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CORPORATE & COMMERCIAL **ALERT**

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The JSE issues further guidance on disclosure obligations

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BLACK ECONOMIC EMPOWERMENT
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The JSE issues further guidance on disclosure obligations

Given the uncertainty introduced by the pandemic, it is important that investors are provided with information which provides insight into the potential impact on the cash flow of issuers.

As discussed in our *previous Alert*, the COVID–19 pandemic has had an impact on reporting obligations for listed entities. As a result, the JSE has reminded sponsors and designated advisors of their continuing disclosure obligations amidst the pandemic. On 10 September 2020, the JSE issued a further letter (JSE Letter) pertaining to communication with investors and the continuing obligation to disclose information when issuers embark on capital raisings. Now, more than ever, it is important that investors are provided with clear and transparent information in order to promote certainty and to counter volatility in share prices.

Under the general disclosure principles contained in paragraph 8 of the JSE Listings Requirements (Requirements), issuers must provide full information of activities that are price sensitive, ensure adequate opportunity to consider this information, ensure equal treatment for all shareholders, and ensure that the Requirements promote investor confidence in standards of disclosure. When raising capital, issuers should bear in mind the following focus areas:

Business insights

Given the uncertainty introduced by the pandemic, it is important that investors are provided with information which provides insight into the potential impact on the cash flow of issuers.

Issuers must provide a forward-looking assessment which includes a discussion of the following factors: (i) the impact the pandemic may have on demand for the issuer's product or services, (ii) the impact on supply chain deliverables, and (iii) any other pandemic-related business issues which issuers are experiencing. The issuer must also provide its investors with insight into its future cash flow position, which should take into account factors such as debt covenant triggers, the proximity of the issuer breaching debt covenant triggers, and the board's view of debt levels and how any potential breach of debt covenant triggers can be addressed.

An issuer should also provide a narrative account which considers the impact of the factors above on its income statement, balance sheet and cash flows. These business insights should be provided in terms of the issuer's continuing obligations and in the context of any new corporate action.

Financial reporting obligations under IFRS

The JSE Letter reiterates the importance of presenting a statement of cash flow which complies with International Accounting Standard 7, that is, investors should be provided with detailed information which will allow investors to understand the future liquidity obligations of an issuer.

Specific disclosures in statements and circulars

Paragraph 7 of the Requirements sets out information which must be included in pre-listing statements and circulars relating to rights offers, capitalisation issues and Category 1 transactions. When providing disclosures in circulars pertaining to the description of the business, the prospects of the company, and the use of funds, the business insights above should be included.

The JSE issues further guidance on disclosure obligation...*continued*

Investors have indicated that more information will be of great assistance in deciding whether to inject further capital into an issuer.

The JSE warns issuers against using vague and generic language and suggests that a short paragraph will not be enough to comply with the Requirements. When disclosing the business activities and the prospects of success of the business, the issuer should address both the past and future impact that the pandemic has had or will have. When raising capital, issuers should provide a detailed explanation of the intended use of the funds and the objects that the issuer hopes to achieve. Sponsors and designated advisors are reminded to provide comprehensive and detailed disclosures in order for investors to be in a position to make informed decisions.

Frequency of reporting

The JSE suggests that more frequent and detailed communication to the market will benefit transparent price information. The JSE Letter discusses quarterly reporting, which is not mandatory. However the JSE suggests that more frequent updates, published together with a trading statement, may better assist success in capital raisings.

Trading statement obligations

In terms of paragraph 3.4(b) of the Requirements, issuers must publish a trading statement when a reasonable degree of certainty exists that the financial results for the period to be reported on next will differ by at least 20% from (i) the financial results for the previous corresponding period, or (ii) a profit forecast previously provided to the market in relation to such period. Trading statements must provide specific guidance by including comparative numbers which must take the form of (i) a specific number and percentage to describe the difference, (ii) a range of percentages and numbers to describe the difference, or (iii) a minimum percentage difference and number difference, together with any other relevant information that the issuer has at its disposal at the time. Issuers are reminded that the reference to 20% is the trigger for a trading statement. Therefore, issuers must advise the market of the actual minimum percentage change in earning and headline earnings which they anticipate and not solely refer to the 20%. If issuers publish a minimum percentage, issuers must provide an update to the market as soon as more certainty exists as to the actual percentage or by providing a range to describe the differences.

