[6] The Minister's direct reply to Stali, which he presumably

[7] In the meantime the applicant and Petro SA then apparently reached agreement that, pending the outcome of an investigation by the Minister into the problems underlying the failure to conclude the written contract, the applicant would continue to provide services to first Petro SA in terms of the original tender award. The terms of this agreement appear from passages in correspondence between the parties.

[8] On 12 April 2005 the applicant's holding company wrote to Petro SA confirming a telephone conversation between two representatives of the parties, *inter alia*, in the following terms:

> "*We agreed that Sebenza... continue to provide services to Petro SA in terms of the International Shipping tender. This is in order that the Minister of Minerals and Energy can conduct a full investigation into our problem. Should Petro SA still require the termination of Sebenza's services after the Ministerial investigation, we would request a termination period of 60 (sixty) days*."

[9] A reply from Petro SA dated 13 April 2005 confirmed that the contract period between the parties, which would otherwise have lapsed, was extended… "*to enable the Minister of Mineral and Energy to conclude or make a final ruling on the matter*". In the letter Petro SA's representative goes on to state that "*as it is not clear what form or how the Minister will approach the matter I would prefer the parties refrain from referring to such inquiry as a 'full investigation' as such expression might have other expectations or consequences which were never intended by the Minister*". For completeness sake it needs be said that Petro SA denies the authority of the official who represented it in concluding the aforesaid agreement but this dispute is not material to issue presently before the Court.

[10] Notwithstanding the aforesaid apparent agreement on 19 May 2005 Petro SA purported to terminate the contract with the applicant on one month's notice which ultimately led the applicant to institute interdict proceedings against the respondents on 17 June 2005. The principal basis thereof was that Petro SA's undertaking constituted "administrative action" and that, from both a substantive and a procedural perspective, it was bound to honour such undertaking. The applicant obtained certain interim relief pending the filing by Petro SA of its answering papers, which relief was extended from time to time.

[11] On 24 June 2005 the Minister filed a notice indicating that she did not intend to oppose the application and would abide the decision of the court. On 14 July 2005 Petro SA filed its answering papers. Attached as an annexure was an undated letter from the Minister to Petro SA's chief executive officer stating that she had decided not to launch a formal enquiry into the dispute. The letter bears quoting in full and reads as follow:

> "*I have received your detailed response to my enquiry regarding the complaint from Sebenza about their contract with Petro SA.*
>
> *I have noted and studied your response and I am satisfied with the manner in which you are proceeding and handling the matter.*
>
> *I am of the firm view that this matter is an operational matter that must be handled and resolved by Petro SA management. I am consequently not intending to launch a formal enquiry on this matter.*"

[12] Given the form of the relief initially sought by the applicant, the discovery that the Minister had decided not to conduct any investigation pulled the rug out from its feet as far as the interdict proceedings were concerned. Presumably in response thereto, the applicant gave notice on 1 August 2005 of a proposed amendment to its notice of motion in which the following further relief would be sought:

> "*Reviewing, correcting and setting aside of the decision of the Second Respondent on or about 30 June 2005 in which she approved of the manner in which the First Respondent was dealing with its dispute with the*

*Applicant ['the dispute']; indicated that the dispute was an operational matter to be resolved by the First Respondent's management; and refused to launch a formal enquiry into the dispute.*"

[13] Because of the late stage at which the applicant learnt of her decision, it could only make out its case against the Minister in its replying affidavit. In essence its case was that her decision was procedurally unfair in that she had failed to hear the applicant in the decision-making process. The applicant pointed out that upon receipt of Stali's letter the Minister had written to Petro SA and requested it to revert to her with an answer to the issues raised in the letter. Petro SA's chief executive officer duly did so on 20 April 2005, forwarding a detailed response to the Minister dealing with the problems between it and the applicant. Neither that letter nor the Minister's original request were furnished to the applicant which was quite unaware of this exchange of correspondence.

