COHABITATION AND THE SAME-SEX MARRIAGE. A COMPLEX JIGSAW PUZZLE

Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs 2006 3 BCLR 355 (CC)

"'The sting of the past and continuous discrimination against both gays and lesbians lies in the message it conveys, namely, that viewed as individuals or in their same-sex relationships, they 'do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.' This 'denies to gays and lesbians that which is fundamental to our Constitution and the concepts of equality and dignity' namely that 'all persons have the same inherent worth and dignity', whatever their other differences may be" (*Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) par 13).

1 Introduction

The aim of this note is, firstly, to give an overview of the Constitutional Court (CC) judgment in *Fourie v Minister of Home Affairs*; secondly, to discuss the consequences of same-sex marriages; thirdly, to highlight certain areas of the law that require legislative intervention to clarify the application of common law rules to same-sex spouses; and, lastly, to examine the discrepancy that will exist after December 2006 between same-sex and heterosexual cohabitees.

2 Constitutional Court judgment

The facts before the court dealt with same-sex couples that are by law excluded from getting married by both common law and section 30(1) of the Marriage Act 25 of 1961. The common law definition of marriage states that a marriage is a union between one man and one woman, to the exclusion of all others while it lasts. Section 30(1) also contains references to a wife and husband, thereby excluding same-sex couples (par 1-3).

The main question the court had to determine was whether these exclusions are constitutional: are these exclusions a denial of the equality protection provided for under the Constitution of the Republic of South Africa, 1996 (s 9(1)) resulting in unfair discrimination based on sexual orientation in terms of section 9(4)? And if so, what should the remedy be (par 4-5)?

The history of the litigation on the merits came before the court via two cases: the first being *Fourie v Minister of Home Affairs* ((TPD) 2002-10-18

case number 17280/02). In this case the application, by a same-sex couple, was based on the argument that the common law has developed so far that it can recognise marriages between persons of the same sex as legally valid marriages in terms of the Marriage Act. Roux J dismissed the application. The constitutionality of the provisions of the Marriage Act was, however, not challenged (par 6-7). Leaving aside the issues of procedure, it suffices to note that the matter ended up in the Supreme Court of Appeal (*Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA)) where the applicants again based their arguments on the development of the common law, without linking it to a constitutional challenge of the Marriage Act (par 11). The SCA found that the exclusion of same-sex couples from the common law definition of marriage constituted unfair discrimination against them, although the judges differed on the reasons for such discrimination (par 12). The majority held that there is a duty on the courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights (par 13). Although the applicants overlooked the question of the Marriage Act, this omission was not a complete obstacle as the Act permits the Minister to approve variant marriage formulae. As such he is at liberty to approve religious formulae that also include same-sex marriages (par 19). The court specifically noted that this possibility would not infringe any rights of freedom of religion, as the extension of the common law definition would not compel any denomination to approve or perform same-sex marriages (par 20).

Consequently, the SCA took the liberty to develop the common law definition of marriage to read “Marriage is a union between two persons to the exclusion of all others for life” (par 22); but also, stated that the Marriage Act could not be read in such a way as to include same-sex marriages. Although religious marriages may be concluded as soon as their new formulae are approved by the Minister, pure secular marriages will have to wait for the outcome of the Johannesburg High Court *Equality Project*-case (launched July 2004) designed to secure comprehensive relief in challenging the provisions of the Marriage Act (par 21).

The SCA minority judgment held both that the common law definition should be developed and that the Marriage Act should immediately be read in an updated form to include same-sex marriages. The minority, however, suspended the amendments for two years to enable Parliament to enact the appropriate legislation (par 32).

The second case before the Constitutional Court in the *Fourie* case was the *Equality Project* matter where the constitutionality of section 30(1) of the Marriage Act was challenged by the Lesbian and Gay Equality Project on the basis that it is unconstitutional and in violation of the rights to equality, dignity and privacy (par 34).

