IN THE CONSTITUTIONAL COURT

OF THE REPUBLIC OF SOUTH AFRICA

CCT Case No: 62/2022

In the variation application between:

MINISTER OF FINANCE **Applicant**

and

SAKELIGA NPC **First Respondent**
(PREVIOUSLY KNOWN AS AFRIBUSINESS NPC)

RULE OF LAW PROJECT **Second Respondent**

ECONOMIC FREEDOM FIGHTERS **Third Respondent**

In re the matter CCT 279/20 between:

THE MINISTER OF FINANCE *Applicant*

and

AFRIBUSINESS NPC *Respondent*

and

RULE OF LAW PROJECT *First Amicus Curiae*

ECONOMIC FREEDOM FIGHTERS *Second Amicus Curiae*

and

FIDELITY SERVICES GROUP (PTY) LTD *First Intervening Party*
THE SOUTH AFRICAN NATIONAL SECURITY

EMPLOYERS ASSOCIATION *Second Intervening Party*

FILING NOTICE

DOCUMENTS TO BE FILED:

- **FIRST RESPONDENT'S PRACTICE NOTE;**
- **FIRST RESPONDENT'S WRITTEN SUBMISSIONS;**
- **BIBLIOGRAPHY**

SIGNED at PRETORIA on 25 MARCH 2022.

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and

AFRIBUSINESS NPC Respondent

and

RULE OF LAW PROJECT First *Amicus Curiae*

ECONOMIC FREEDOM FIGHTERS Second *Amicus Curiae*

and

FIDELITY SERVICES GROUP (PTY) LIMITED First Intervening Party

THE SOUTH AFRICAN NATIONAL SECURITY EMPLOYERS' ASSOCIATION Second Intervening Party

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FIRST RESPONDENT'S PRACTICE NOTE

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1. **NAMES OF THE PARTIES AND CASE NUMBER**

The names of the parties and case number are as described above.

2. **DATE OF HEARING**

If the matter is to be heard, it is yet to be enrolled for hearing.

3. **NAMES AND CONTACT DETAILS OF COUNSEL**

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For the third respondent:

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4. **NATURE OF THE APPLICATION**

4.1. This is an application which the Applicant brought in terms of rules 12(1),18 and 29 of the rules of this Court, together with a rule 42(1)(b) of the Uniform Rules of Court and section 167 (6)(a) of the Constitution.

4.2. The Applicant styles these proceedings as an urgent application for direct access to this Court, seeking a variation and/or clarification, alternatively declaratory relief from this Court in respect of its judgment in *Minister of Finance v Afribusiness* [2022] ZACC 4, handed down electronically on 16 February 2022 ("**the judgment**").

4.3. The First Respondent resists the relief sought on an urgent basis and contends that this exercise in futility by the applicant is an abuse of process and a waste of valuable judicial resources.

4.4. The Applicant through a most peculiar approach relies on a footnote in the minority judgment, which constitutes a novelty of some note.

4.5. The majority judgement and order was simply the dismissal of the appeal to the Constitutional Court. The Applicant cannot utilise Uniform Rule 42 in seeking the amendment of the SCA order which is truly the subject of its complaint.

5. RELIEF SOUGHT

5.1. It appears that the Applicant wants to vary this court order in order to deal with fresh issues, being:

5.1.1. A declaratory order regarding the calculation of the periods of suspension, which should apply according to the Applicant to the suspension of the invalidity of the Preferential Procurement Regulations 2017("the Regulations");

5.1.2. A declaratory order that the tender process was conducted by organs of state under the Regulations *ex post facto* to this court order are not affected until the expiration of the suspension did.

5.2. There is no need for such declaratory relief, as the period of suspension of a judgement is regulated be the Superior Court Act 10 of 2013.

5.3. In the highly unlikely event of this Court deciding to rescind or vary its order made, it is contended that an order be issued to the effect that the 2017 Regulations are void *ab initio*.