[14] Against this background, the applicant contended in its replying affidavit, that the Minister's letter containing her decision not to launch an enquiry implicitly confirmed "*that the Minister did entertain this matter and indicates that she recognised the need to make a decision in this regard. In accordance with the principles of procedural fairness applicable to all exercises of public power, it is submitted that at the very least Petro SA's response should have been forwarded to*

*Sebenza for comment before the Minister made her decision in this regard*".

[15] The Minister opposes the proposed amendment, on the grounds that the decision in question was a "political decision" not susceptible to judicial review. In its Notice in terms of Rule 28(3) the Minister contended further that the decision was not administrative action as referred to in Section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") or as defined in the Promotion of Administrative Justice Act, 2000 ("the PAJA"), or an exercise of public power susceptible to judicial review. Petro SA also opposes the amendment but did not participate in the hearing of the interlocutory application.

[16] The matter was fully argued before me on 19 September when the parties advised that the main application had been set down for hearing on 20 October. In the circumstance it is clearly appropriate that judgment in this matter be delivered as soon as possible notwithstanding that the issues raised are by no means straightforward. It is important to note that, apart from the fact that the implications and consequences of the Minister's decision were only addressed by the applicant in its replying papers, I do not have the benefit of any affidavit from the Minister, or anyone from her Ministry, since her legal

representatives chose to address the amendment purely as a matter of law and on the facts as put up in the affidavits filed by the applicant and Petro SA.

THE APPROACH TO APPLICATIONS FOR AMENDMENT

[17] The general approach to applications for amendments to a notice of motion was, as restated by Rose-Innes J in *Devonia Shipping Limited v MV Luis (Yeoman Shipping Company Limited)* 1994 (2) SA 363 (C) H at 369F – I:

> "…*As in the case of the summons or a pleading in an action, (it) will always be allowed unless the application to amend is mala fide or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the Notice of Motion which it sought to amend was filed*".[1]

It was common cause between the parties that the applicant had timeously sought the amendment and that, given its invitation to Petro SA to file affidavits in response to the proposed amendment, the latter would suffer no procedural disadvantage should it be granted. As the Minister's notice of objection foreshadows, however, she contended

1 See also *Moolman v Estate Moolman* 1927 CPD 27 at 29 and *Embling v Two Oceans Aquarium* CC 2000 (3) SA 691 (C) at 694 – 695.

that since the proposal amendment failed to raise "*something deserving of consideration, a triable issue*" it should not be granted. This principle was enunciated *inter alia* in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) where at 641A Caney J stated as follows:

> "*Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable"*.

A similar point was made by Selikowitz J in *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958B where he stated, in a similar context:

> "*If the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment*".

See also *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n ander*

**2002 (2) SA 447 (SCA) para. 34, 36, 42 and 43.**

[18] Mr. Breitenbach, who appeared on behalf of the Minister, argued that in effect the court was dealing with an exception which had to be resolved on the basis of the evidence put up by the applicant in its affidavits. In my view this analogy with exception proceedings in a trial action should not be taken too far. In an application the affidavits constitute both the pleadings and the evidence and a significant fact which cannot be overlooked is that the Minister has, to date, not put her version of events before the court in the form of an affidavit or at all. There are, furthermore, several unanswered questions regarding the procedure adopted by the Minister in dealing with the complaint conveyed by Stali to her on behalf of the applicant to which I shall revert later. As was pointed out by Mr. Arendse who, together with Mr. Borgström, appeared for the applicant, it might well be that, should the amendment be granted and should the Minister choose to file an opposing affidavit, other considerations may come to light which may cause the applicant to broaden the basis of its challenge to her decision. There is also the consideration that, until such time as any amendment is granted and a lis is created between the applicant and the Minister, the former does not enjoy the right to the record of any decision-making process or to discovery by the Minister.

## THE ISSUES

[19] Against this background the question which arises is whether the applicant's proposed amendment will place a "*trlable issue*" before the court and, more specifically:

i) whether the Minister's decision constituted an "*administrative action*" or an exercise of public power and, if the latter,

ii) whether the decision is susceptible to judicial review in accordance with the principles of procedural fairness.

