendant agreed to pay the plaintiff agent's commission in the amount of N\$74, 756.22, being 7% of the purchase price of the property.

Was there an agreement between the parties?

[27] The parties agree that the first defendant approached the plaintiff's representative to secure a buyer for the property. It is common cause that the two engaged each other verbally and continued to communicate via WhatsApp messaging platform. Hence, the plaintiff referred to the agreement between the parties as partly oral and partly written.

[28] In *AN v PN*¹ the court held that:

'In the event that legal formalities are not required in the execution of an agreement, verbal agreements are as binding as much as written agreements, as long as it could be demonstrated that the parties thereto reached consensus and merely desired the reduction of the verbal agreement in writing as a memorial'.

[29] The first defendant denies that the parties agreed on the agent's commission of 7% of the purchase price.

[30] It was established during evidence that the plaintiff's representative had previously assisted the first defendant to secure a buyer for another property at the price of N\$ 600 000. In respect of that property, the parties agreed on a fixed amount (plaintiff says N\$ 15 000, while first defendant says N\$ 12 000) as commission. The plaintiff's representative explained that the reason she accepted a fixed amount was because the value involved was relatively low. However, she maintained that the first defendant indicated that he would pay her full commission on the next property, being the one in question.

¹ *AN v PN* (HC-MD-CIV-ACT-MAT-2017/00135) [2017] NAHCMD 275 (27 September 2017).

[31] The discovered written communication between the parties, in my view, confirms that the parties engaged each other verbally before they continued to communicate through WhatsApp. The reason for this is as follows:

- (a) The messages start off with the plaintiff's representative providing the first defendant with the details (identity number, postal address and email address) of the buyer (third defendant).
- (b) The first defendant then enquires: 'which bank is he from'?
- (c) She replied: 'FNB'.
- (d) First defendant then said: 'N\$ 1.1 million right'?
- (e) She responded: 'Yes, with my full commission'.
- (f) First defendant replied: 'Did you say you are not going to lose out'?
- (g) She says: 'No, no more'.
- (h) First defendant then said: 'Cool..let's work, good money for you'

[32] According to our law, if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid agreement arises between them enforceable by action. The only element that our law requires for a valid contract is consensus.²

[33] Counsel referred to the English decision of *Printing and Numerical Registering Co v Sampson*³ wherein the court held:

'If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts of Justice'.

[34] I find that the parties concluded an agreement for the following reasons:

² See *Conradie v Rossouw* 1919 AD 279 at 320; *AN v PN* see footnote 1.

³ *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

- (a) The background of the matter, of which the parties are in agreement is that the first defendant approached the plaintiff's representative to secure a buyer for the property.
- (b) The communication between the parties as highlighted above demonstrate that the parties agreed on the price for the property and the agent's commission.
- (c) The first defendant then concluded and said 'Cool..let's work'.

[35] The plaintiff's pleaded case is that, in terms of the agreement, the plaintiff was to secure a buyer and the first defendant would pay full commission of 7%. The first defendant, in his pleaded case did not allege any other terms of the agreement. The above communication between the parties further demonstrate that the plaintiff's representative secured a buyer, being the third defendant.

[36] The first defendant denies that the parties agreed on the 7% commission. According to the plaintiff's representative, the first defendant is well aware of the 7% as the parties spoke about it during the previous transaction. I am inclined to accept the plaintiff's version over that of the first defendant for the following reasons:

- (a) The communication between the parties clearly depict that the parties had spoken about the issue of the commission. In the communication, the first defendant mentioned the price of the property. Then the plaintiff's representative replied 'yes with my full commission'. The first defendant then replied with a depiction of symbol of joy emoji (face with tears of joy because of laughing so hard) and then said '...owati itokana yes', translated by sworn translator as 'Did you say you are not going to lose out'? To which the plaintiff's representative replied with the same joy emoji and then said 'Ayeee, no more,,'. The first defendant then said 'cool, let's work, good money for you'.
- (b) The expression by the first defendant that: 'Did you say you are not going to lose out' indicates that he acknowledged what was said before or in the past.
- (c) The answer by the plaintiff's representative that: 'No, no more' indicates that this time around it was going to be different.
- (d) The first defendant's reply that 'good money for you' indicates that he acknowledged that full commission is good money.