6. SUMMARY OF ISSUES

Stripped of all paraphernalia, the matter really is simple as it boils down to the following:

6.1. Whether the Applicant's application is urgent to the extent that it requires the urgent attention of this Court by way of direct access;

6.2. Whether Uniform Rule 42(1)(b), on which the Applicant's case is based, finds application, and specifically whether there are any ambiguities or omissions in this Court's judgement, allowing interference with same.

6.3. Whether costs should be awarded, and against whom.

7. **ESTIMATED TIME**

3 hours

8. **NEED TO READ THE PAPERS**

All the papers must please be read.

9. **OTHER MATTER RELEVANT FOR EFFICIENT CONDUCT OF THE HEARING**

None at this stage.

DATED AT PRETORIA ON 25 MARCH 2022

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24 March 2022

IN THE CONSTITUTIONAL COURT

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FIRST RESPONDENT'S WRITTEN SUBMISSIONS

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INTRODUCTION:

1 This is an application which the Applicant brought in terms of rules 12(1),18 and 29 of the rules of this Court, together with a rule 42(1)(b) of the Uniform Rules of Court and section 167 (6)(a) of the Constitution.[1]

2 These heads of argument are filed in response to the Applicant's lengthy heads of argument, consisting of some 40 pages.

> *"The length of the document defends it well against the risk of it being read".*[2]

---

1 FA paragraph 13.

2 Winston Churchill.

3 Stripped of all paraphernalia, the matter really is simple as it boils down to the following:

3.1 Whether the Applicant's application is urgent to the extent that it requires the urgent attention of this Court by way of direct access;

3.2 Whether Uniform Rule 42(1)(b), on which the Applicant's case is based, finds application, and specifically whether there are any ambiguities or omissions in this Court's judgement, allowing interference with same.

3.3 In the event of this Court deciding to rescind or vary its order made, what the content of such order should be.

THE LEGAL POSITION

4 The legal position is trite, and the relevant principles for purposes of this matter are briefly dealt with by the First Respondent.

5 The general, well-established rule is that once a Court has duly pronounced a final judgement or order, it has itself no authority to set it aside or to correct, alter or supplement it. The reasons are twofold, first, the Court becomes *functus officio* and its authority over the subject matter ceases, and secondly, the principle of finality of

litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality) dictates that the power of the Court should come to an end.[3]

6 Rule 42(1(b), which is applicable to this matter, allows this Court to interfere if there is an ambiguity, or a patent error or omission.

7 It is a fundamental principle of our law that a Court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done.[4]

8 Not only must the order be couched in clear terms, but its purpose must also be readily ascertainable from the language used.[5]

9 An ambiguity or a patent error or omission has been described as an ambiguity or an error or omission as a result of which the judgement granted does not reflect the real intention of the judicial officer pronouncing it; in other words, the ambiguous language or the patent error or omission must be attributable to the Court itself.[6]

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3 Freedom Stationers (Pty) Ltd v Hassam 2019(4) SA 459(SCA) at 465A-B;
Erasmus Superior Court Practice: Second Edition: Van Loggerenberg Volume 2: D1-561.

4 Eke v Parsons 2016 (3) SA 37 (CC) at 65 E-G;
Erasmus Superior Court Practice: Second Edition: Van Loggerenberg Volume 2: D1-570A.

5 Eke v Parsons 2016 (3) SA 37 (CC) at 58 F;
Erasmus Superior Court Practice: Second Edition: Van Loggerenberg Volume 2: D1-570A.