In dealing with the issue of the failure of the common law definition and the Marriage Act to include same-sex marriages, the CC found that in both cases it results in unfair discrimination towards same-sex couples (par 114). The court revisited a series of cases that dealt with the rights of same-sex couples and their right to be different (par 46-58). The court noted that these decisions highlight at least four unambiguous features of the context within

which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. The first is that there is a magnitude of family formations in South Africa and that it would be inappropriate to entrench any form as the only socially and legally acceptable one; secondly, the constitutional need to recognise the history of persecution of gays and lesbians; thirdly, the necessity for a comprehensive legal regulation of family law rights of gays and lesbians and not a mere piecemeal approach; and lastly, that the Constitution represents a radical departure with past intolerances and demands development towards a society based on equality and respect for all (par 59).

The CC further noted the significance of marriage as an institution and the impact it has for those excluded from it (par 63-74). It concluded that the exclusion of same-sex couples from the benefits and responsibilities of marriage is not "a small and tangential inconvenience", but that the intangible damage is as severe as the material deprivation (par 71-72). The court found that as both the common law and section 30(1) of the Marriage Act amount to unfair discrimination by the state in conflict with section 9(3) of the Constitution, same-sex couples were entitled to a declaration of equal protection (par 78-79). The court rejected the notion that same-sex unions should be dealt with outside the traditional institution of marriage (par 81) and in this regard discarded the arguments based on procreation as a marriage defining characteristic (par 85-87); religion (par 89-98); international law; and family law pluralism (par 106-109). Similarly the court rejected the argument that respect for the traditional concepts of marriage is justifiable in terms of the limitation clause (par 110-114). The details of these arguments are, however, not important for purposes of this case note and are therefore not discussed.

With regard to the issue of the appropriate remedy, both the judgments of the majority (Sachs) and the minority (O'Regan) are noteworthy: both judgments accepted that both the common law definition and section 30(1) of the Marriage Act are inconsistent with the Constitution; and in terms of section 172(1)(a) of the Constitution the court must declare any inconsistent law invalid to the extent of its inconsistency, but, under section 172(1)(b), it is open to the court to make any order that is just and equitable, including suspending any invalidity to give the legislature time to cure the defect (par 118).

After evaluating the judgments relating to same-sex couples that the CC and other courts have heard over the past few years (par 119-124), the majority of the court suspended the declaration of invalidity of the common law definition and section 30(1) of the Marriage Act for a period of 12 months to allow Parliament to correct the defect. The reason for this suspension is the fact that the South African Law Reform Commission (SALRC) (Project 118) has been researching the law relating to domestic partnerships since 2001 and the public has been given an opportunity to give its views on the proposals (par 125-131). The court felt that Parliament would very soon be in a "well-suited position to find the best way of ensuring that same-sex couples are brought in from the legal cold", as the various possibilities to

consider have already been set out by the SALRC (par 138-153). The court further refused to grant the applicants an interim remedy as the issue is one of status and it wanted to give Parliament a free hand (par 154-155). The court regarded the period of suspension, one year, as short, but sufficient, as the SALRC process is almost complete (par 156). However, the court determined that if Parliament fails to remedy the situation in the given time frame, section 30(1) of the Marriage Act will forthwith read as including the words "or spouse" after the words "or husband" as they appear in the marriage formula (Majority Order).

The minority judgment preferred the route of the Supreme Court of Appeal not to suspend the order of invalidity. They argued that such an order would not preclude Parliament from addressing the law of marriage in future and would simultaneously and immediately protect the constitutional rights of gay and lesbian couples pending parliamentary action (par 173).

3 Comment

> "[M]arriage and its legal consequences sit at the heart of the common law of persons, family and succession and of the statutory scheme of the Marriage Act. Moreover marriage touches on many aspects of law, including labour law, insurance and tax. These issues are of importance not only to the applicants and the gay and lesbian community but also to society at large" (Moseneke J in *Fourie v Minister of Home Affairs* 2003 5 SA 301 (CC) par 12).