## WAS THE MINISTER'S DECISION ADMINISTRATIVE ACTION?

[20] The applicant contended that the Minister's decision constituted administrative action as defined in either Section 1(a)(ii) or 1(b) of the

PAJA. Since the first subsection relates to a decision taken by "an organ of State" and the second to a natural or juristic person other than an organ of State, the applicant cannot have it both ways. The Minister must either be an organ of State or not. Since she is sued in her representative capacity and having regard to the wide definition of an "organ of State" in section 239 of the Constitution, it would seem that section 1(a)(ii) is applicable. Unfortunately a host of further questions must be answered in determining whether the decision challenged constitutes "administrative action" as defined in the PAJA. These include whether the Minister's action constituted a decision taken or a failure to take a decision, whether such was a exercise of public power or the performance of a public function, what legislation if any was involved and whether the decision adversely affected applicant's rights and had a "direct, external legal effect".

[21] Any final answer to these questions should ideally be given by the Court seized with the review. It is open to the Minister, if she considers that the amended relief sought has no foundation in either law or fact, to challenge the matter on the papers they stand at the hearing of the main proceedings. I agree with the applicant's counsel's submissions that that court will be in the best position to determine the matter based on a complete conspectus of the facts on all the issues. I do not see the question of the reviewability of the Minister's decision as purely a

matter of law. The questions concerning whether the Minister's decision falls within the bounds of the various definitions in the PAJA is properly determined in relation to all the facts of the matter which have not necessarily been placed before the court. It would be unwise and unnecessary for this court to seek to reach any final or firm conclusions on what may be incomplete facts. Each of these sub-questions can be the subject of a detailed analysis given the vagueness of some of the concepts involved and the various statutory definitions which come in to play. In this regard the criticisms expressed by Cora Hoexter[2] of the statutory definition of administrative action in the PAJA as "*parsimonious*, *unnecessarily complicated and probably as unfriendly to users as it is possible to be*" are by no means unfounded.

[22] Nonetheless, for the purpose of determining whether the proposed amendment will produce a "triable issue", a preliminary enquiry as to whether the Minister's decision could be "administrative action" as defined in the PAJA, is necessary. I proceed to examine each element in turn. A "*decision*" is somewhat circularly defined in the PAJA as meaning "*any decision of an administrative nature… under an empowering provision… doing or refusing to do any other act… of an administrative nature, including a decision to…*". An empowering provision is defined *inter alia* as "a law" or "an agreement" in terms of

2 "Administrative action" in the courts - an unpublished paper delivered at the Comparative Administrative Justice Workshop, Cape Town, 20 – 22 March 2005.

which "administrative action" was purportedly taken. Thus, notwithstanding the number and scope of the definitions involved in this enquiry, the question whether the impugned action is "administrative" remains the defining concept. This aspect of the enquiry boils down, in my view, to the question of whether the Minister's decision was executive action. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[3] the court held that the distinction between executive and administrative action came down to a distinction between the implementation of legislation, which is administrative action, and the formulation of policy which is not. Where this line is drawn, the court stated further, will depend primarily upon the nature of the power and also upon other relevant factors including the source and nature of the power, it subject matter, whether it involves the exercise of a public duty and whether it is related to policy matters or the implementation of legislation (par. 143 of the judgment).

[23] In the present matter Petro SA is the wholly owned subsidiary of CEF (Proprietary) Limited, a State owned company managed and controlled by a board of directors all of whom are appointed by the Minister on conditions co-determined by her and the Minister of Finance. Quite clearly CEF (Proprietary) Ltd, and its subsidiary companies would ultimately be responsible to the executive, represented by the Minister.

3 2002(1) SA 1 (CC)

This is reflected *inter alia* in section 1E (6) of the Act which provides that the chairman of the board of directors of CEF (Proprietary) Ltd "*shall furnish the Minister… with such information as the Minister may from time to time call for relating to the activities of CEF (Proprietary) Ltd… or relating to the transactions entered into for account of or the financial state of the Central Energy Fund… or any other account of CEF (Proprietary) Ltd…*". In response to Stali's initial letter of complaint to the Minister, the Head of Ministerial Services in the Minister's department wrote to Petro SA's chief executive officer advising that the Minister required him to revert back to her with an answer to the letter, which was attached, "as soon as possible".

