Civil Litigation and Jura Novit Curia

The recent case of *Director of Hospital Services* v *Mistry* 1979 (1) SA 626 (A) reaffirmed a basic principle of our law that, in civil litigation at least, a court should confine its inquiries to the facts placed before it and not resolve the dispute on the basis of issues that had not been raised by the parties. The purpose of this note is to consider whether this principle applies, not only to factual issues, but also to propositions of law, and, in doing so, to investigate whether and to what extent the Continental doctrine of *jura novit curia* is a part of, and appropriate to, our system of civil procedure.

The essential facts in *Mistry's* case were as follows: M had been suspended from his duties at a hospital by the Director of Hospital Services, as a result of a charge being laid against M of a criminal offence arising out of his employment. After a delay in prosecution of six months, M had instituted proceedings on notice of motion in the Transvaal Provincial Division for his reinstatement on the hospital staff, as well as for certain ancillary relief. The basis of his application was that the respondent (the Director) had delayed unreasonably in assisting the prosecution to be brought against M. After the respondent had delivered his opposing and supporting affidavits, there was a further delay of two months before M filed his replying affidavit; the case was set down for hearing only a further three weeks later. Thus the proceedings 'continued to move at a leisurely pace' (Diemont JA at 632D).

Le Roux J, by whom the application was finally heard, criticized the delays but came to the conclusion that the applicant, M, had failed to prove that the respondent had delayed unreasonably or that his officials had not been sufficiently diligent or had in any way failed to expedite the matter. This finding was considered by the Appellate Division to be 'of cardinal importance' (at 633 of the report) and it was not challenged on appeal. However, Le Roux J had gone on to *grant* the main order applied for on the ground that, although the respondent could not be held responsible for the initial delay in prosecution, more than a year had gone by, at the stage of the hearing, and no prosecution had yet been brought; nor had any attempt been made to alleviate M's financial position. '[T]he respondent could not hide behind the police indefinitely' (at 634). He refused to make an order as to costs, because he considered both parties blameworthy for the delay in bringing the application.

The respondent appealed to the Appellate Division on various grounds, the principal one being that the judge *a quo* had decided the dispute on an issue that had not been raised on the papers before the court. It was on this ground that the Appellate Division unanimously reversed the decision. Diemont JA, delivering the judgment of the court, accepted the argument of counsel for the respondent that the judge *a quo* should have confined himself to the issues and facts as presented by the parties:

> 'Counsel cited authority, ancient and modern, for the principle that a judicial officer in civil proceedings must resolve the dispute on the issues raised by the parties and confine the enquiry to the facts placed before the court; he must not have regard to extraneous issues and unproved facts' (at 635F).

The learned Judge of Appeal then quoted with approval Voet 5.1.49, as well as extracts from the judgments of Krause J in *Pountas' Trustee* v *Lahanas* 1924 WLD 67 at 68 and Van Winsen J in *SA Railways Recreation Club* v *Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260.

The court's decision is certainly based on a firm foundation of cases which make it clear that a judge is confined in his decision to a consideration of the factual issues raised by the parties and the ambit of their dispute as determined by *them* in their affidavits or pleadings. (See *Erasmus* v *Brett* 1878 Buch 160; *Spiegel* v *Eisenbach & Co* (1881) 1 SC 226; *Driefontein Consolidated Gold Mines* v *Schlochauer* 1902 TS 33; *Pountas' Trustee* v *Lahanas* (*supra*); *SA Railways and Harbours Recreation Club* v *Gordonia Liquor Licensing Board* (*supra*); *John Roderick's Motors Ltd* v *Viljoen* 1958 (3) SA 575 (O); *Schreuder* v *Viljoen* 1965 (2) SA 88 (O). Cf *Cole* v *Government of the Union of SA* 1910 AD 263 at 272–3 and *Alex Campbell (Pty) Ltd* v *Erikson-Miller* 1954 (4) SA 465 (N) at 467–8.) Of course, the issues may be altered or enlarged by the parties, or at the suggestion of the judge (providing the parties consent and neither is prejudiced). (See, for instance, *Mistry* at 636C; *South British Insurance Co Ltd* v *Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) at 714; *Alex Campbell (Pty) Ltd* v *Erikson-Miller* loc cit. Cf *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* II 7 ed by P W E Baker, H J Erasmus and I G Farlam (1979) (hereinafter referred to as Jones & Buckle) 20n14.) In the magistrates' court a judicial officer is bound, in terms of rule 29(5) of the Rules of Court, to the facts admitted by the parties. (Cf Jones & Buckle 267.)