Additional disclosures for capital raising

Investors have indicated that more information will be of great assistance in deciding whether to inject further capital into an issuer. The JSE therefore requests that the following be included in any capital raising documents, for the foreseeable future (at least the next 12 months):

- paragraph 7.A.15 of the Requirements (details of material loans);
- paragraph 7.F.7 of the Requirements (material risks) specifically in the context of risks that impact cashflows; and
- the information discussed in the business insights paragraph above.

Rights offer timetables

The JSE notes that concerns have been raised about the negative impact of delays the rights offer timetables brought between the announcement

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The JSE issues further guidance on disclosure obligation...*continued*

The JSE requires full transparency with regard to the identity of all underwriters, sub-underwriters and shareholders who have provided irrevocable undertakings together with the fee structure applicable to each of these parties.

of the intention to embark on a capital raising exercise and the provision of the key terms of a rights offer including the (i) total amount to be raised, (ii) the pricing mechanism / formula to apply, and (iii) the actual price. These delays can lead to price volatility.

In order to reduce the concerns, issuers are encouraged to implement the following mechanisms:

- strict internal controls around the flow of information so that issuers are not forced to make an early intention announcement when they have not finalised the key terms;
- as short a period as possible between the intention announcement and the formal declaration date in terms of the JSE corporate actions timetables;
- disclosure of all of the key terms as soon as possible, and if it is not possible to disclose all of the key terms, disclosure of those key terms that are known;
- disclosure of the identity of any intended underwriters to the rights offer; and
- disclosure of the business insights as soon as possible.

Underwriting

The JSE requires full transparency with regard to the identity of all underwriters, sub-underwriters and shareholders who have provided irrevocable undertakings together with the fee structure applicable to each of these parties. The disclosure must include details of (i) whether the fee is payable on the entire rights offer or only the portion for which irrevocable undertakings were not provided by the shareholders, and (ii) the amount payable to each party, expressed as both a rand amount and a percentage of the amount being underwritten (Market Related Disclosures). Fees paid to shareholders must be market related.

The JSE notes that the Market Related Disclosures strictly speaking only apply when the underwriter is a shareholder. However, the JSE now requires that this information be disclosed in all circumstances regardless of whether the underwriter is a shareholder. The Market Related Disclosures must also be provided when there is a commitment fee payable for providing an irrevocable undertaking.

Furthermore, issuers are required to include a narrative, explaining why they believe the fee is market related, taking into account the nature of the service. If the fee is being paid to a related party, the issuer must explain the governance process applied to the negotiation process. These disclosures are to be provided for underwriting, sub-underwriting and commitment fees.

Governance

While the content and timing of disclosures are important, issuers are reminded to apply the highest level of corporate governance to their processes and capital raising exercises. Investors should be treated fairly in terms of access to information and price sensitive information must be disclosed in accordance with the Requirements.

Ben Strauss, Clara Hofmeyr and Chanté du Plessis

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BLACK ECONOMIC EMPOWERMENT

SCA confirms BEE Act takes precedence when determining BBBEE criteria

In September 2017, ACSA had published the RFB in which members of the public were invited to bid for the hiring of 71 car rental kiosks and parking bays at nine airports that were operated by ACSA.

In the recent case of *Airports Company South Africa SOC Ltd v Imperial Group Ltd and others* [2020] JOL 46607 (SCA), Airports Company South Africa SOC Limited (ACSA), the appellant, sought to set aside a decision granted by the High Court in favour of Imperial Group Limited (Imperial) in terms of which the High Court held that a Requests for Bids (RFB) issued by ACSA for the grant of car rental concessions and the decision to publish it were unlawful, inconsistent with the Constitution and the legislative framework envisaged therein, and invalid.

In September 2017, ACSA had published the RFB in which members of the public were invited to bid for the hiring of 71 car rental kiosks and parking bays at nine airports that were operated by ACSA. The RFB indicated that each successful applicant would be granted a concession for a period of at least 10 years. Bids were also to be evaluated in four stages. In the first stage, bidders were required to meet certain pre-qualification criteria. A failure to comply with the pre-qualification criteria meant that the bidder in question would fail at the first hurdle and would not be eligible to proceed to the second stage of the evaluation process. The pre-qualification criteria of the RFB related to BEE and prescribed the minimum percentages of designated persons that each large entity was expected to have at the level of Ownership, Enterprise and Supplier Development as well as Management Control. The criteria prescribed for Ownership were,

> *"At least 30% of exercisable voting rights in the enterprise in the hand of black people" and "at least 15% of exercisable voting rights in the enterprise in the hands of black women". The prescribed criteria for Enterprise and Supplier Development were "At least 40% procurement spend (excluding procurement of motor vehicles) from suppliers that are at least 51% black-owned" and "at least 12% procurement spend (excluding procurement of motor vehicles) from suppliers that are at least 30% black women owned".*