3 1 Introduction

This section deals with the application of the current legal rules, based in both common law and legislation, to marriages by same-sex couples: specifically with regard to engagement contracts and the invariable and variable consequences of marriages. It also looks at other areas of the law that the legislature will have to tinker with before it introduces a new definition of marriage under common law and the Marriage Act. These are delictual claims between spouses married in community of property; the relationship between same-sex and heterosexual cohabitees; some sections of the Insolvency Act 24, 1936; the Criminal Procedure Act 51 of 1977; the Children's Status Act 82 of 1987; the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993.

3 2 Engagement

Presumably, if same-sex relationships are legalised as marriages and thus deserving of legal protection, such protection should extend to engagements. The common law requirement of the engagement being a contract between one man and one woman to marry each other on a specific or determinable date should be amended to be gender-neutral. It follows that the requirements for engagements with regard to consent, capacity to act, lawfulness and possibility of performance would be extended to same-sex couples and in instances of breach of promise, the existing claims would also be available.

3 3 The invariable consequences of marriage

> "Marriage creates a *consortium omnis vitae* between the spouses ... an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouses of a marriage" (Cronje and Heaton *South African Family Law* (2004) 49-51 with reference to *Grobbelaar v Havenga* 1964 3 SA 522 (N) 525E).

3 3 1 General

The invariable consequences of a marriage refer to those changes that automatically occur once the parties say "I do". Most fundamentally, the status of the spouses changes (Cronje and Heaton 49): neither may marry another while the marriage subsists; new impediments to the marriage arise as a result of the relationship by affinity which is created by the marriage; there is a right to intestate succession; the spouses' capacity to act is restricted if they are married in community of property; and a spouse under the age of 21 attains and retains majority. One would presume that these consequences would also become applicable to same-sex spouses.

3 3 2 Maintenance and household necessities

The reciprocal duty to maintain is one of the areas of the law that is readily adaptable to same-sex marriages as both spouses are proportionally responsible for reciprocal maintenance and that of the family and the extent of their duty is determined by their social status, their means and the cost of living (Cronje and Heaton 52). And as the Maintenance Act 99 of 1998 is applicable to all instances where a legal duty to maintain exists (s 2(1)), same-sex marriages would be automatically included. As in other marriages, the duty of support in same-sex marriages will come to an end either on the death of one party or divorce and the surviving spouse should have a claim for maintenance against the deceased spouse's estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 if need be.

3 3 3 Adultery

The possibility of a delictual claim against a third party who infringes on the *consortium omnis vitae* by committing adultery with one of the spouses is noteworthy, although the constitutionality and desirability of this claim is ignored for purposes of this note (Church "*Consortium Omnis Vitae*" 1979 *THRHR* 376 379; and Labuschagne "'Deïnjuriëring' van Owerspel" 1986 49 *THRHR* 336). Adultery in the common law was interpreted to refer to a sexual relationship between a spouse and a member of the opposite gender who is not his/her spouse. According to Hahlo (*The South African Law of Husband and Wife* 4ed (1975)), intercourse which does not result in at least partial penetration does not amount to adultery. This definition is informed by intercourse between heterosexual partners and the assumption is the "traditional" heterosexual relationship. Presumably, this definition will not arise with regard to gays as the definition of adultery in common law has

been broadened enough to include them. However, the same definition will definitely be problematic in a lesbian relationship. The legislature will have to broaden/extend this common law definition further to include adultery between lesbian partners. It is submitted that there is no reason why the definition of adultery could not be extended to include a sexual relationship between lesbians as the basis of the claim is interference in the consortium between the spouses. By implication it could be argued that a claim for adultery could be a possibility irrespective of the gender of the third party in relation to the adulterous spouse.