Furthermore, the decision is in accordance with the principles of our adversary system of civil procedure and the passive role of the judge which it entails. (See Greenberg JA's discussion of the duties of a judicial officer in a civil trial in *Naran Dhana* v *Hull NO* 1927 TPD 603 at 607–8; cf Leslie Blackwell 'The Judge's Function' (1961) 78 *SALJ* 80 at 82; and see below.) A further example of a similar restriction on the judge's capacity to consider evidence is his inability to

examine witnesses other than those called by the parties, unless the parties consent. (See, for example, Jones & Buckle 271–2 and the cases there cited.)

In our law it is quite clear, therefore, that the court is confined to the issues of fact and the factual ambit of the dispute *as they are presented to it by the parties themselves*. This is the case in all jurisdictions that follow the adversary system of litigation (cf, for instance, J A Jolowicz 'The Active Rôle of the Court in Civil Litigation', being section 2 of M Cappelletti and J A Jolowicz *Public Interest, Parties and the Active Rôle of the Judge in Civil Litigation* (1975) 158ff), and represents the principle known to comparatists as the *Verhandlungsmaxime*. (See also R W Millar in A Engelmann *et al History of Continental Civil Procedure* (1927) 11–13.)

So far as the factual issues are concerned, the same principle even applies (though to a lesser extent) in some Western European jurisdictions where the investigatory principle (*Untersuchingsmaxime*) is the basis of civil litigation and where the court plays a much more active role. (See, for instance, Jolowicz op cit 198–9; and F Bauer 'The Active Rôle of the Judge' (1976) 13 *Law and State* 31 at 37 for the example of the Federal Republic of Germany.)

However, where the issue is one of law there is a fundamental difference between the approach of the adversary systems and the investigatory systems of Europe: throughout Europe the principle *jura novit curia* applies; ie 'it is . . . for the court to decide the legal basis of a claim or defence . . . and this is the incidental consequence that concessions by one party on questions of law are not binding on the court' (Jolowicz op cit 198. See also idem 205, 224; and Bauer op cit 33.) On the other hand, the fundamental principle of common-law, adversary, systems is that of *judicial unpreparedness*. (Cf F A Mann 'Fusion of the Legal Professions?' (1977) 93 *LQR* 367 at 369.) The court in an adversary system is heavily reliant on counsel for both parties for its information concerning the law as well as the facts. (See Mann loc cit. Cf Eric Morris *Technique in Litigation* 2 ed (1975) 38–9.)

For the rest of this note I wish to consider whether this is equally true in our system or, if not, to what extent the principle *jura novit curia* applies, and whether it is appropriate that this be the case. Before proceeding, however, it is as well to clarify what is meant by *jura novit curia*. There seem to be two aspects of the duty of the court to know the law. First, there is the duty to ascertain what is the *correct* law applicable after a consideration of the competing versions of what it is stated to be by the parties. Secondly, there is a duty to determine what in fact are the legal *issues* evident from the facts themselves: for instance, what causes of action arise from the circumstances; what exceptions could or should be raised; whether prescription may be raised as a defence. In this note I shall not consider a related issue,

which concerns the court's duty to observe principles of public policy and *ordre public*, thereby placing a duty on the court, for example, to ensure that a contract which forms the basis of a dispute is not illegal. (See, for example, W J Hosten *et al Introduction to South African Law and Legal Theory* (1977) 392ff.)

Clearly, the second duty is considerably wider than the first; indeed, the difference would seem to be one of kind, not merely degree. Courts on the Continent seem to bear both duties. (See, for instance, Jolowicz op cit 198, 205.)