The three criteria specified in relation to Management Control were,

> *"At least 30% Black executive management as a percentage of all executive management within the car rental division of the entity"; "At least 15% black female executive management as a percentage of all executive management within the car rental division of the entity"; and "At least 2% black employees with disabilities as a percentage of all employees".*

Imperial submitted a bid under the RFB, but also challenged its validity at the same time, and ultimately made application to the High Court for the urgent review

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BLACK ECONOMIC EMPOWERMENT

SCA confirms BEE Act takes precedence when determining BBBEE criteria*...continued*

ACSA contended that Imperial's application for review was premature as it had not yet made a final decision pertaining to the bids.

and setting aside of the RFB, under the provisions of the Promotion of Access to Justice Act 3 of 2000 (PAJA), and on the principle of legality. ACSA contended that Imperial's application for review was premature as it had not yet made a final decision pertaining to the bids. It also alleged that its decision to issue the RFB did not amount to an administrative action and was not reviewable under PAJA. However, in favour of Imperial, the High Court held that the RFB and ACSA's decision to publish it were to be set aside under the principle of legality and PAJA.

On appeal, Imperial contended that the decision to issue and publish the RFB amounted to the exercise of a public power reviewable either in terms of PAJA or the principle of legality, that it was invalid because it had no lawful basis, was irrational, and contravened the provisions of section 217 of the Constitution and the statutes envisaged in that section. Imperial contended that the inclusion of prequalification criteria imposing discriminatory minimum ownership, enterprise and supplier development as well as management control requirements based on race and gender were unlawful as they contravened section 217 of the Constitution (which provides that when an organ of State or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost effective), the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and its regulations, as well as the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) read with the Tourism Sector Code.

Although ACSA acknowledged that PAJA applies to any tender award, it maintained that PAJA was not applicable to the RFB. It relied on three main contentions for that submission. First, because it had not yet made a final award, with the result that the mere issuance of the RFB had no direct external legal effect and thus had no adverse effects on Imperial's rights. ACSA thus contended that Imperial's review application was premature. Second, ACSA submitted that section 217 of the Constitution does not apply to the RFB because it was merely granting concessions to bidders who were paying it for those concessions and not *"procuring"* anything from the bidders or *"contracting for goods and services"*. ACSA contended that section 217 of the Constitution is, in any event, only applicable where an organ of state is incurring an expense. As the nature of the contract envisioned in the RFB would not result in ACSA incurring an expense, it did not concern procurement for goods or services, thus making it unnecessary for ACSA to comply with section 217 of the Constitution or the PPPFA. ACSA contended that even if it were to be found that section 217 was applicable to the RFB, the PPPFA and its regulations would be inapplicable in a situation where ACSA was not paying providers for goods and services.

Regarding the question whether Imperial's application had been premature, the court considered whether the publication and issuance of the RFB constituted administrative action under PAJA. The court found that it was clear from the provisions of the RFB that a bidder who did not meet the prescribed prequalification criteria would be automatically disqualified

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BLACK ECONOMIC EMPOWERMENT

SCA confirms BEE Act takes precedence when determining BBBEE criteria*...continued*

The clear implication is that organs of state may implement preferential procurement policies provided they do so within a framework prescribed by national legislation.

from the evaluation process at stage I and that the RFB did not permit ACSA to exercise any discretion in that regard. It was also undisputed that in the light of the prequalification criteria, the self-evident outcome of stage I of the evaluation process was that Imperial would be disqualified from further evaluation.

Referring to the dicta of the court in the matter of *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd*; *Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and others* that "*Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decisionmaker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process... Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma*," the court held that the automatic disqualification of Imperial at the first hurdle of the evaluation process would have an external effect and adversely affected Imperial's legal rights; and that, on the facts, the RFB constituted an administrative action in terms of PAJA that was capable of a judicial challenge.

Regarding the contention by ACSA that section 217 of the Constitution was not applicable, the court found that it is clear that the freedom conferred on organs of state to implement preferential procurement policies is circumscribed by subsection 217(3), which provides that national legislation "*must*" prescribe a framework within which the preferential procurement policies "*must*" be implemented. The clear implication is that organs of state may implement preferential procurement policies provided they do so within a framework prescribed by national legislation. The minority judgment of Molemela JA in this matter, which arrived at the same conclusion on the matter as the majority judgment, is highly instructive and persuasive on the role and status of the PPPFA and BBBEE Act. The court noted that the PPPFA and the BBBEE Act constitute the legislative scheme envisaged in section 217(3).