[24] It seems to me quite conceivable that this response by the Minister was in effect an exercise by her of her powers in terms of section 1E (6) of the Act. The Minister's aforesaid response, the statutory basis of Petro SA and her power to appoint the board of directors of its holding company points furthermore to a residual power on the part of the Minister to conduct an investigation into whatever might have been revealed by the information furnished by Petro SA. Certainly it would not be unreasonable to expect that the Minister would have a general duty and power of oversight in regard to the affairs of CEF (Pty) Ltd and its subsidiaries. An enquiry by the Minister into alleged irregularities on the part of Petro SA would be closer to the

implementation of legislation and thus administrative action than the formulation of policy. A full analysis of the Minister's powers and obligations would, however, be best undertaken by a reviewing Court with the benefit of the Minister's explanation and views of the matter.

[25] It was argued on behalf of the Minister in this regard that her decision not to hold an enquiry was "political" and not an exercise of public power. In support hereof it was argued that the applicant, as a constituent, had approached an elected politician (Stali) to raise its complaints with the Minister and in so doing sought a political solution to its problems. In turn the Minister's decision was an exercise of political judgment. I do not agree with this characterisation for a number of reasons. The fact that a politician may be the channel through which an organ of State is approached for certain relief or action does not, in itself, render a decision to take such action or not a political decision. Furthermore, the applicant's request for an investigation by the Minister into the complaints alleged also does not necessarily mean that such an investigation would be a "political" solution. It could well coincide with administrative action which the Minister was in any event duty bound to take. Finally, as was noted by O'Regan J in a different context *"(T)he fact that a decision has political implications does not necessarily mean that it is not an administrative decision within the meaning of section 33…"*.[4]

4 *Permanent Secretary of the Department of Education and Welfare, Eastern*

WAS THE MINISTER EXERCISING A PUBLIC POWER OR PERFORMING A PUBLIC FUNCTION IN TERMS OF ANY LEGISLATION?

[26] It is possible that had the Minister ordered an enquiry she would have been exercising a public power in terms of section 1E (6) of the Act. Taking into account the extended definition of "a decision" in subsection (1)(g) namely "*doing or refusing to do any other act or thing of an administrative nature, …*" it is at least arguable that in refusing to do so the Minister was similarly exercising a public power. The Minister's counsel argued that, upon an analysis of the applicant's affidavits and correspondence written by its legal representative the applicant in effect conceded that the Minister's decision was not "administrative action" in terms of section 1 of the PAJA.

[27] Although the applicant's counsel did not suggest that the Minister's powers came from a statutory source, no admission was made that her decision was not "administrative action" and to reach such a conclusion requires a painstaking and hypercritical analysis of the correspondence and replying affidavit. Such an approach is, in my view, not justified. Counsel for the applicant based its case in this regard on an agreement by the Minister to conduct an enquiry thus bringing her decision within the extended meaning of an "empowering provision" contained in section 1 of the PAJA. However, whilst the parties appeared to agree that the Minister would conduct such an enquiry, on the papers before me I can see no indication that the Minister herself ever agreed to any such process and thus this approach cannot be sustained.

DID THE MINISTER'S DECISION ADVERSELY AFFECT THE

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*Cape, and Another v Ed-U-College (PE)(Section 21) Inc.* 2001(2) SA 1 (CC) par 17.

APPLICANT'S

RIGHTS AND HAVE A DIRECT, EXTERNAL LEGAL EFFECT?

[28] The scope of this further qualification on the right to just administrative action is by no means clear. Assuming a broad definition of "right" it would be open to the applicant to contend that although it had no right to an enquiry at the behest of the Minister, it was at least entitled to be heard before the Minister refused any such request. See in this regard *Minister of Public Works v Kyalami Ridge Environmental Association* 2001(3) SA 1151 (CC) at paragraph 101. Furthermore, at least in the sense that the Minister appears resolute in refusing to reconsider her decision to launch any such enquiry (after considering the applicant's side of the story), the Minister's decision has had a direct and actual impact on the applicant's rights or interests. This effect goes beyond a merely intra-departmental impact and in that sense the second leg of the requirement could be satisfied.