The expression by the first defendant that 'cool..let's work' is an indication that the first defendant gave the parties a go ahead with the agreement. The conclusion of the agreement is buttressed by the fact that, after the first defendant said 'Cool..let's work, good money for you', the plaintiff's representative replied: 'Yes, do u still have available plots and plan around?' To which the first defendant responded: 'Only in Omuthiya, Grootfontein and Helao Nafidi'. So the conversation moved on to other matters.

- (e) The first defendant agreed without querying the import of 'full commission'.
- (f) The first defendant gave a version that he thought when reference was made to 'full commission' it was meant an amount paid once off and not in installments, yet the parties did not agree on a fixed amount like in the previous transaction. The first defendant is a learned person, having studied accounting and finance as well as information technology. He writes books and is also a business person in the construction industry. Also, he had sold other properties before. Against this background, it is hard to accept his claim, more so when from the communication it appears that the parties were *ad idem* on the terms of the agreement and he blessed the arrangement with a go ahead. He cannot therefore easily resile from what he agreed to.

[37] The first defendant referred to the plaintiff's evidence that full commission is 7% to 11% and argued that it does not appear in the communication between the parties that they agreed at 7% commission. I have already found that the written communication between the parties was a continuation of the conversation between them. The first defendant also confirmed during his evidence that before the parties communicated via WhatsApp, they had engaged verbally. Similarly, I already found the plaintiff's evidence that the first defendant was well aware of the 7% to be supported by the fact that the first defendant agreed to pay the full commission without any query, as well as the fact that parties did not agree either verbally or in writing on any fixed amount, nor did the first defendant suggest any. Thus, the first defendant's denial of the 7% commission cannot be sustained.

Whether the plaintiff was the effective cause of the sale

[38] The ordinary law of agency requires the agent's efforts to be the effective or efficient cause of the ensuing sale.⁴ This is to be deduced from the facts of the case. In the event of the estate agent introducing to his principal (owner of the property), a purchaser for the property who is willing and able to purchase it and the transaction is successful and finalised, then in that case, the agent is the effective cause of the sale and the estate agent is entitled to payment of an agreed commission.⁵

[39] In *No. 1 Estates CC v Baard*⁶ this court per Maritz J cited with approval the decision in *Schollum & Co v Lloyd*⁷ wherein the court had the following to say:

'An estate agent claiming commission on the sale of an immovable property is required to prove both a contractual and causal relationship: a contractual relationship mandating the agent to find a willing and able purchaser for or seller of an immovable property and a causal relationship between the agent's mandated efforts and the property's sale or purchase, as the case may be.'

[40] As stated in *Nelson v Hirschhorn*⁸ per Wessels JA:

'It is not enough . . . to say . . . "I introduced you . . . But for my introducing you . . . would not have sold." The respondent must go further; he must satisfy the Court that the "introduction . . ." was not only an incident in the sale - an incident without which the sale may not have taken place - but that it was the real and effective cause which brought about the sale. In order to determine this we must examine closely all the circumstances surrounding the sale and from those conclude whether the introduction . . . was not only the *causa sine qua non*, but also the *causa causans*.'

[41] The plaintiff argued that it is through the efforts of its representative that the sale was a success. It is common cause between the parties that the plaintiff's representative introduced the third defendant (purchaser) to the seller (first defendant). The fact of the introduction is a relevant factor to consider.⁹

⁴ See *Lieb and Another NND v I Kuper & Co (Pty) Ltd* 1982 (3) SA 708 (T).

⁵ See *Warren Farms CC v Ferreira N.O. and Another* (352/2015) [2017] ZAFSHC 63 (10 May 2017).

⁶ *No 1. Estates CC v Baard* (1206/2002) [2002] NAHC 5 (3 September 2002).

⁷ *Schollum & Co v Lloyd* 1916 TPD 291.

⁸ *Nelson v Hirschhorn* 1927 AD 190 at 197.

⁹ See *Lombard v Reed* 1948 (1) SA 30 (T).

[42] It was submitted on behalf of the first defendant that there was no evidence adduced by the plaintiff that proves that the introduction operated up to the execution of the deed of sale. It was further argued that there were other intervening factors, as it is not in dispute that there was a fallout between the plaintiff's representative and the purchaser.

[43] Under cross-examination, the first defendant testified that the plaintiff's representative was sidelined from the transaction because she had a fallout with the buyer due to her bad manners.

[44] In circumstances of intervening factors, the question that arises is whether the agent's introduction was the effective cause of the sale going through. This would depend, inter alia, upon whether the agent's introduction still operated to influence the purchaser to buy the property.

