



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 48631/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 4 MARCH 2022

SIGNATURE

In the matter between:

SMALL ENTERPRISE FINANCE

AGENCY SOC LIMITED

Plaintiff

and

RAZOSCAN (PTY) LTD

First Defendant

MENDISWA OEDIRETSE MZAMANE

Second Defendant

J U D G M E N T

(In respect of the Defendant's application for amendment)

This matter has been heard by way of virtual hearing and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J**[1] Introduction**

This is the judgment in respect of the belated application by the defendants for an amendment of their plea and the introduction of a counterclaim.

[2] Timing of the amendment

The timing of the amendment and the chronological factual and procedural history are relevant to the issues of prescription, prejudice, costs and the exercise of the court's discretion. It is therefore apposite, for purposes of this judgment, to set out the following relevant events:

- 2.1 The initial agreement between the parties was entered into on 21 September 2015.
- 2.2 An amendment to the agreement was entered into on 23 September 2015.
- 2.3 A collection agreement was entered into by the plaintiff, the first defendant and First National Bank (FNB) on 30 September 2015.
- 2.4 The disbursement which forms the subject matter of the current litigation was made by the plaintiff on 8 November 2015.
- 2.5 Subject to some variables, the amount loaned and advanced by way of the disbursement had to be repaid by 15 November 2015.
- 2.6 Action was instituted for the recovery of the loan on 20 June 2016.
- 2.7 On 3 October 2017 the defendants pleaded to the plaintiff's particulars of claim.

- 2.8 The plaintiff has subsequently amended its particulars of claim. This was done without objection and the amended pages were delivered and uploaded on Caselines on 8 June 2021.
- 2.9 The defendants have not pleaded to the amended portions of the particulars of claim, and if they had, no amended plea has been uploaded or furnished to the Court. However, at a pre-trial conference before me as a case management judge, held on 21 September 2021, certain admissions were sought by the plaintiff and obtained from the defendants, which formed the basis of the triable issues set down, by agreement, for hearing on 2 and 3 December 2021. No further amendments of any pleadings were then contemplated by any of the parties.
- 2.10 On 2 December 2021 and, at the instance of the defendants, the trial was postponed. This was despite the defendants having previously been the parties who had insisted on an expedited hearing of the matter. Leave was granted to the defendants (based on undertakings made on their behalf in open court) to serve and file, before 9 December 2021, the following court processes:
- An amendment to their plea and a proposed counterclaim.
 - A rule 13 third party notice, with leave of the court, despite pleadings having closed long ago.
- (The formal order was handed down on 9 December 2021 after receipt and consideration of written submission on behalf of the defendants regarding the issue of wasted costs).
- 2.11 A further case management meeting was scheduled for 28 January 2022.

2.12 On 27 January 2022 the defendants delivered a notice of amendment of their plea and their intention to “insert” a counter-claim. By this time the delivery of any notice in terms of Rule 13 had been abandoned.

2.13 At the meeting of 28 January 2022 it was agreed and directed that, after the delivery of objections and a formal notice of application for amendment, that application be heard on 22 February 2022, which duly took place.

[3] The admitted facts at the previous trial date

Before dealing with admissions contained in the plea and the amendment or withdrawal thereof, it is apposite to point out what the parties had agreed to as to the pleadings prior to the currently proposed amendment. The following was recorded at the pre-trial meeting of 21 September 2021:

4.1 ***“AD PARAGRAPH 3 (OF THE PLEA)”***

4.1.1 *The plaintiff and the first defendant (“Razoscan”) entered into a Developmental Bridging Loan Agreement on 21 September 2015 (“Loan Agreement”). The defendants admitted this.*

4.1.2 *The Loan Agreement was amended on 23 September 2015. The defendants admitted that the agreement was amended but disputed that the only amendment was on 23 September 2015.*

4.1.3 *The Loan Agreement, as amended, comprises of:*

4.1.3.1 *The agreement attached to the particulars of claim as Annexure “A1” – “A21”;*

4.1.3.2 *Loan Sheet, attached to the particulars of claim as Annexure “A22” – “A26”;*

4.1.3.3 *The letter of 23 September 2015, attached as annexure “B”, to the particulars of claim.*

The defendants admitted the above.