The South African Law

(*a*) *Roman-Dutch authorities.* The Appellate Division in *Mistry* did not deal with the role of the court so far as the parties' presentation of the *law* is concerned. However, in dealing with the court's duty to limit itself to the *factual* issues raised by the parties, Diemont JA quoted with approval from Voet 5.1.49, where the author warns that judges should not attempt to enlarge on matters of fact not dealt with by the parties. In the same paragraph Voet goes on to distinguish the duty of the judge as regards the law:

> 'But if matters of law have been overlooked by parties or their advocates, the judge will rightly make them good. The reason is that things which are wont to be stated before a judge ought yet to be known to him even if they have not been stated. It follows that he is bound to take account in judging even of sure rules of law, however much left unstated' (Gane's translation II 60).

(See also Voet 2.13.13. Cf Huber *Hedendaegse Rechtsgeleertheyt* 5.33.4.)

However, in this context one should be cautious in relying upon Roman-Dutch authorities; in the sphere of civil procedure the writings of our Roman-Dutch authorities are at once both deceptive and inappropriate. In the first place, we should distinguish between the substantive law of an action (including the cause of action and the remedy sought) and the process whereby the action is brought. Whereas the former is in many respects based upon Roman-Dutch common law, the processes of litigation in South Africa are no longer similar to those of the courts of Holland in the era of Roman-Dutch law. The English influence upon our law is, in this regard, pervasive, and common-law processes based upon English practices are, with only a few exceptions (such as namptissement—provisional sentence), the foundation of our present rules of court. (Cf D Carey-Miller 'Is the Ivory Tower Impregnable?' (1977) 94 *SALJ* 184 at 184–6; Jerold Taitz 'Rescission of Default Judgment in the Supreme Court—An Error Perpetuated' (1979) 96 *SALJ* 182 at 187.) Because of a similarity of terminology, the procedures before the courts of Holland (and Friesland) appear very similar to our own. However, the true position is to the contrary: those courts were far more 'Continental' in their approach than those of England and, since the Charter of Justice of 1828, our own. Thus courts with original jurisdiction, such as the

Hooge Raad and the Hof van Holland, Zeeland en West-Friesland were collegial in composition, consisting of a President and a large number of members. (See, for example H R Hahlo and Ellison Kahn *The South African Legal System and its Background* (1968) 541–3.) Our courts, on the other hand, consist, like those in Anglo-American jurisdictions (cf, for instance, C J Hamson 'Civil Procedure in France and England' (1950) 10 *Cambridge LJ* 411 at 412), of a single judge at first instance. (See s 13(1)(*a*) of the Supreme Court Act 59 of 1959.)

Whereas one of the judges in the Dutch court was appointed to be a *rapporteur*, with the duty of investigating the case and reporting to the others (see Merula *Maniere van Procederen* 4.85.2ff and Van der Linden *Verhandeling over die Judicieele Practicq* 3.5.1ff), the judge under our system of procedure is on his own while hearing the parties or their representatives, and remains so until he gives his judgment. Our judge conforms to the principle of judicial unpreparedness in that he will have had no contact (other than purely fortuitous involvement in interlocutory proceedings) with the case before it comes to trial. The conduct at the trial is governed by English-based rules of evidence, developed within the adversary system and designed to present 'evidence' (not proofs) to a jury at a single, oral hearing. (Cf Hamson op cit 416–17; Jolowicz op cit 247.) In all respects he remains passive and does not, or should not, enter the 'arena' of the dispute other than for the purpose of clarifying his understanding of the evidence being placed before him. (See Jolowicz op cit 187–8; and Morris op cit 302ff and the cases there cited.) As Viscount Kilmuir said of the common-law approach:

> 'Now the first and most striking feature of the common law is that it puts justice before truth. The issue in a criminal prosecution is not, basically, "guilty or not guilty?" but "can the prosecution prove its case according to the rules?" These rules are designed to ensure "fair play", even at the expense of truth. Perhaps the most obvious example of this principle is the rule that a prisoner cannot be made to expose himself to cross-examination if he does not want to. The attitude of the common law to a civil action is essentially the same: the question is "Has the plaintiff established his claim by lawful evidence?" not "has he really got a good claim?" Again, justice comes before truth. So, you see, there is more than meets the eye in the old story of the Irish prisoner who, when asked whether he pleaded "guilty" or "not guilty" replied "and how should I be knowing whether I am guilty until I have heard the evidence?".' (Introduction to 'The Migration of the Common Law' (1960) 76 *LQR* 41 at 42–3. Cf M E Frankel 'The Search for Truth: An Umpireal View' (1975) 123 *Pennsylvania LR* 1031 at 1035ff.)

