

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



REPORTABLE

CASE NO: SA 96/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF HOME AFFAIRS AND IMMIGRATION

Appellant

and

P[...] L[...]

Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ, MAINGA JA, SMUTS JA and
FRANK AJA

Heard: 6 March 2023

Delivered: 20 March 2023

Summary: The appeal concerns a finding by the High Court that the Minister of Home Affairs and Immigration unlawfully denied a minor child born in South Africa through a surrogacy arrangement, citizenship by decent as contemplated by Art 4(2) of the Namibian Constitution. The respondent had approached the High Court on notice of motion. He alleged that the minister's refusal was actuated by his

disapproval of the respondent's same-sex marriage to a Mexican national with whom the respondent is

recorded as joint (male) parents on the birth certificate issued by the South African authorities in respect of the minor child. When the respondent applied to the minister for the registration of the minor child's citizenship by descent, the minister required him to submit to a DNA paternity test to prove that it was the respondent and not his Mexican same-sex spouse that contributed the male gamete. The respondent refused and sought relief in the High Court declaring that the minor child had acquired citizenship by descent by virtue of the respondent being a 'parent' of the minor child – and that the birth certificate issued by the South African authorities was sufficient proof of such parentage as contemplated by Art 4(2) of the Constitution.

The minister opposed the application and filed a counter-application seeking an order that the respondent submit to a DNA test. The High Court held that the surrogacy agreement sanctioned by the Western Cape High Court, and the birth certificate issued in South Africa to the minor child, constituted sufficient proof of the respondent's paternity of the minor child and directed the minister to issue a certificate of citizenship for the minor child. The High Court dismissed the counter-application.

On appeal to the Supreme Court, counsel for the minister raised a point *in limine* that the relief granted by the High Court was incompetent without regard being had to the counter-application. The reason for that, it was argued, is that the High Court failed to consider the point raised by the minister in the answering affidavit that in terms of s 2 of the Citizenship Act 14 of 1990 (the Citizenship Act), the jurisdictional fact for the granting of citizenship by descent under Art 4(2), is registration of the birth of the child in the country of birth at a Namibian diplomatic mission or a trade representative, alternatively in Namibia within a period of one year or a longer period approved by the minister – and in terms of the applicable laws of Namibia. It is common cause that in respect of the minor child no such registration took place.

Held that, the point *in limine* is good and because there was non-compliance with s 2 of the Citizenship Act, the minister was correct in not granting the minor child citizenship by descent. It was therefore not necessary to consider the counter-application. The appeal is allowed and the order of the High Court is set aside.

APPEAL JUDGMENT

DAMASEB DCJ (SHIVUTE CJ, MAINGA JA, SMUTS JA and FRANK AJA concurring):

Introduction

[1] The present appeal concerns whether a child (YDL) born in South Africa through a surrogacy arrangement between a South African woman and a Namibian man (the respondent) and his Mexican spouse in a same-sex marriage, has acquired Namibian citizenship by descent. The respondent maintains that YDL had acquired Namibian citizenship by descent whereas the appellant (the minister) states that YDL had not acquired such status. Acting on behalf of YDL, the respondent instituted motion proceedings in the High Court seeking a declarator that YDL had acquired Namibian citizenship by descent and an order directing the minister to issue a certificate to that effect. The minister had opposed the relief sought and in addition filed a counter-application seeking an order that the respondent be ordered to submit to a scientific (DNA) test to prove paternity of YDL.

[2] The High Court granted the relief sought by the respondent and dismissed the minister's counter-application. It ordered as follows:

- '1. The minor child YDL, born on 6 March 2019, is hereby declared to be a Namibian citizen by descent, as envisaged by Article 4(2) (a) of the Constitution of the Republic of Namibia.

2. The Minister of Home Affairs and Immigration is within 30 days of issue of this order, directed to issue the said minor child YDL a certificate of Namibian citizenship by descent.
3. The counter-application launched by the Minister of Home Affairs and Immigration to compel the Applicant to submit to a DNA test, to prove the paternity of the minor child YDL, is hereby dismissed.
4. The Respondent is ordered to pay the costs of the application.'