3 3 4 Remnants of patriarchal family law rules

3 3 4 1 Introduction

Generally, the recognition of gay and lesbian marriages created problems for the legislature because of the erstwhile patriarchal nature of South African family law and its interpretation of family relations. The legislature has, however, through statutory intervention gradually and relentlessly reversed the patriarchy in family relations (Matrimonial Affairs Act 37 of 1953; Matrimonial Property Act 88 of 1984; General Law Fourth Amendment Act 132 of 1993; Guardianship Act 192 of 1993 and the Domicile Act 3 of 1992). The courts have also gone a long way to create equality between spouses (see *inter alia Bezuidenhout v Bezuidenhout* (SCA) 23 September 2004 unreported case number 364/2003).

3 3 4 2 Head of the family

The last remnants of patriarchy linger, at least in theory, in the common law in which the husband is still regarded as the head of the family. Because of that position, he has a decisive say in all matters concerning the common life of the spouses, such as where and in what style they are to live (Cronje and Heaton 67-68). In a same-sex marriage with non-traditional gender roles, this common law rule is outdated and it would be interesting to find out how this rule will manifest itself in a same-sex marriage.

3 3 4 3 Surname

Traditionally, most married women take their husbands' surnames although they do not have to do so. According to section 26(1) of the Births and Deaths Registration Act 51 of 1992 a wife may assume her husband's surname or maintain her maiden name or add her married surname to any surname she bore before she got married; she may create a double-barrel surname. A husband does not have this choice. The question is who, in the case of same-sex couples, will assume whose surname and on what basis? This is clearly an issue that should be addressed by the legislature.

3 4 Variable consequences of a marriage

The property consequences of civil marriages are governed by the common law as read with the Matrimonial Property Act 88 of 1984 and the legal principles should not create any problems for same-sex marriages as the same choices of matrimonial property system, each with its unique set of rules, would apply – without a need to amend any of the legislation. Only with foreign marriages may this be problematic as, according to our law, the patrimonial consequences of a marriage are determined by the *lex loci domicilii*, the law of the place where the husband was domiciled at the time of the marriage, which would be nonsensical in a same-sex marriage scenario.

3 5 Dissolution of a marriage

With regard to the divorce procedure, including the grounds for divorce, the rules are generally wide enough to encompass same-sex spouses seeking a divorce. Even section 4(2)(b) of the Divorce Act 70 of 1979, dealing with the guideline of adultery, is gender-neutral, referring to adultery and a plaintiff (spouse) finding it irreconcilable with a continued marriage.

3 6 Other

3 6 1 Insolvency

In terms of section 21(13) of the Insolvency Act 24 of 1936 "the word 'spouse' means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as her husband or a man living with a woman as his wife, although not married to one another". This clause is gender-specific and should be amended by legislation to include same-sex spouses and same-sex cohabitative life partners.

3 6 2 Evidence

In terms of section 198 of the Criminal Procedure Act 51 of 1977 "a husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not at criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage". In the same vein, section 199 provides that "no person shall at criminal proceedings be compelled to answer any question or to give any evidence, if the question or evidence is such that under the circumstances the husband or wife of such person, if under examination as a witness, may lawfully refuse and cannot be compelled to answer or to give it".

These provisions are obviously not available to same-sex life partners at the moment, but, should they decide to get married after December 2006, the sections should also be amended to make them gender neutral.

3 6 3 Delictual claims between spouses married in community of property

It is currently possible for same-sex life partners to sue each other in delict. However, once they are married in community of property, this is not possible as spouses may not sue each other in delict as any amount owed would be paid from the joint estate, back into the joint estate (Cronje and Heaton 75). Section 18(b) of the Matrimonial Property Act 88 of 1984 however creates one exception:

> "Notwithstanding the fact that a spouse is married in community of property … (*b*) he may recover from the other spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him and attributable either wholly or in part to the fault of that spouse."

The exception in practice deals mainly with claims from the insurer of the negligent spouse, the Road Accident Fund, for pain and suffering arising from a motor vehicle accident. Any damages paid are recoverable from the separate property of the negligent spouse, if any. In so far as he has no separate property, the claim is from the joint estate provided that an adjustment is made upon the division of the joint estate in favour of the other spouse (s 19 of the Matrimonial Property Act). These provisions are gender-neutrally worded and would be applicable, without the need for amendments, to same-sex spouses after December 2006.