On the other hand, the Dutch judge (or his agents) played an active role, questioning witnesses (Van der Linden 3.4.9ff; cf Huber 5.27.45) and raising exceptions not raised by the parties themselves. (See, for instance, Voet 5.1.49.)

In these circumstances the weight of the Roman-Dutch authorities on the subject is considerably reduced. Nevertheless, our own case

law does seem to support the principle of *jura novit curia*, at least in the first, limited, sense described above (p 533).

(*b*) *South African authorities.* In *Van Rensburg* v *Van Rensburg* 1963 (1) SA 505 (A) Botha JA announced, as a general principle, that it is intolerable (onhoudbaar) that a court should be bound by a mistake of law on the part of one of the parties (at 510A). This broad statement of principle has subsequently been repeated in numerous decisions (see below p 538). However, it is not self-evident whether the learned judge of appeal intended his dictum to apply to cases where the court wished to override the choice of legal grounds by the parties. In this context the dictum would at most be *obiter*, since in *Van Rensburg's* case Botha JA was dealing with the position where one of the parties wished to rely on a construction of law not relied upon in his papers but nevertheless feasible on the basis of the facts and circumstances established by the parties' affidavits.

Before dealing with this case, I should point out that it seems clear from other cases that the principle of *jura novit curia* does apply in our law in its first sense, i e that the court has a duty to ensure that it ascertains the correct legal position regarding any points of law actually raised and argued by the parties. This is evident from the *obiter dictum* of Ramsbottom JA in *Boesch* v *Bark and Guttenburg NNO* 1960 (1) SA 293 (A) at 302:

> 'In this court, Mr Ettlinger, on behalf of the defendant, conceded that the principle of fictional fulfilment could be used to bring about a fictional non-fulfilment of a resolutive condition . . . but we were informed that no case and no Roman-Dutch authority could be found in which the doctrine . . . had been thus extended. If, therefore, it were necessary to decide the question, Mr Ettlinger's concession would not relieve this court of the duty of examining the law and giving a decision thereon.'

(See also Hahlo and Kahn op cit 270n45; and cf *Rosenbach & Co (Pty) Ltd* v *Dalmonte* 1964 (2) SA 195 (N) at 201.)

Although it is often difficult to ascertain from a reported judgment whether counsel had in fact referred to a case or statute, it seems that judges do sometimes rely in their judgments upon cases or statutes not referred to by either counsel. A recent example is *Botes* v *Daly* 1976 (2) SA 215 (N), in which James JP relied upon a statutory provision not referred to or considered by either counsel. Counsel had fully argued the common law on the question whether an attorney's conduct in refusing to disclose his client's address (on his client's instructions) amounted to an act which assisted criminal activity on the part of his client (removing a child contrary to a custody order) and therefore was not protected by privilege. The learned Judge President decided, however, that in view of s 1 of the General Law Further Amendment Act 93 of 1962, to which he had not been referred by counsel, the conduct of the attorney's client was clearly criminal and the communication of the address was not privileged (at 223 of the report).

Further examples where South African courts have relied on authority not presented or argued by counsel are discussed by Hahlo and Kahn op cit 321–2, including the extreme example of *Roberts Construction Co Ltd* v *Willcox Bros (Pty) Ltd* 1962 (4) SA 326 (A). Here the Appellate Division relied, in its decision, upon a doctrine of Roman-Dutch law that had previously been thought not to be part of our law. R S Welsh in the *Annual Survey* points out that the doctrine (*causae continentia*) had not been referred to by the court *a quo*, or by counsel on either side in either court, or by any member of the Appellate Division during the hearing of the appeal! (1962 *Annual Survey of SA Law* 453.)

For the approach of English courts, see *Rahimtoola* v *Nizam of Hyderabad* [1958] AC 379 at 398, 404, 423–4 and the discussion of this case by Lord Denning in his recent book *The Discipline of Law* (1979) 287–9.