[3] Aggrieved by the orders, the minister has come to this court on appeal. The material facts are common cause.

[4] Either the respondent or his spouse contributed the male gamete that fertilised the egg of the South African surrogate mother. That arrangement was sanctioned by the Western Cape (WC) High Court under the laws applicable in that country. After YDL was born, the South African authorities issued a birth certificate in respect of him where the respondent and his spouse are recorded as the child's 'parents'. The two spouses thereafter travelled to Namibia with the minor child and applied to have him registered as a Namibian citizen by descent on account of the respondent being recorded on his birth certificate as a 'parent'. The minister then required the respondent to submit to the scientific test to prove paternity which he refused. It is common ground between the respondent and the minister that the actual donor of the male gamete (as between the respondent and his spouse) is a matter peculiarly within the knowledge of the couple and unknown to the Namibian authorities.

[5] The essence of the respondent's opposition to the counter-application is that the minister's stance is discriminatory and is actuated by the minister's disapproval of the two men's same-sex marriage. The alleged discrimination is said to be because

the same stance would not have been taken if the respondent was married to a female.

[6] The respondent's case before the High Court was that the minister's refusal to grant citizenship by descent to YDL is unconstitutional as it is in conflict with Art 4(2) of the Namibian Constitution (the Constitution). In terms of that provision, a child born outside Namibia to a Namibian father or mother may acquire Namibian citizenship by descent if he or she complies with the requirements and conditions for the registration of such citizenship.

[7] According to the respondent, YDL was born to him (a Namibian citizen) outside Namibia and therefore qualifies for citizenship by descent. He maintains that there is no dispute regarding the validity of the duly authenticated birth certificate issued by the South African (SA) authorities in respect of YDL and recording him to be the parent of the child.

[8] In addition, the respondent prayed in aid the surrogacy arrangement concluded in SA in terms of the laws of that country and sanctioned by the WC High Court on 28 November 2017, thus:

- '1. The surrogate motherhood agreement entered into between the parties and annexed hereto as "A" is confirmed;
2. The child/children born of third applicant, in accordance with the surrogate motherhood agreement entered into between the parties, is/are for all intents and purposes the child/children of first and second applicants from the moment of the birth of the child/children concerned;
3. First and second applicants shall have full parental rights and responsibilities in respect of the child/children born of such surrogate motherhood agreement, whether

in terms of the common law or the Children's Act, 38 of 2005 (the Children's Act) (and any amendments thereto) and/or any other statute which may be promulgated or has been promulgated dealing with parental rights and responsibilities;

4. No adoption procedures are required in respect of the child/children to be born of the surrogate motherhood agreement in terms of section 297(1)(a) of the Children's Act, together with the provisions of paragraphs 2 and 3;

5. The registration of birth of the child/children as required in chapter II of the Births and Deaths Registration Act, 51 of 1992, shall be effected such that the first and second applicants shall be registered as the parents of the child/children respectively, as from date of birth;

6. Third and fourth applicants shall have no rights of parenthood or care in respect of the child/children born of the surrogate motherhood agreement, no rights of contact with such child/children and the child/children will have no claim for maintenance or of succession against the third and fourth applicants or any other relatives.'

[9] The respondent also invoked Arts 8 and 10 of the Constitution in support of his application. According to Art 8: Respect for Human Dignity

'(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.'

[10] In terms of Art 10: Equality and Freedom from Discrimination

'(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social economic status.'

[11] The minister denied that YDL's right to equality before the law is being infringed upon and contended that it was in fact in the child's best interests to have

its true paternity determined as the basis for the acquisition of Namibian citizenship by descent.

[12] It is alleged that the minister's insistence on a DNA test violates YDL's and the respondent's right to dignity and not to be discriminated against. In addition to Arts 8 and 10, reliance was placed on international instruments to which Namibia is a State party: the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child. In the view I take of the outcome of the appeal on the compliance with s 2(2) of the Citizenship Act 14 of 1990 (Citizenship Act), nothing further needs to be said about the respondent's reliance on international instruments.