4 Cohabitation v marriage

4 1 General legal rules

With the decision that same-sex couples would be able to get married legally, the issue regarding same-sex couples that choose not to get married deserves some discussion. The choice not to marry, but merely to cohabit, should surely have the same consequences for same-sex life partners as for heterosexual life partners generally and as set out in the Constitutional Court case of *Volks NO v Robinson* (2005 5 BCLR 466 (CC)).

Briefly, this entails that unless the life partners can prove a universal partnership, any property acquired by the partners prior to and during cohabitation belongs to the partners separately (Hahlo "The Law of Concubinage" 1972 *SALJ* 326). As a general rule, one life partner cannot bind the other to contracts with third parties for household necessities (Hahlo 1972 *SALJ* 324). There is also no general right to maintenance during or at dissolution of the life partnership and no right to inherit intestate from the life partner at his/her death as they are not related by blood or affinity as required in terms of the Intestate Succession Act 81 of 1987. The issue of a

possible maintenance claim after the death of the life-partner was the subject of the 2005 *Volks* decision.

4 2 Volks NO v Robinson

In this case the Constitutional Court found that a survivor of a monogamous permanent heterosexual life partnership of 16 years, where there was no legal obstacle to marriage, did not have a maintenance claim against the estate of the now deceased life partner in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (par 62). The majority judgment found that the purpose of the Act, viewed in light of its history, is to extend an invariable consequence of marriage beyond the death of one of the spouses. Parties to a marriage are legally obliged to maintain each other during its subsistence. The Act is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of spouses cease upon death (part 36-39). The court evaluated the equality challenge and found that the distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons. To extend the provisions of the Act to the estate of a deceased person who was not obliged during his lifetime to maintain his partner would amount to imposing a duty after death where none existed during his lifetime. Thus the differentiation in relation to the provision of maintenance in terms of the Act does not amount to unfair discrimination (par 46-60); neither does it violate the dignity of surviving partners of life partnerships (par 61-62). The minority judgments are not relevant for purposes of this note.

The Constitutional Court thus makes a clear distinction between persons who are married and those who choose not to get married. It is this distinction that is the focus in this section.

4 3 Claim for loss of support

Generally a heterosexual life partner does not have a claim for damages for loss of support against a third party who unlawfully kills his/her life partner. The SCA in *Du Plessis v Road Accident Fund* (2004 1 SA 359 (SCA)) however awarded such damages to a same-sex life partner who had a contractual undertaking for support from his (now deceased) same-sex life partner (par 42). The court based the award on the duty of support by stating that it is worth protecting. Put otherwise, the court asked whether the killing of the deceased should be considered a wrongful act against the life partner. The court referred to *Amod v Multilateral Motor Vehicle Accidents Fund* (1999 4 SA 1319 (SCA)) where the court granted a claim to a woman married in terms of Muslim law, the court answered the question in light of the prevailing *boni mores* of society (par 17). In *Du Plessis* the court awarded damages to a partner in a same-sex life partnership. The question is whether, after the legalisation of same-sex marriages, same-sex life

partnerships should qualify, or whether, like heterosexual life partners, not have such a claim. The *Du Plessis* case specifically left this question open.

4 2 Amended statutes

4 2 1 Introduction

In light of the *Volks* judgment, cohabitating couples who legally can get married but choose not to, cannot rely on the invariable consequences of a marriage after death of one of the life partners. These consequences should, after December 2006, also be applicable to same-sex life partners who choose not to get married as the distinction is between those who are married on the one hand and those who choose not to get married on the other hand.