6 Mostert NO v Old mutual Life Assurance Co Ltd 2002(1) SA 82 (SCA) at 86C-D.

10 For purposes of interpreting a judgement, the basic principles applicable to the construction of documents also apply to the construction of a Court's judgement or order. The judgement or order and the Court's reasons for giving it must be read as a whole to ascertain its intention. If on such a reading, the meaning of the judgement or order is clear and unambiguous, no extrinsic factor or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgement and order can be asked to state what its subjective intention was in giving it.[7]

11 It is accepted that the modern approach of interpretation is as set out in the matter of **Natal Joint Pension fund v Endumeni Municipality**[8], which was confirmed in **University of Johannesburg v Auckland Park Theological Seminary and Another**[9], which states in summary that one must consider the context and the language together, with neither being predominant over the other.

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7 Administrator Cape v and another v Ntshwagela and others 1990 (1) SA 705 (A) at 715F.

8 2012 (4) SA 593 (SCA) at para [18];

9 2021 (6) SA 1 (CC) at para [64].

12 In **Firestone South Africa (Pty) Ltd v Gentiruco AG**[10] the Appellate Division recognised a number of exceptions to the *functus officio* rule, being:

12.1 Supplementing of judgement: the principal judgement or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgement debt, which the Court overlooked or inadvertently omitted to grant;

12.2 Clarification of judgement: the Court may clarify its judgement or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to the true intention, provided it does not thereby alter " the sense or substance of the judgement or order". If the meaning of the order is, however, clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgement.[11] (Our emphasis)

12.3 A Court may correct arithmetical or other errors in its judgement or order to give effect to its true intention.

---

[10] 1977 (4) SA 298 (A) at 304 E.

[11] Administrator cape v, and another v Ntshwagela and others 1990 (1) SA 705 (A) at 715F; Erasmus Superior Court Practice: Second Edition: Van Loggerenberg Volume 2: D1-573.

URGENCY

13 This Court's judgement was delivered on 16 February 2022.

14 The majority judgement and order was simply the dismissal of the appeal.

15 The Applicant itself caused uncertainty when it addressed the circular/letter to Organs of State on 25 February 2022, stating that:

15.1 All tenders that were advertised before 16 February 2020 be finalised in terms of the Preferential Procurement Regulations, 2017 (which were declared invalid);

15.2 All tenders advertised after 16 February 2022, be held in abeyance; and

15.3 That no further tenders to be advertised.

16 The upshot of such circular/ letter is that the Applicant incorrectly advised the Organs of State, as this Court's order clearly had the consequence that the SCA's order was effective, and that the invalidity of the Preferential Procurement Regulations 2017 was suspended for a period of 12 months from the date of the SCA's order.

17 This meant that all the tenders should have been dealt with as before, pending the period of 12 months, which should have been correctly calculated, as the invalidity thereof was suspended.

18 The First Respondent's attorney thereafter addressed a letter to the Applicant on 28 February 2022 criticising the approach of the Applicant relating to the directions to Organs of State to hold the tenders advertised after 16 February 2022 in abeyance and not to advertise any further tenders. The First Respondent had its own views on the manner in which those tenders should have been dealt with.

19 The First Respondent's letter of 28 February 2022 focussed on the Applicant's circular/letter to Organs of State which created the impression of a uniform instruction to cease or hold over tender processes. Even though the Applicant differed in its interpretation of the judgment, the letter was aimed at preventing a stalling of service delivery in the country. The letter does not declare an active litigable dispute on the interpretation of the judgment. Its intentions are clear from its wording:

> "*7. Our client is aggrieved by your instructions to organs of state not to advertise or process any current tenders after 16 February 2022. It is our client's position that this instruction is unlawful and that the Minister*

and National Treasury do not have the authority to instruct or advise organs of state to hold over their tender processes.

[…]

8. Your directions are unlawful and should immediately be withdrawn.

9. The Minister, alternatively National Treasury, is unlawfully interfering with the constitutional duties of organs of state. A blanket direction to stop issuing tenders will result in many organs of state, who are unaware of the depth of their constitutional authority in terms of the Constitution (read with the Preferential Procurement Policy Framework Act, 5 of 2000), terminating all current tender processes. Our client's view is that your direction of 25 February 2022 will result in the delay, interruption, or withholding of service delivery."