Molemela JA found that the ordinary interpretation of the word "*procure*" in section 217 was that of "*obtain*" and that it is not limited to where the organ of state would incur expenditure. The court explained further that section 217(1) provides that "*procurement*" means "*to contract for goods or services*", and that it does not restrict the means by which goods and services are acquired. The judge also expressed that it was clear from the RFB that the object of inviting the bidders was ultimately for ACSA's benefit as ACSA had asserted that it sought to use a car rental strategy to increase its international airport standards through the allocation of car rental facilities at ACSA airports which would increase stakeholder value and increase its revenue generation. Ultimately, the court held that the RFB was subject to section 217 of the Constitution.

On whether the RFB was unlawful, irrational or invalid, Imperial contended that the decision to issue and publish the RFB was irrational because ACSA has not conducted any research prior to publishing the RFB and that there was no proper factual basis and proper consideration of all the relevant facts showing that the prequalification criteria, scoring methods or transformation criteria were necessary, feasible or achievable in

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BLACK ECONOMIC EMPOWERMENT
SCA confirms BEE Act takes precedence when determining BBBEE criteria*...continued*

Based on the facts before it, the court concluded that the RFB was based on the wrong premise and this wrong premise led to ACSA's failure to comply with section 217 of the Constitution and the legislation emanating from the section.

the car rental market. It also contended that there was no demonstration of the correct application of the law, thus rendering the decision to publish the RFB irrational. ACSA contended that it was unquestionable that seeking to transform any industry was a legitimate government purpose. It maintained that the pre-qualification criteria were rationally connected to ACSA's envisioned purpose of accomplishing transformation of the car rental industry.

The court noted that (i) the principle of legality dictates that there must be a rational connection between the decision taken and the purpose for which the decision was taken; (ii) a decision is *"rationally"* connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious; and (iii) PAJA provides that an administrative action is reviewable if it is not rationally connected to the purpose for which it was taken. The court also stated that it has in previous judgments emphasised that in order to be rational, a decision must be based on accurate findings of fact and a correct application of the law, and that a wrong or mistaken interpretation of a provision in a statute constitutes an error of law that is reviewable under PAJA and under the principle of legality. Based on the facts before it, the court concluded that the RFB was based on the wrong premise and this wrong premise led to ACSA's failure to comply with section 217 of the Constitution and the legislation emanating from the section.

Molemela JA stated that in determining whether the RFB contravened the principle of legality, the court had to consider the relevant provisions of the PPPFA and the BBBEE Act in order to determine whether the PPPFA is applicable to the RFB, and if so, whether the RFB passes muster in relation to the procurement provisions stipulated in those two statutes.

He noted that ACSA falls within the ambit of the BBBEE Act because it is a public entity as defined in that Act and that the following is relevant in relation to the BBBEE Act:

- In terms of section 9 of the BBBEE Act, the Minister of Trade and Industry (Minister) is empowered to issue Codes of Good Practice on black economic empowerment (BBBEE Codes) that may include, inter alia, qualification criteria for preferential purposes for procurement and other economic activities.
- The provisions of section 9(2) read in conjunction with section 11(2) of the BBBEE Act emphasise the need to ensure that the preparation and issuance of BBBEE codes by the Minister are informed by a strategy that provides for *"an integrated, coordinated and uniform approach to black economic empowerment"* by all the stakeholders, including the organs of state. It is undisputed that the BBBEE code that is relevant to the RFB is the Amended Tourism BBBEE Sector Code (Tourism Code) published on 20 November 2015. Its provisions are therefore binding on ACSA.
- Section 9(6) provides that the Minister may permit organs of state or public entities to specify qualification criteria for procurement and other economic

BLACK ECONOMIC EMPOWERMENT
SCA confirms BEE Act takes precedence when determining BBBEE criteria*...continued*

Molemela JA stated that it is plain that it is not open to an organ of state, without the Minister's consent, to design its own custom-made set of qualification criteria that deviate from the provisions of the applicable BBBEE code.

activities which exceed those set in the BBBEE codes. That provision thus gives recourse to organs of state that are not content with the standards of empowerment and measurement set out in the BBBEE codes.