4.1.3.4 *The terms of the Loan Agreement are as set out in the documents referred to in paragraphs 4.1.3.1 – 4.1.3.3 above.*

The defendants admitted this but alleged that the agreement was subsequently further amended regarding the independent inspections required.

4.2 AD PARAGRAPH 5.1 (OF THE PLEA)

4.2.1 *On 30 September 2015 and 6 October 2015, Razoscan, represented by the first defendant (“Ms Mzamane”), provided the plaintiff and First National Bank (“FNB”) with a report prepared by SITCO Leading Inspections (SITCO”) and advised that:*

4.2.1.1 *Razoscan was in the process of purchasing fruits and had been allocated the necessary pallets;*

4.2.1.2 *SITCO had conducted a quality inspection of the fruits that Razoscan was in the process of purchasing;*

4.2.1.3 *the fruits which Razoscan was in the process of purchasing was of good quality for export purposes;*

4.2.1.4 *Razoscan sought funding from the plaintiff for purposes of purchasing the fruits.*

The defendants admitted this save to deny that any of them had provided the plaintiff or FNB with the report.

4.3 ***AD PARAGRAPH 5.2 (OF THE PLEA)***

4.3.1 *On 30 September 2015, Razoscan, the plaintiff and FNB entered into a collection agreement and appointed FNB as a collection agent for purposes of disbursing the loan advanced in accordance with the Loan Agreement (“the collection agreement”). **The defendants admitted this.***

4.3.2 *The terms of the collection agreement are as set out in the collection agreement, attached as annexure “C”, to the Particulars of Claim. **The Defendants admitted this.***

4.4 ***AD PARAGRAPH 5.2 (OF THE PLEA)***

4.4.1 *Razoscan established an account with FNB in accordance with the Collection Agreement. **The defendants admitted this.***

4.4.2 *The plaintiff deposited the Loan amount into an FNB account opened on behalf of Razoscan. **The defendants admitted this.***

4.4.3 *The plaintiff advanced a loan amount of R3 357 496.18 to Razoscan in terms of the Loan Agreement (“Loan amount”).*

The defendants averred that the advance was either R 3, 1 million or the lesser amount reflected in the purchase invoice.

4.5 **AD PARAGRAPH 6 (OF THE PLEA)**

4.5.1 *On 7 October 2015, Razoscan, represented by Ms Mzamane, instructed the plaintiff and FNB, to disburse the loan amount (held in the FNB account) to its supplier, Cosmo Fruit. **The defendants denied this.***

4.5.2 *On or about 8 October 2015, FNB disbursed the loan amount to Cosmo Fruit. **The defendants denied this.***

4.6 **AD PARAGRAPH 9 (OF THE PLEA)**

4.6.1 *Ms Mzamane has bound herself as surety and as co-principal debtor with Razoscan in favor of SEFA, on the terms as set out in the suretyship attached as annexure “E”, to the Particulars of Claim. **The second defendant admitted this.***

[4] Objections to the amendment and counterclaim.

4.1 In respect of the proposed amendment to the plea, the plaintiff objected thereto on the grounds that:

- it attempts to withdraw admissions.
- it is either vague and embarrassing or does not disclose a cause of action/defense.

4.2 In respect of the proposed counterclaim, the plaintiff objected thereto on the grounds that:

- any claim sought to be introduced thereby has become prescribed.
- an element of wrongfulness is improperly pleaded.
- the proposed counterclaim does not disclose a cause of action.
- the proposed counterclaim is vague and embarrassing.

[5] The issue of admissions

5.1 The learned author Van Loggerenberg states the position of our law in this regard in Erasmus: Superior Court Practice at D1 – 337 (with reference to case law) as follows:

“An admission is an unequivocal agreement by one party with a statement of fact by the other ... the effect of an admission is to render it unnecessary for the plaintiff to prove the admitted fact”.