It should be noted that certain statutes, such as the Estate Duty Act 45 of 1955, Pension Funds Act 24 of 1956, Maintenance Act 99 of 1998, Judges' Remuneration and Conditions of Employment Act 47 of 2001, Medical Schemes Act 131 of 1998 and the Immigration Act 13 of 2002, treat spouses, same-sex and heterosexual life partners the same. These statutes are not at issue in this note. The complication arises, however, where amendments were made to legislation during the past decade to bring same-sex permanent life partnerships into line with married couples. The situation is that once same-sex life partners can choose to marry (or not), these statutes differentiate between (non-married) same-sex permanent life partnerships and (non-married) heterosexual life partnerships. It is submitted that this differentiation would be unconstitutional. The distinction, after December 2006, should be between spouses on the one hand, and life partners on the other hand, irrespective of gender. Three statutes are highlighted.

4 2 2 Children's Status Act 82 of 1987

In the case of *J v Director-General, Department of Home Affairs* (2003 5 BCLR 463 (CC)) the court found that section 5 of the Children's Status Act is unconstitutional as it rendered children born from artificial insemination legitimate where the mother is married, but not where she is a partner in a same-sex life partnership. The court ordered that the defect be cured by amending the section to read as follows:

> "5(1)(*a*) Whenever the gamete or gametes of any person other than a woman or her husband, or permanent same-sex life partner, have been used with the consent of both that woman and her husband, or permanent same-sex life partner, for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband, or permanent same-sex life partner.
>
> (*b*) For the purposes of paragraph (a) it shall be presumed, until the contrary is proved, that both the woman and her husband, or permanent same-sex life partner, have granted the relevant consent." (Subsection 2 is ignored for purposes of this note).

After December 2006, when same-sex spouses can legally marry, unless this section is amended, it would mean that same-sex life partners will be in a stronger position than heterosexual life partners. Children born from artificial insemination are, as the section now reads, legitimate where the mother is married or in a same-sex life partnership, but not if she is in a heterosexual life partnership. This would be unconstitutional in light of the equality clause after December 2006.

4 2 3 Child Care Act 74 of 1983 and Guardianship Act 192 of 1993

Another problematic scenario can be traced back to the Constitutional Court judgment in *Du Toit v Minister of Welfare and Population Development* (2003 2 SA 198 (CC)) where the court confirmed the order of the High Court to make provision for the adoption of children by same-sex life partners by amending the Child Care Act and the Guardianship Act to read as follows:

Section 17 of the Child Care Act:

> "A child may be adopted
> (*a*) by a husband and his wife jointly or by two members of a permanent same-sex life partnership;
> (*b*) by a widower or widow or unmarried or divorced person;
> (*c*) by a married person whose spouse is the parent of the child or by two members of a permanent same-sex life partnership;
> (*d*) by the natural father of a child born out of wedlock."

Section 20(1) of the same Act:

> "An order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse or permanent same-sex life partner contemplated in section 17(*c*)) immediately prior to such adoption, and that parent's relatives."

Section 1(2) of the Guardianship Act:

> "Whenever both a father and mother have guardianship of a minor child of their marriage or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of –
> (a) the contracting of a marriage by the minor child;
> (b) the adoption of the child;
> (c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;
> (d) the application for a passport by or on behalf of a person under the age of 18 years."

Again, in all three of the above sections the same-sex life partners (not married) will be in a stronger legal position than heterosexual life partners

(not married) in the same scenario: same-sex life partners may adopt children as a couple, but not heterosexual life partners, for example. Again it is submitted that the differentiation between heterosexual and same-sex life partners will be unconstitutional in light of the equality clause. Either all life partners must be on par with spouses and allowed to adopt, or, in light of the *Volks* case, heterosexual and same-sex partners should be on par with each other as persons choosing not to marry as opposed to spouses (whether same-sex or otherwise).

5 Conclusion

This case note has highlighted and discussed some common law consequences of a marriage. It has also discussed some statutes that the courts and the legislature have changed in order to accommodate same-sex partnerships. The point is made that when the legislature changes the common law definition of marriage and the Marriage Act, as instructed by the Constitutional Court in the *Fourie* case, it has to consider some of these anomalies without discriminating against heterosexual life partners.

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