[13] The minister denies that the government's stance breaches the Constitution. The government's case in support of the opposition to the application and in aid of the counter-application can be summed up briefly. It is necessary to establish that the respondent (and not his same sex-spouse) was the male donor of the gamete that fertilised the egg of the surrogate mother. The argument goes that it is in the best interests of YDL to remove the uncertainty about his biological paternity. At the core of the minister's stance is the need to eschew the possibility of granting Namibian citizenship by descent to a non-Namibian.

[14] In his opposition to the respondent's application, the minister also contended that the respondent had not complied with s 2(2) of the Citizenship Act which makes it a precondition for the acquisition of citizenship by descent for a child born outside Namibia, that its birth be registered at a Namibian diplomatic mission or trade representative in the prescribed manner and in terms of applicable Namibian

legislation¹; alternatively that upon entry into Namibia of such a child, its birth is registered in Namibia in the prescribed manner within one year after such entry or such longer period as the Minister of Home Affairs may prescribe.

[15] At para 17 of the answering affidavit, the minister alleged:

'17.2 I am advised that [YDL] does not fall under section 2 of the Namibian Citizenship Act in the following respects:

17.2.1 Regarding section 2(2)(a)(i): There is no proof that the child was registered at the Namibian High Commission in South Africa. If this was done, no such proof has been furnished to me.

17.2.2 With regards to section 2(2)(a)(ii): the registration of birth is done in terms of the Births, Marriages and Deaths Registration Act, 1963. The applicant has with regards to this not discharged the onus on him that the registration was in terms of that law.

17.2.3 Regarding section 2(2)(b): the child was not adopted in terms of the provisions of any law regulating adoption of children in Namibia.'

[16] In the replying affidavit the respondent did not engage with the very specific allegation by the minister that YDL's birth was not registered in terms of s 2(2) of the Citizenship Act. The reply to the minister's para 17 reads:

'[49] I submit that the relevance of section 2 of the Citizenship Act lies in the fact that it provides for two categories of persons: firstly, those who in terms of subsection (2) are placed in the same position as persons born in Namibia and who because of their births were registered as per the subsection, do not require a certificate of citizenship and secondly, those who were born outside Namibia and whose births were not registered in accordance with subsection (2) and persons born outside but adopted in Namibia (whose births must be registered) and who require a certificate of citizenship by descent.

¹ Births, Marriages and Deaths Registration Act 81 of 1963.

[50] I submit that [YDL] falls into the second category, persons who were born outside Namibia whose births were not registered (in Namibia) and who therefore require a certificate of citizenship by descent.'

[17] Since the minister's allegation of non-compliance with s 2(2) of the Citizenship Act was unanswered it stood uncontroverted that, as a fact, YDL's birth was not registered in terms of the requirements of s 2(2) of the Citizenship Act. The only way the respondent can avoid the consequence of non-registration is if it is held that the section did not apply to YDL's situation. I will address that issue in due course.

The High Court

[18] The court *a quo* observed that 'it would seem that the minister's position is informed by the notorious fact that the applicant is in a same-sex marriage with Mr C[...], who is of Mexican extraction'. This attitude, the learned judge observed, is because the 'minister adopts the position that it would be improper for him and the court to grant the order sought by the applicant, who is a Namibian, because a possibility exists that the gamete that fertilised the egg of the surrogate mother, is not that of a Namibian citizen as his matter involving Namibian citizenship is awaiting judgment in the Supreme Court.'

[19] The first question which the High Court set about answering was whether YDL was entitled to citizenship by descent. That issue, the court *a quo* reasoned, required examining whether the respondent must be biologically related to YDL.

[20] The court *a quo* held that Art 4(2) of the Constitution requirements would be met if it is shown in respect of YDL that his father is a Namibian citizen by birth and

that in respect of YDL statutory requirements for the registration of his citizenship were complied with.

[21] In the latter respect, the High Court reasoned, the applicable legislation is the Citizenship Act which sets out the procedure to be followed. The learned judge *a quo* held that the relevant provisions of that Act had been complied with.