- 5.2 Although an admission may be withdrawn by way of an amendment, the approach has been held to be the following: “... *the withdrawal of an admission is usually more difficult to achieve [than other amendments] because (i) it involves a change of front which requires full explanation to convince the court of the bona fides thereof and (ii) it is more likely to prejudice the other party who had by the admission been led to believe that he need not prove the relevant fact ...*”.
- 5.3 The learned author continues *op cit* “*The court will, therefore, in the exercise of its discretion, require an explanation of the circumstances under which the admission was made and the reasons for now seeking to withdraw it*”.
- 5.4 In the present matter, the affidavit delivered by the defendants in support of their proposed amendment, does not satisfy the above requirements but I shall deal with the relevant parts thereof in considering the individual amendments.
- 5.5 Before considering the issue of withdrawals of admissions, it is apposite to note what has actually been admitted in the plea itself. The most important issue is that of the conditions precedent. These have been defined in the admitted developmental agreement as meaning “*all the conditions precedent set out in clause 9.1 of this agreement and any additional conditions precedent as indicated in the loan sheet*”.
- 5.6 Clause 9.1 mentioned above, list those conditions pleaded in paragraphs 4.6.1 to 4.6.4 of the plaintiff’s original particulars of claim, all of which have been admitted.
- 5.7 The “loan sheet” referred to in said clause 9.1 contain “Additional Conditions Precedent”. These were added to the plaintiff’s amended

particulars of claim as paragraphs 4.6.5 and 4.6.6 thereof. Paragraph 4.6.7 of the amended particulars thereafter reads as follows: “*The plaintiff shall not be obliged to advance any monies in terms of the provisions of the agreement unless all the conditions precedent have been fulfilled or waived by the plaintiff in its sole and absolute discretion*”. This pleading accords with the express term contained in clause 9.2 of the developmental agreement.

5.8 In respect of fulfillment of the conditions precedent, the plaintiff had pleaded this expressly in paragraph 5.1 of its original particulars of claim and this had been admitted.

[6] Ad paragraphs 8.1 and 8.2 of the proposed amended plea

6.1 The conclusion pleaded in paragraph 8 of the (original) particulars of claim, pursuant to the fulfillment of the conditions precedent and the plaintiff’s alleged fulfillment of its obligations, was pleaded as follows:

“As of 30 April 2016, the First Defendant was indebted to the plaintiff in the amounts of R 3 282 965, 97 together with interest calculated at the rate of 13,8% per annum, calculated from 1 May 2016 to date of payment, both days inclusive. A copy of the certificate of indebtedness is annexed hereto and marked “C””.

6.2 The defendants pleaded as follows to this paragraph: “8. *The defendant denies the contents of this paragraph and further adds that the certificate of annexure “C” is also a request for payment*”.

6.3 In the proposed amendment, the defendants now seek to replace the above quoted paragraph 8 of their plea with the following” “8.1 *The First Defendant denies that it breached the loan agreement because there was no valid, enforceable and binding loan agreement amongst the parties due*

to the failure by the Plaintiff to fulfill the conditions precedent and the suspensive condition for the agreement is void ab initio alternatively, in the event that the court finds that it is not, which the Defendants do not concede, it is voidable at the instance of either party thereto”.

- 6.4 The plaintiff objects to this proposed amendment as it would amount to a withdrawal of previously admitted facts relating to the fulfillment of conditions precedent, as pleaded and admitted as indicated in paragraph 5.8 above.
- 6.5 In an attempt to meet the plaintiff's objection, the second defendant, in the affidavit delivered in support of the application, argues that the new paragraphs 8.1 and 8.2 do not amount to withdrawals, but are merely a “clarification” of the previous denial quoted in paragraph 6.2 above.
- 6.6 The defendants' submission is wrong. The previous denial was based on the conclusion quoted in paragraph 6.1 above. It followed on the pleading of fulfillment of conditions precedent, which have expressly been admitted. That admission cannot, without explanation, be withdrawn by way of an alleged “clarification” in respect of a pleaded conclusion.
- 6.7 Were the defendants allowed to withdraw these admissions, it would constitute a whole “change of front” and would make a mockery of the previous case management procedures. Had the defendants all long either pleaded or alleged a non-fulfilment of conditions, those disputes could and would have been fleshed out at the pre-trial stage.
- 6.8 Moreover, had the defendants not made the previous admissions and had they timeously pleaded the alleged voidness of the agreement, the plaintiff could have amended its particulars of claim or replicated thereto with a possible reliance on an enrichment claim. Such a cause of action had

probably by now however, become prescribed and forcing the plaintiff into that corner or into the position of having to prove fulfillment of conditions which it had, since the delivery of the plea in 2017, no longer needed to prove, would clearly cause prejudice to the plaintiff.