Nevertheless, it is by no means clear whether the duty of a judge includes *jura novit curia* in its second, fuller sense. Does the court have a duty to decide a dispute on the basis of *any* legal consequence of the facts and circumstances before it? Section 17(1) of the Prescription Act 68 of 1969 prohibits a court from raising the defence of prescription *mero motu*. But a prohibition is not so clear elsewhere.

Without doubt, there has been a considerable relaxation so far as the technical limitations created by pleadings are concerned. In *Robinson* v *Randfontein Estates GM Co Ltd* 1925 AD 173 at 198 Innes CJ pointed out that although parties will be kept 'to their pleas where any departure would cause prejudice or would prevent a full enquiry', the court has, within those limits, a wide discretion: 'For pleadings are made for the court, not the court for pleadings.' This principle has been repeatedly reaffirmed and followed. See, most recently, *Mastlite (Pty) Ltd* v *Stavracopoulos* 1978 (3) SA 296 (T) at 299.

Thus, where justice demands, and where no prejudice is caused to either party, the court will allow a departure from the strict ambit created by pleadings or affidavits if a party so requests. And this has been extended to cover the legal inferences created by the facts. The effect of *Van Rensburg* loc cit was to reverse the practice previously obtaining in the Natal Provincial Division of binding the parties strictly to their pleadings so far as grounds of law are concerned. *Van Rensburg* was immediately followed by the full bench of the Natal Provincial Division in *Simmons NO* v *Gilbert Hamer & Co Ltd* 1963 (1) SA 897 (N), where Caney J stated that the effect of the dictum in *Van Rensburg* was that '[a] party is entitled to make any legal contention which is open to him on the facts as they appear on the affidavits' (at 903C). Although this decision was reversed in part by the Appellate Division, the same principle was reaffirmed. See *James Brown & Hamer (Pty) Ltd* v *Simmons NO* 1963 (4) SA 656 (A) at 663G–H.

Van Rensburg has been followed in *Rosenbach & Co (Pty) Ltd* v *Dalmonte* 1964 (2) SA 195 (N), where Caney J, for the full bench of the Natal Provincial Division, stated:

> 'In my judgment a court cannot be held to be bound to a mistake of law on the part of one of the parties. Cf *Van Rensburg* v *Van Rensburg*. . . . Particularly is this so when the court is being invited to make a declaration of rights; it cannot be hampered by an incorrect admission of law made either deliberately or incautiously by one of the parties' (at 200–1).

See also *Community Development Board* v *Revision Court, Durban Central* 1971 (1) SA 557 (N) at 564C–D; *Amod* v *SA Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 615–16; and *Smith* v *Ring van Keetmanshoop van die Nederduitse Gereformeerde Kerk, Suidwes-Afrika* 1971 (3) SA 353 (SWA) at 360A–C.

But all these cases were concerned with an attempt by one of the parties to raise new legal arguments based upon the facts already before the court. While they are consistent with a well-established principle that the issues may be enlarged where the other party is not prejudiced by the enlargement, where both parties are afforded an opportunity to deal with the new issue (see, for instance, *Schill* v *Milner* 1937 AD 101 at 105), and where the new issues raised are based upon facts and circumstances that have been thoroughly canvassed (see, for example, *Cole* v *Government of the Union of SA* 1910 AD 263 at 273 and, recently, *South British Insurance Co Ltd* v *Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 at 714G, 716D and *Mistry* at 636C), they do not deal directly (with the exception of Caney J's *obiter dictum* quoted above) with the question whether a court may itself take cognizance of legal consequences arising from the facts proved. For example, can a court hold that although there was no liability in contract—the cause of action disputed by the parties—there is to be inferred from the facts liability in delict and that liability does still arise?

The answer would seem to be: *clearly not*. While the courts may assist an unassisted litigant or, for example, a layman not trained in the law, such as an arbitrator, to find the correct legal issues (see, for example, *Devland Investment Co (Pty) Ltd* v *Administrator, Transvaal* 1979 (1) SA 321 (T) at 325C–D), there appears to be no authority in our law for a departure from the principle of party presentation in so far as the cause of action is concerned.