[22] The learned judge *a quo* held that YDL meets the requirements of Art 4(2) of the Constitution because (a) he was born in SA (outside Namibia); (b) his birth certificate has not been impeached by the minister; (c) it is not 'the subject of dispute' that the respondent is a Namibian citizen; (d) the respondent is recorded on YDL's birth certificate as his parent; (e) because the respondent says that he is the father of YDL that 'qualifies him to be regarded as a parent to' YDL in terms of Art 4(2); and (f) in terms of the law a person who is either a father or mother qualifies to apply for citizenship by descent for a minor child who qualifies under Art 4(2).

[23] The High Court was satisfied that a father or mother referred to in Art 4(2) is the same thing as 'a parent' as 'that appellation . . . has been employed by the South African authorities in describing the status [of the respondent] and his partner in relation to [YDL]. It cannot make sense nor be in line with logic, to insist that the person who applies must be either a mother or father, as parent includes both. In any event, the applicant describes himself in the papers as father to the minor child, which in my view, meets the requirements of the legislative scheme in Namibia'.

[24] According to the learned judge *a quo*, the father or mother referred to in Art 4(2) of the Constitution 'does not exclude a parent in the generic sense'.

[25] Another consideration which the High Court relied upon for its finding in favour of the appellant's relief in the notice of motion is that because of comity of States it had to give effect to the surrogacy arrangement sanctioned by the WC High Court. Not only was the authenticity of the court order not challenged but it did not violate Namibia's public policy or laws, the learned judge concluded.

[26] The court below therefore granted the relief sought by the respondent and dismissed the minister's counter-application. For completeness, I will only briefly summarise the reasons the court gave for dismissing the counter-application because, as will soon become apparent, the appeal falls to be determined without reference to the minister's counter-application. The court *a quo* was alive to the minister's primary reason for insisting on a DNA test – 'that scientifically, only one male gamete is capable of causing conception and it is critical in this case to know whose gamete is the one that caused the conception of. . . YDL'.

[27] The High Court did not find favour with the minister's rationale. Firstly, because parentage is not in dispute between the spouses. Secondly, according to the court the best interests of YDL 'are well catered for' and 'it is not clear as to why it should be regarded as in the best interest of the minor child for the minister' to establish which of the spouses is the gamete contributor.

[28] On the contrary, said the High Court, it is in YDL's best interests 'to live with his parents' and to 'take up citizenship [of the respondent] by descent'.

[29] The present appeal lies against the judgment and order of the High Court granting the relief sought by the respondent and dismissing the minister's counter-application.

The appeal

[30] At the hearing of the appeal, Mr Madonsela SC on behalf of the minister raised a point *in limine* that the minister had in the answering affidavit squarely raised, namely non-compliance with s 2(2) of the Citizenship Act, in that YDL's birth was not registered in terms of that provision and that the point ought to have succeeded *a quo*; that the High Court misdirected itself in not doing so and that the appeal ought to succeed on that basis alone without the need for the consideration of the counter-application.

[31] I have already demonstrated that the minister's contention that there was non-compliance with s 2(2) of the Citizenship Act remains unchallenged. The question then is whether the respondent was required, as a matter of law, to comply with that provision – and as a precondition for claiming citizenship by descent on behalf of YDL.

[32] On behalf of the respondent, Ms Katjipuka's answer to the legal point raised on behalf of the minister is that under the scheme created by Art 4(2) of the Constitution read with s 2(2) of the Citizenship Act, the respondent had a choice either to register YDL in South Africa or to come to Namibia and to seek YDL's registration for citizenship by descent. The respondent chose the latter as he was entitled to, the argument went.

Analysis and disposal

[33] The acquisition of Namibian citizenship by descent is regulated by the Constitution and the Citizenship Act. Article 4(2) of the Constitution guarantees citizenship by descent to a child born outside Namibia to a Namibian father or mother – if that child complies with the requirements as to registration prescribed by Parliament. The Constitution makes it clear that the legislature is authorised to make legislation to require that the birth of such persons born after the date of Independence be registered within a specified time either at a diplomatic mission or trade representative of Namibia in a foreign country, or in the territory of Namibia.