[...]

12. Our client demands the withdrawal of your 25 February 2022 direction by no later than 2 March 2022 at 12h00. Our client reserves the right to approach the Court on an urgent basis for an order to have the direction set aside if you fail to respond."

20 Thereafter the Applicant addressed a further circular/letter to Organs of State on 3 March 2022, subsequent to receiving a letter from the First Respondent's attorney on 28 February 2022, which it described as an "advisory note". In the "advisory note" the Applicant stated that the Preferential Procurement Regulations 2017 have been and

continue to be of full force and effect, and that the arrangement as per paragraph 15 above should continue to be applicable. The Applicant clearly was undeterred by the criticism and opinion received from the First Respondent and ignored the First Respondent's suggestions as to the way forward, but nevertheless decided that this Court should be approached on an urgent basis by way of direct access in seeking confirmation from this Court that the invalidity of the Preferential Procurement Regulations 2017 has been and continues to be suspended. It was stated that guidance will be sought from this Court.

21 It is clear that this urgent application stems from the Applicants own decision, based on its own incorrect interpretation of this Court's judgement and order, read together with the judgement of the SCA, and its own misconception that this Court should be approached on an urgent basis, with direct access, to make declaratory orders to give guidance as to the interpretation of its judgment and order.

22 The urgency stems from the Applicant's own making, through its incorrect interpretation of the judgment and order, and the whole application and urgency is self-created.

23 On its own version, the Applicant ignored the criticism and suggestions by the First Respondent, and that could not have caused the urgency, nor the need for direct access to this Court.

24 In fact, the Applicant goes to great lengths in its written submissions to mischaracterise the First Respondent's letter of 28 February 2022, conveniently failing to quote the full text of the letter and reading into the letter's closing paragraph the following words:

> *"Our client demands the withdrawal of your 25 February 2022 direction* ***[stating that the 2017 Regulations remain in effect until expiry of the suspensive period granted by the SCA]*** *[…]"*

25 The Applicant's insertion reveals what appears to be at least a remarkable unwillingness to acknowledge the obvious and explicit preceding statements in the First Respondent's letter, being a demand that a uniform instruction to all Organs of State to halt all tender processes be withdrawn.

26 The mischaracterisation of First Respondent's letter is clearly inconsistent with the Applicant's own conduct, as shown by the letter of 3 March 2022 in which Organs of State were advised to deal with the 25 February 2022 circular/letter as an *advisory note.*

UNIFORM RULE 42(1)(b)

27 The Applicant bases its application on Uniform Rule 42(1)(b).[12]

28 The relevant portion of uniform rule 42(1)(b) and uniform rule 42(2) read as follows:

> *(1) "The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) …*
>
> *(b) an order or judgement in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.*
>
> *(c) …*
>
> *(2) any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*"

29 In order to succeed with its application, the jurisdictional key lies therein that the Applicant must show that there is an ambiguity, error or omission in this Court's judgement.

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[12] The First Respondent erroneously referred to Uniform rule 42(1) (c) in the heading after para 19 of the AA.

30 Even if the Gentiruco-principles are applied, it is clear that:

30.1 There is no reason to supplement the judgement;

30.2 The clarification of the judgement can only take place, once it has been shown that the meaning of the judgement remains obscure, ambiguous or otherwise uncertain;

30.3 There is no reason to correct any clerical, arithmetical or other errors in the judgement, as none exist.

31 The Applicant's case is stillborn, as there is simply no ambiguity, error or omission in this Court's judgement.

32 The peremptory requirement for this Court to interfere and to vary or rescind its judgement is simply not present.

33 The relevant part of this Court's majority judgement, which is the binding and relevant judgement, reads as follows:

> "*3. Leave to appeal is granted;*
>
> *4. The appeal is dismissed with costs, including the costs of two counsel."*

34 Even if one reads the order together with the reasons for the judgement, the meaning is clear as daylight, being a dismissal of the appeal to this Court.