[29] Assuming, for the reasons set out above, that a reviewing court might well find that the Minister's decision was administrative action as defined in the PAJA, it is clear that the applicant could then invoke its right to procedurally fair administrative action. I turn then to consider the applicant's case for procedural fairness and then its alternative argument regarding the reviewability of the Minister's decision.

THE CASE FOR PROCEDURAL FAIRNESS

[30] In argument before me counsel for the Minister chose not to address the applicant's complaints that it was not afforded a hearing which does not of course mean that she cannot do so at a later stage. The importance for procedural fairness of a hearing was recently restated in *Zondi v MEC for Traditional and Local Government Affairs and Others*[5]. "*The right to notice before an adverse decision is a fundamental requirement for fairness. Notice provides the person affected with the opportunity to make representations as to why an adverse decision should not be made. It is a fundamental element of fairness that adverse decisions should not be made without affording a person to be affected by the decision a reasonable opportunity to make representation.*" On the evidence presently available, however, the applicant appears to have cause for complaint in this regard. Stali's request for a meeting apparently never bore fruit and instead his letter, which, crucially, was cursory on the nature and extent of the problems complained of by the applicant in relation to Petro SA, was referred by the Minister to the latter's CEO.

[31] This elicited a detailed reply from Petro SA's CEO in which he explained the circumstances leading to the award of the tender to the applicant and pointed out that the contract remained unsigned by the applicant, notwithstanding Petro SA's insistence that it do so. He further alleged that the applicant's refusal to sign the contract arose

5 2005(3) SA 589 (CC) at 112

from two major areas of dispute, namely, the exclusion of certain work from the tender and a dispute concerning pricing. Besides expressing Petro SA's dissatisfaction with the applicant's service levels, the response elaborated on Petro SA's underlying complaints and described a series of interventions by it to address these. It concluded by stating that Petro SA had resolved formally to terminate the contract with the applicant with effect from 14 April 2005. The letter made no mention of any agreement or request that the Minister act as arbiter in the dispute between the parties nor did it even suggest that this was something which the Minister should consider. As previously mentioned what is striking about this exchange of correspondence was that neither letter was copied to the applicant.

[32] I am aware of the danger that the scope of administrative action could be unjustifiably broadened by including within its scope formal requests from outside parties to Ministers and departments for enquiries into alleged irregularities falling within their jurisdiction. Such requests could be without any merit or be inappropriately directed to that particular authority. Were every refusal of such a request be considered "administrative action", organs of State, other institutions or functionaries exercising a public power could find themselves burdened with unwarranted review applications with consequent deleterious effects on the levels of public administration. There is no clear answer

to this potential problem and guidelines may have to be developed on a case by case basis.

[33] In the present matter the difficulty does not arise as starkly in my view by reason of the Minister's response to Stali's initial request. This was not to summarily refer Stali or the applicant back to Petro SA on the grounds that the subject matter of the complaint was *prima facie* an operational matter to be resolved by the latter's management. Faced with a cursory letter of complaint, which was no more than the prelude to the request for a meeting by Stali on behalf of the applicant, the Minister obtained a detailed reply from Petro SA and clearly took her decision on the basis thereof. This approach suggests that the Minister appreciated the need for at least a preliminary enquiry into the complaints alluded to by Stali prior to her taking a decision on whether to launch a formal investigation. The lack of any detail in Stali's letter insofar as the actual complaints were concerned and the Minister's failure to obtain a response from the applicant to Petro SA's detailed defence of its own actions and its criticisms of the applicant, in my view sets the Minister's ultimate decision apart from a stock refusal to hold an enquiry following upon an ill-founded or inappropriately directly request or complaint.