[34] According to Art 4(2) of the Constitution, the following persons shall be citizens of Namibia by descent:

- '(a) those who are not Namibian citizens [by birth] under Sub-Article (1) hereof and whose fathers or mothers at the time of the birth of such persons are citizens of Namibia or whose fathers or mothers would have qualified for Namibian citizenship by birth under Sub-Article (1) hereof, if this Constitution had been in force at that time; and
- (b) who comply with such requirements as to registration of citizenship as may be required by Act of Parliament: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which requires the birth of such persons born after the date of Independence to be registered within a specific time either in Namibia or at an embassy, consulate or office of a trade representative of the Government of Namibia.' (own emphasis)

[35] The Namibian Parliament has since passed the Citizenship Act as contemplated by the Constitution. Amongst other forms of citizenship, it regulates the acquisition of Namibian citizenship by descent. Subsection (2) of section 1 of the Citizenship Act states that any reference to citizenship in it must be construed as a

reference to citizenship by descent in the Constitution. And in terms of subsection (4) an 'application for a certificate of registration referred to in subsection (1) shall, in the case of a child who is under the age of 18 years and who is not or has not been married, be made on behalf of such child by the responsible parent or guardian of that child'.

[36] Section 2, provides:

'2. (1) Subject to the provisions of subsection (2), a person who complies with the requirements and conditions for the acquisition of citizenship by descent shall be a Namibian citizen by descent upon registration of his or her citizenship as such in the prescribed manner, and the minister may upon application made at any time in the prescribed form by that person, cause a certificate of registration as such a citizen to be issued to that person.

(2) (a) A person born outside Namibia on or after the date of Independence shall be deemed to have complied with the requirements of registration under subsection (1), if -

(i) such person's birth is registered at any Namibian diplomatic mission, if there is one, or in default thereof, any Namibian consular mission or office of a trade representative of the Government of Namibia or such other mission, office or place as may be prescribed, in accordance with the provisions of any law in force in Namibia regulating the registration of births; or

(ii) such person has entered Namibia and his or her birth is, within one year after having entered Namibia or such longer period as the minister may in the special circumstances of the case approve, registered in Namibia in the prescribed manner.

. . .

(4) An application for a certificate of registration referred to in subsection (1) shall, in the case of a child who is under the age of 18 years and who is not or has not been married, be made on behalf of such child by the responsible parent or guardian of that child.'

[37] In *Tlhoru v Minister of Home Affairs*², Maritz J (as he then was) lucidly set out the manner in which Namibia's founding mothers and fathers chose to grade different categories of citizenship under the Constitution. The learned judge wrote:

'[22] The tenor in which the Constitution frames the citizenship scheme reflects an inverted relationship between the intimacy of a person's bond with Namibia and the powers entrusted to Parliament to regulate the acquisition or loss of citizenship. But for a number of narrowly defined exceptions, art 4(1) of the Namibian Constitution recognises the automatic acquisition of Namibian citizenship as of right by the mere incidence of birth in the country (*ius soli*). Those falling within the ambit of the subarticle become Namibian citizens purely by operation of law and they are not required to do anything as a precondition to the conferral of Namibian citizenship upon them. The automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by an Act of Parliament. Parliament may not deprive individuals of Namibian citizenship by birth - not even if, after the date of Independence, they have acquired the citizenship of any other country, or served in the armed forces of such a country without permission of the Namibian government, or if they have taken up residence in such a country and absented themselves thereafter from Namibia for a period of more than two years without such permission. The only manner in which persons falling within this category may be deprived of Namibian citizenship is by voluntary renunciation in a formal deed to that effect.

[23] Much the same holds true for the second group: those who have acquired the right to Namibian citizenship by descent (*ius sanguinis*), except that in their case, Parliament may require of them to register as citizens as a precondition to the acquisition of citizenship and, in relation to those born after Independence, may require registration within a specific time and at a place mentioned in para (b) of art 4(2).

[24] In respect of the third and fourth groups (those who are citizens by marriage or registration), there are stringent residency requirements and Parliament may enact legislation providing for the loss of Namibian citizenship in circumstances referred to in art 4(8).' (Footnotes omitted)

² *Tlhoru v Minister of Home Affairs* 2008 (1) NR 97 (HC); referred to with approval by this court in *MW v Minister of Home Affairs* 2016 (3) NR 707 (SC) para 29.