35 There is no conceivable reason, let alone any ambiguity, that will trigger this Court to interfere and to rescind or vary that judgement and order.

36 The high watermark of the Applicant's attack on the judgement and order is the reliance on a footnote, no 28, which appears in the minority of the of this Court's judgement, stating that the period of suspension expired on 2 November 2021.

37 That minority judgement and footnote is of no consequence as far as the majority judgement and order is concerned, being the judgement and order which is binding on the parties.

38 The Applicant's approach defies all logic, as the minority judgement needs to be read with the minority order, and the majority judgement needs to be read with the majority order. The majority judgement and order are the relevant ones that are binding on the parties.

39 There can be no conceivable problem in interpreting the majority judgement and order, which comprise simply an order dismissing the appeal.

40 If anyone, be that the Applicant or the First Respondent, might have different opinions of their own relating to the interpretation of the majority Court's judgement and order, as it stands, same is no reason to approach this Court for the clarification thereof. The test is not what other people's opinions might be, but whether there is any ambiguity considering a proper interpretation of the judgement and order. Judgments often result in differences as to their meaning and implications. This does not however mean that the Court should become an interpretation service to a party, even if that party forms part of Government. Unless an actual litigable dispute is declared, differences in interpretation are not actionable in law.

41 It, however, appears that the Applicant's real gripe is not this Court's order, but rather the order of the SCA, which order stands consequent upon the majority of this Court having dismissed the appeal, and where the following was ordered:

1.1 The appeal is upheld with costs;

1.2 The order of the court a quo is set aside and is replaced with the following order:

(a) the application succeeds with costs;

(b) it is declared that the preferential procurement

regulations, 2017 are inconsistent with the preferential procurement policy framework act five of 2000 and are invalid;

(c) The declaration of invalidity referred to in paragraph (b) above is suspended for a period of 12 months from the date of this order"

42 Uniform Rule 42 (1)(a) refers to the "court". Upon a proper interpretation thereof the reference to the Court which is entitled to rescind or vary its own judgement and order, is the Court having made the order, and does not allow another Court, such as a court of appeal or the Constitutional Court, to utilise that rule in order to rescind or vary the lower courts judgement and order.

43 Accordingly, the Applicant cannot utilise Uniform Rule 42 in seeking the amendment of the SCA order which is truly the subject of its complaint.

44 However, and in the alternative, even if one accepts that this Court can amend the SCA's judgement and order, in terms of an application lodged in terms of Uniform Rule 42(1)(b), it must be remembered that even under such circumstances the Applicant must show that there is an ambiguity in that order.

45 There is absolutely no obscurity or ambiguity in the SCA's order, especially insofar as it has declared that the invalidity be suspended for a period of 12 months from the date of that order.

46 Once again, even if it might be argued that there are different interpretations, be that by the Applicant or the First Respondent in respect of the SCA's order, same are not the relevant factors to be considered in coming to a conclusion that there is an ambiguity in respect of such order. There can only be an ambiguity if such is found after a proper interpretation process is applied.

47 Interpreting the SCA's judgement and order, it is clear that the SCA in paragraph (c) envisaged that the invalidity is suspended for a period of 12 months from date of this order.

48 Accordingly, the Applicant's application to rescind or vary the SCA judgement is unfounded.

FRESH ISSUES THAT THE APPLICANT WANTS TO HAVE CONSIDERED

49 It appears that the Applicant wants to vary this court order in order to deal with fresh issues, being:

49.1 A declaratory order regarding the calculation of the periods of suspension, which should apply according to the Applicant to the suspension of the invalidity of the preferential procurement regulations 2017;

49.2 A declaratory order that the tender process was conducted by Organs of State under the preferential procurement regulations 2017 *ex post facto* to this court order are not affected until the expiration of the suspension did.