[45] The position where such a 'new' factor enters the enquiry is stated in *Aida Real Estate Ltd v Lipschitz*:¹⁰

'If a new factor intervenes causing or contributing to the conclusion of the sale and the new factor is not of the making of the agent, the final decision depends on the result of a further enquiry - viz, did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale as the introduction was, or was the introduction still overridingly operative? Only in the latter instance is commission said to have been earned. This enquiry is not a metaphysical speculation in the result of cause and effect. It requires, as is said in *Webranchek v L K Jacobs and Co Ltd* 1948 (4) SA 671 (A), a common sense approach to the question of what really caused the sale to be concluded. . . .'

[46] The plaintiff's representative testified that she is not aware of the fallout with the third defendant as it was not brought to her attention. Other than the mere say so by the first defendant that there was a fallout between the plaintiff's representative and the buyer, there was no evidence presented to sustain such claim. The buyer did not testify,

¹⁰ *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871 (W) at 873H-874C.

nor did the first defendant discover any communication from the buyer to that effect. Thus, the first defendant's claim on this score is unsubstantiated.

[47] This is not a case where one agent introduced the property to the purchaser and another agent finally negotiated the transaction and produced the written offer which the seller accepted. Even under those circumstances, the first introduction would necessarily be an important factor.¹¹

[48] The first defendant contradicted himself on the role played by the plaintiff's representative. On the one hand, he stated that the plaintiff's representative did not carry out her entire mandate, presupposing that she is not entitled to payment. He went on to say that the person who carried out the work was the purchaser who finalised the process at the bank. On the other hand, he stated that he did not pay the plaintiff's representative because the money is still held by the lawyers and that he has no problem paying her, just not 7% commission. Suffice it to say that there was no evidence presented to show that the purchaser did the pre-approval on his own. Thus, there was no new factor introduced to the chain of events.

[49] Nowhere is it mentioned in the first defendant's papers that the plaintiff's representative did not carry out her mandate in terms of the agreement. This issue was only raised by the first defendant when he was cross-examined by the plaintiff's legal practitioner. According to the plaintiff's representative, her mandate was to secure a buyer which she did. The first defendant did not allege other terms of the agreement which the plaintiff did not meet.

[50] It is undisputed and common cause that the plaintiff's representative took the buyer to the property in order to view it. She then sent through the buyer's details to the first defendant in order to start the paper work. It was her further evidence that she also took the buyer to the bank for a pre-approval. The plaintiff discovered communication between the plaintiff's representative and one Anna Jambeinge, an employee of the bank in respect of the pre-approval. Thus, the plaintiff's version on the issue of the pre-

¹¹ See *Key Properties (Pty) Ltd v Lamprecht and Another* 1996 NR 197 (HC); *Wakefield & Sons (Pty) Ltd v Anderson* 1965 (4) SA 453 (N).

approval is supported by the discovered communication between the plaintiff's representative and an employee of the bank.

[51] According to the plaintiff's representative, she was 'kicked out' of the deal at the stage when she was awaiting for the building plan and the deed of sale from the first defendant. She ascribed the reason for her relegation to a 'big heart' on the part of the first defendant who now wants to avoid paying the commission.

[52] The basic duty of an estate agent is to find a buyer for the property belonging to the principal. After performance of the duties the agent is entitled to the agreed remuneration in the form of commission.¹²

[53] Accordingly, I find that the plaintiff proved on a balance of probabilities that its introduction of the purchaser to the property was the *causa causans* of the resultant sale.

Costs

[54] The general rule is that costs follow the event. There is no reason why this rule should not be applied in this matter. However, there is no basis for costs on a punitive scale as prayed for by the plaintiff.

The order:

[55] For these reasons, I make the following order:

1. Judgment in favour of the Plaintiff in the amount of N\$74,756.22 against the First Defendant.
2. In the event that the First Defendant fails and/or refuses to pay the aforesaid amount, Second Defendant is directed to pay over Plaintiff's commission from the proceeds of the sale.

¹² See Nagel *et al* (2015) *Commercial Law*, 5th Ed at 182.

3. Interest on the aforesaid amount at the rate of 20 percent calculated from date of judgment to date of final payment.
4. Costs of suit.
5. The matter is removed from the roll: Case Finalised.

D C MUNSU
JUDGE

APPEARANCES

PLAINTIFF:

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Ongwediva.

FIRST DEFENDANT:

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