[38] Maritz J is eminently correct in stating that Parliament is authorised by the Constitution to require persons seeking citizenship by descent to register as such. That is what Parliament has done in terms of the Citizenship Act.

Section 2 of the Citizenship Act deconstructed

[39] Section 2 of the Citizenship Act establishes the following jurisdictional facts for the acquisition of citizenship by descent:

Subsection (1)

[40] The child should have been born abroad to a mother or father who is a Namibian citizen. Once that threshold is met, his or her citizenship must be registered in the prescribed manner whereupon the minister can cause a certificate of registration to be issued. Now, subsection (1) states that its terms (as I have summarised above) are subject to subsection (2).

[41] The drafting technique of including the words 'subject to' in legislation generally has the following effect. (I say generally because it is not a hard and fast rule. The context will in each case determine what is actually intended)³. In the first place the technique requires that the interpreter cross-reference the provision where those words appear in the Act (in this case s 2(1)) with another provision (in this case s 2(2)). Secondly, the words 'subject to' establish the hierarchical priority between the two provisions to the extent that there is an overlap between the two. Thirdly, the provision to which the one provision is subject sets out an exception to the provision in which the words 'subject to' appear.⁴

³ Per Levy J in *De Roeck v Campbell and Others* (1) 1990 NR 28 (HC) paras 32-33.

⁴ Compare: *S v Marwane* 1982 (3) SA 717 (A) at 747H-748A.

Subsection (2)

[42] This provision deems compliance by the child born outside Namibia to a Namibian Citizen, mother or father with the requirements for registration under Art 4(2)(b) of the Constitution, if the following occurs:

- (a) The birth is registered at a Namibian diplomatic mission or a trade representative abroad; or
- (b) The child had entered Namibia and its birth is registered in Namibia in prescribed form within one year after entry into Namibia or a longer period as the minister may approve.

[43] Because the provision in subsection (1) regarding citizenship by descent is subject to that in subsection (2) setting out the registration requirements, such citizenship is 'deemed' upon proof of registration. Besides, the salutary effect of the deeming predicated under (a) and (b) in para [42] above is that they establish objective criteria and, in my view, leave no room for subjective consideration once the registration requirements have been satisfactorily met.

[44] The scheme created by Art 4(2) of the Constitution and s 2(2) of the Citizenship Act makes it clear that it is a precondition⁵ for registration of citizenship by descent that the birth of a child born to a Namibian citizen outside Namibia must be registered in terms of either s 2(2)(a)(i) or (ii). Ms Katjipuka's contention to the contrary is not supported by the law.

[45] Mr Madonsela submitted that on the undisputed facts the respondent did not comply with s 2(2) of the Citizenship Act and that on that basis alone the relief sought

⁵ As recognised by Maritz J, in *Tlhoru v Minister of Home Affairs* at paras 22-24.

was not competent and that the High Court misdirected itself in granting it. That submission is supported by the record and is sound in law as I have demonstrated.

[46] Since the birth of YDL was not registered in in terms of s 2(2)(a)(i) or (ii) of the Citizenship Act, it was not competent for the High court to grant the relief it did to the respondent. The application should have been dismissed on that basis alone and it was not necessary for the court *a quo* to deal with the minister's counter-application.

[47] This case is and was similarly not about adoption as there is also a specific procedure under our law for dealing with such matters⁶. It was never the respondent's case that those provisions were complied with and that citizenship ought to have been granted to YDL on that basis. It is therefore unnecessary to deal with the issues raised in argument by the respondent concerning adoption.

Costs

[48] Counsel for the minister accepted that this is not a proper case for the losing party to be mulcted in costs and therefore no such order will be made, both *a quo* and in the appeal.

Order

[49] In the result, I make the following order:

1. The judgment and order of the High Court is set aside and replaced with the following order:

'The application is dismissed. There is no order as to costs.'

⁶ Child Care and Protection Act 3 of 2015.

2. There is no order as to costs in the appeal.

DAMASEB DCJ

SHIVUTE CJ

MAINGA JA

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT: T G Madonsela SC (with him J Ncube)
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