WAS THE MINISTER'S DECISION SUBJECT TO JUDICIAL REVIEW AS AN EXERCISE OF PUBLIC POWER IRRESPECTIVE OF THE PROVISIONS OF

THE PAJA?

[34] The applicant argued in the alternative that even if the Minister's decision fell outside the definitional boundaries of administrative action as set out in section 1 of PAJA, it nonetheless remained subject to judicial review simply as an exercise of public power. Here it relied on the decisions in *SARFU and Pharmaceutical Manufacturers Association of SA and Another; in re* ex parte *President of the Republic of South Africa and Others*[6]. These cases, whilst observing a distinction between matters which are administrative and executive in nature, hold nevertheless that the labelling of a decision as "executive" does not necessarily insulate it from judicial scrutiny. These remain exercises of political power which are reviewable if they fail to meet the standards of legality or rationality. There are indications, moreover, that these standards are by no means a *numerus clausus*. In *Kaunda and Others v President of the Republic of South Africa* 2005(4) SA 235 the Constitutional Court held, per Chaskalson CJ, as follows:

> "*If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list."* (My underlining)

6 2000(2) SA 674 (CC)

[35] Currie and De Waal[7], relying on the decision in *Pharmaceutical Manufacturers,* state that:

> "*The rule of law therefor means more than the value neutral principle of legality. It also has implications for the content of law and government conduct. In this regard it has both procedural and substantive components. The procedural component forbids arbitrary decision making. Not only the executive, but Parliament itself may not act capriciously or arbitrarily."*

[36] Where a decision is taken hearing only one side of the story, the prospects of it being arbitrary can only be increased. In this sense it becomes all the more difficult to assert that executive action can never be subject to judicial scrutiny by want of a lack of adherence to a fair procedure.

CONCLUSION

[37] In conclusion then I am of the view that if the amendment is allowed, at the least a "triable issue" will be placed in front of the reviewing court, namely, that the decision of the Minister sought to be challenged was administrative action as defined in the PAJA and was reviewable for want of compliance with the applicant's right to procedurally fair

7 The Bill of Rights Handbook (5th Edition) at page 13.

administrative action. Even if I am wrong in concluding that the Minister's decision was "administrative action" as defined in the PAJA, in my view the applicant can rely, in the alternative, on the Minister's decision being executive action which is subject to judicial scrutiny for procedural fairness. This too would constitute a "triable issue" before the reviewing court.

## COSTS

[38] Rule of Court 28(9) provides that unless the court otherwise directs a party giving notice of an amendment shall be liable for the costs thereby occasioned to any other party. This reflects that the grant of an amendment is an indulgence to the party seeking it and usually entails such party being liable for all costs occasioned as a result of the amendment. Where the opposition to the amendment is vexatious or frivolous, however, the objector runs the risk of not being awarded his costs[8]. Each case must however depend on its own facts and it is clear that the court exercises a discretion in this regard[9].

[39] The Minister's opposition to the proposed amendment can by no means said to be frivolous or vexatious. What sets this case apart from others, however, is that the amendment sought was caused by the applicant's belated discovery, when Petro SA's opposing affidavit was

8 *Meyerson v Health Beverages (Pty) Ltd* 1989(4) SA 667 (C) at 679A – D.
9 *Roup Wacks Kaminer and Kruger* 1989(3) SA 912 (C) at 915F.

filed, that the Minister had, unbeknown to it, taken the decision which it now seeks to impugn. This was a decision which, in the ordinary course, one would have expected the Minister to have communicated to the applicant, if not at the time it was taken, then at least when the Minister was cited in the interdict proceedings and the importance of her decision, pending or taken, to the proceedings was apparent. There is no explanation presently before me as to precisely when the Minister's decision was taken or why it was not communicated directly to the applicant. In these circumstances it appears appropriate for the question of costs to stand over for determination by the reviewing court which is likely to have more information at its disposal with which to make a costs order which does justice between the parties.

ORDER

[40] In the result the following order is made:

1. The applicant's application for the amendment contained in its notice dated 1 August 2005 is granted.
2. The costs of this application are reserved for later determination.

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LJ BOZALEK, J