50 There is no need for such declaratory relief, as the period of suspension of a judgement is regulated by the Superior Court Act 10 of 2013.

51 Section 18 (1) of which reads as follows:

> "*18* ***Suspension of decision pending an appeal***
>
> *(1) subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal*.

52 With reference to the period of 12 months, referred to in the SCA order, the clock started to tick at the time when the High Court delivered its judgement and order (which judgement was replaced by the SCA's order), and the period of 12 months was thereafter suspended pending the appeals to the SCA and this Court, respectively. It is a simple matter of calculating the period considering the periods of the pending appeals that should be excluded.

53 There is no need to approach this Court, *ex post facto* its decision, to make the calculation on behalf of the Applicant or other affected parties.

54 The issue of the calculation arose subsequent to this Court's order and did not form part of the issues that were considered by this Court (or even the SCA) at the time of pronouncing their judgements and orders.

55 Apart from the aforesaid, this Court cannot be approached subsequent to judgements and orders delivered, to give legal advice or opinions and declaratory orders relating to judgements and orders granted by it, let alone by way of direct access to this Court. It is conceded in the Applicant's practise note that they are approaching the Court for direct access.

56 The High Court has jurisdiction, in terms of section 21(1)(c) to enquire and determine, in its discretion, and at the instance of any interested person, any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

57 If the Applicant wanted to seek declaratory orders, relating to the calculation of the periods of time of suspension, it could have approached the High Court for that purpose.

58 The High Court may decline the granting of a declaratory order, if it considers that the issues raised are hypothetical, abstract or academic. It is argued that the High Court will not interfere, if the declaratory order is sought in respect of a clear and unambiguous order that was made, such in this instance, by the SCA and this Court. Such order would not be granted if it is merely a matter where the High Court's opinion is required, or if it is academic, like in the present instance, where there is sufficient time allowed to the Applicant to rectify the impugned regulations.

59 Even if this Court considers making such declaratory orders, in terms of its inherent powers, it is submitted that such discretion should not be exercised in the Applicant's favour as the declaratory orders are not necessary, considering the content of this Court's and the SCA

order, which orders are clear and unambiguous. There is still sufficient time allowed for the Applicant to rectify the impugned regulations.

60 With reference to the declaratory order sought, the same argument as above applies *mutatis mutandis* to such issue. There is no need that the Court be approached for such issue on a direct basis, it is a fresh issue which is now raised and which was not considered by this Court at the time of the hearing of the matter and/or in its judgement and order, and there is no ambiguity in the Court's judgement or order, or even the judgement and order of the SCA, necessitating such intervention and declaratory order.

CONCLUSION AND ORDER SOUGHT BY FIRST RESPONDENT

61 For the reasons set out above, the Applicant's application should be dismissed with costs, inclusive of the costs of two counsel, if applicable**.**

62 Realising that the Applicant's application was stillborn, the First Respondent addressed a letter to the Applicant on 14 March 2022, which letter is annexed to the First Respondent's Answering Affidavit as annexure B, pointing out the deficiencies in the Applicant's application which was already lodged on 4 March 2022. Specific

reference was made to the fact that the application does not fulfil the requirements of Uniform Rule 42 and that the application was a waste of time and resources. Despite this invitation, the Applicant declined and refused to withdraw its application.

63 Alternatively, and only insofar the Court might decide to vary the order, which the First Respondent argues should not be done, the First Respondent will argue that considering that the regulations were *ultra vires*, that this Court should delete the period of invalidity of the suspension alternatively it should not be extended any further, due to the fact that the regulations will were *ultra vires* the act and unlawful. The interim period should rather be governed by the content of the draft regulations, which were already published on 10 March 2022, and which is annexed to the First Respondents Answering Affidavit as Annexure “C”.

SIGNED at PRETORIA on 25 MARCH 2022.



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ADVOCATE JP SLABBERT

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FIRST RESPONDENT'S BIBLIOGRAPHY

Case Law

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