- Section 10(1), in peremptory terms, requires every organ of state and public entity to apply the relevant BBBEE code when determining, inter alia, the qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity and in developing and implementing a preferential procurement policy.
- Section 10(2)(a) permits the Minister to consult with organs of state or public entities and to, pursuant to that consultation, exempt that organ of state from the requirements of the BBBEE code or allow deviation from it. It is abundantly clear from all the provisions of the BBBEE Act canvassed above that that Act is aimed at achieving uniformity of standards and measurement.
- The following aspects attest loudly to the binding nature of the BBBEE Codes. Section 10(3) enjoins enterprises within a sector for which a BBBEE code has been issued, to measure entities for compliance with the requirements of BBBEE only in accordance with that code; second, there is an injunction to provide particular, objectively verifiable facts or circumstances before the Minister can grant an exemption or deviation from the provisions of the applicable BBBEE code; third, deviation requires the Minister's express consent, as such consent, once granted, must be published in the Gazette.

Molemela JA stated that it is plain that it is not open to an organ of state, without the Minister's consent, to design its own custom-made set of qualification criteria that deviate from the provisions of the applicable BBBEE code; and given that stakeholders are given an opportunity to give an input that informs the issuance and amendment of the BBBEE codes, the BBBEE Act's demand for all stakeholders to follow an integrated, coordinated and uniform approach is to be expected.

He also states strongly that:

> *"For each organ of state to be allowed to, without the Minister's input, design its own unique criteria that deviate from those laid down in the sector codes would render the uniformity sought to be achieved by the strategies envisaged in the BBBEE Act, nugatory. Moreover, that would allow organs of state to impermissibly arrogate to themselves a power that has been given to the Minister. It is undisputed that ACSA at no stage obtained the consent of the Minister to deviate from the provisions of the Code. To argue that the BBBEE Act and the Tourism Code do not preclude ACSA from setting out the qualification criteria laid down in the impugned*

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SCA confirms BEE Act takes precedence when determining BBBEE criteria...*continued*

Since ACSA was unable to demonstrate objective transformation criteria that would justify the award of the RFB to another tenderer, Molemela JA concluded the RFB Contravened section 2(1)(f) of the PPPFA.

provisions of its RFB is to seek to place form ahead of substance. In so far as ACSA, by virtue of the qualification criteria set out in the RFB, deviated from the Tourism Code without the Minister's consent, it purported to exercise a power for which it was not authorised, thereby offending section 6(2)(a)(i) of PAJA."

The court also concluded that while it is rational to set BBBEE criteria for purposes of promoting transformation, the choice of the specific criteria must be informed by reason. ACSA could have approached the Minister for purposes of obtaining his consent for exemption, deviation or the implementation of criteria that exceed those enunciated in the Tourism Code. It chose not to do so. Moreover, ACSA has not proffered any plausible explanation for setting criteria that are out of sync with those already prescribed in the BBBEE codes. Thus ACSA's decisions were arbitrary.

Of further interest is that in considering the application of the PPPFA to the RFB, Molemela JA states that it must be borne in mind that section 3(2) of the BBBEE Act makes it clear that in the event of any conflict between the BBBEE Act and any other law in force immediately prior to the date of commencement of the BBBEE Act, the BBBEE Act prevails and as such the BBBEE Act will trump the PPPFA on any matter that is specifically dealt with in the BBBEE Act. The PPPFA was enacted before the BBBEE Act and will accordingly be trumped by the BBBEE Act if it conflicts with the BBBEE Act on any matter that the BBBEE Act caters for.

Molemela JA noted that the PPPFA contains qualification criteria for price and BBBEE compliance, and the criteria set out in the RFB contravened the criteria in the PPPFA. Section 2(1)(f) of PPPFA provides that a tender must be awarded to a tenderer who scored the highest points unless objective criteria justify that it be awarded to another tenderer. The court found that the RFB provides that ACSA may award the contract to a bidder other than the highest scoring bidder when transformation imperatives allow for this, but that such transformation imperatives could not be established from the RFB or ACSA's transformation policy. Since ACSA was unable to demonstrate objective transformation criteria that would justify the award of the RFB to another tenderer, Molemela JA concluded the RFB Contravened section 2(1)(f) of the PPPFA.

The court finally concluded that the qualification criteria in the RFB was not rationally connected to purpose for which they were intended; such provisions materially tainted the decision to issue and publish the RFB; and that such decision was unlawful in terms of the principle of legality and PAJA. It dismissed ACSA's appeal.

Verushca Pillay and Arnold Saungweme

2019 THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

DealMakers

2019
M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
1st by BEE M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
2nd by M&A Deal Flow.

2018
1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

2017
2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

2016
1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.

2015
1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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