Thus, parties may make concessions of law should they so wish if this does not involve a concession concerning a specific point of law raised by them. (Cf Hahlo and Kahn op cit 270.) And, in my submission, Didcott AJ (as he then was) rightly distinguished *Van Rensburg* in a case where one party had made a concession which removed an issue of law from the dispute (*Mthanti* v *Netherlands Insurance Co of SA Ltd* 1971 (2) SA 305 (N)). Referring to *Van Rensburg*, *Rosenbach* and *Community Development Board*, he stated:

'A crucial characteristic of each case, to my mind, was that the issue in question was one of substantive law. The extent to which its significance had or had not always been grasped by the litigants, and the manner in which it had originally occurred to them to react to it, was one aspect of the matter. The true answer to it, objectively ascertained, was distinctly another, and the more important' (1971 (2) SA 305 (N) at 309).

On the other hand, in *Mthanti*, although the agreement concerning the law by the parties could well have been wrong, it was no longer in issue, and the learned acting judge did not consider himself bound to pursue it further:

'It is certainly not imperative for me to be inquisitive about the question, in some endeavour to preserve the law from the pollution of judicial error induced by the mistake of a litigant. And, if the present action were eventually to be determined according to the hypothesis that, whatever the true circumstances, the stipulation [of law] were to be regarded as having been fully met, it would be surrounded by an atmosphere of unreality no more pervasive than if the identical hypothesis had resulted from the defendant's adherence to its admission. In this latter connection, what Miller J had to say in the case of *South British Insurance Co Ltd* v *Glisson* 1963 (1) SA 289 (D) at 297C–E, is apt. It was this:

"There is nothing remarkable in the court's deciding a case on facts which, although deemed to be true for the purposes of the case, are known not to be true in reality. It is inherent in the principle of estoppel, for example, that the court will decide a case as if a certain state of affairs existed, even if it is clear that it does not in fact exist. It is also something that is implicit in the court's power to refuse to allow a litigant to withdraw an admission made in the pleadings"' (at 310).

It is the parties who must make it clear upon which cause of action they rely, failing which the claim will itself be vague and embarrassing. (Jones & Buckle 145–6 and 145nn86–7.) There are no provisions in the Rules made under either the Magistrates' Courts Act 32 of 1944 or the Supreme Court Act 59 of 1959 that entitle the court to take exception *mero motu*. This should be distinguished from the case where a magistrate's court should refuse to hear a matter on the ground that it has no jurisdiction to hear it (see Jones & Buckle 205). There, to hear the case would be *ultra vires* of the court itself.

Conclusion

In the light of the aforegoing it is submitted that the principle *jura novit curia* applies only to the limited extent that the court has a duty to ensure that the legal issues that have been *raised* are thoroughly canvassed. The court, in our adversary system, has no power or duty to decide a civil dispute on the basis of what it believes to be the 'truly relevant' legal issues arising from the facts placed before it. This is the prerogative of the parties.

While even the first element of the principle *jura novit curia* does not accord well with the principles of the adversary system—it may be at least arguable that a case or statute found by the judge should be distinguished—there do seem to be policy arguments that would

justify a court's endeavours to ensure that the law, at least, is correctly applied *if* it is raised by the parties.

Jolowicz (op cit 185–6) suggests that the practice of judges basing their decisions upon legal authorities not referred to by either counsel is justified by the possibility of appeal. With respect, this does seem to be a hollow remedy to those parties who cannot, or do not wish to, appeal.

If, on the other hand, the dicta in *Van Rensburg* and the subsequent cases reveal a trend toward a more active role for the courts in South Africa, it is imperative to point out that, for the courts to remain efficient, a more active role would necessarily entail a restructuring of our system of administration of justice and a considerable modification of our present adversary system. (Cf Mann op cit *passim*; Jolowicz op cit 272–3.) It would also imply that the ideological basis of our system of settlement of disputes and our conception of the role of our courts has changed. (Cf Cappelletti in Cappelletti and Jolowicz op cit 145, and his 'Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe' (1971) 69 *Michigan LR* 847 at 881–5.) At present we still place great value upon our 'day in court' and the efficacy of presentation by counsel. (Cf *Transvaal Industrial Foods Ltd* v *BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) at 628; and C J Hamson in Cappelletti and Jolowicz op cit xi–xii.)

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