6.9 On this basis, namely that the amendment to paragraph 8 would amount to a withdrawal of an admission, which withdrawal is sought without explanation and which amendment, if allowed, would prejudice the plaintiff, the amendment should be refused.

6.10 The same goes for the allegations contained in paragraphs 4.6.7.2, 4.6.7.4, 7.1, 7.10 and 7.11 of the proposed plea which all are now intended to allege, contrary to the previous admission, that the conditions precedent had not been fulfilled and that the contract is void and unenforceable.

[7] Vagueness, embarrassment and/or lack of a defence

7.1 The actual nub of the defendants' (new) case appears to be sourced in condition (e) of the additional conditions precedent contained in the loan sheet, which provides for the independent alignment of the order with the actual fruit as referred to in paragraph 5.7 above. The defendants allege that the "independent alignment" documents on which the plaintiff had relied was a falsification and that the plaintiff should have noticed it, alternatively was complicit in the fraud occasioned by the production of or reliance on a falsified document.

7.2 Arguing that the plaintiff should have noticed the falsification, the defendants plead that the plaintiff was negligent in not having done so. See, for example paragraphs 4.6.5, 6.3 and 6.5 of the proposed plea.

7.3 Negligence can only arise in circumstances where a duty or obligation to act in a certain manner exists and that duty or obligation was breached or

the complained of conduct fell short of that expected from a reasonable person. The defendants intend to plead that the plaintiff had failed to ensure that the letter confirming that the goods supplied aligned with the order was true or authentic. There is no such obligation contained in the contract and the defendants have not pleaded facts which would have established a duty on the plaintiff to conduct authentication procedures. Accordingly, the paragraphs proposing to plead such a “defence” cannot be allowed in their current formulation. I shall deal with the issue of fraud hereinlater.

[8] Reciprocity

- 8.1 In paragraph 7.12 of the proposed plea, the defendants propose relying on reciprocity of obligations on the following basis: *“The loan agreement and the collection agreement provide for reciprocal performance of the parties and the exceptio adimpleti contractus defence has application. The defendants have not waived reliance thereof”*.
- 8.2 The above contention, reliant on the alleged applicability of a legal principle, is based on the submission contained in the proposed paragraph 7.10, which reads as follows: *“The defendants submit that, had the conditions precedent been fulfilled by the plaintiff acting reasonably in dealing with an obviously forged document, resulting in compliance with clause 3.2.2 of the collection agreement, only then would the duty on the part of the first defendant to repay the loan arise”*. Clause 3.2.2 of the collection agreement provides for FNB disbursing funds from the collection account to the supplier *“upon receipt of an independent confirmation (by Cosmo Fruit (Pty) Ltd) confirming that the purchase order is consistent with the goods supplied by it in terms of variety, quantity and quality”*.

- 8.3 Apart from the fact that reasonableness is not a contractual obligation and, insofar as it refers to acting “unreasonable” or contrary to how a reasonable person would have acted, such a plea would be dependent on the existence of a duty or obligation for it to become an actionable cause or defence. This aspect has been dealt with in paragraph 7 above, where it has been pointed out that the defendants have not pleaded the necessary facts to establish such duty.
- 8.4 In addition to the above, any reliance on alleged duties on the plaintiff in respect of the conditions precedent, do not disclose defences in view of the fact that the parties have agreed that the conditions were for the benefit of the plaintiff and that they could be waived by the plaintiff in its sole discretion. In addition, it had been agreed that the first defendant had the onus to provide correct and accurate information. The waiver and the first defendant’s onus are provided for in clauses 9.2, 9.3 and 11.4 of the developmental agreement.
- 8.5 The paragraphs by which the defendants intend to rely on reciprocity in the manner pleaded therefore do not disclose a defence and should not be allowed.

[9] Fraud

- 9.1 It is trite that the amendment of pleadings should not be disallowed if such amendment would lead to the true facts being disclosed and the disputes between the parties being ventilated.
- 9.2 Whilst the defendants should not be allowed to willy nilly withdraw admissions or to effect amendments which are either bad in law or inadequately pleaded, the adage “fraud unravels all” might find application.

- 9.3 In paragraph 5.2 of its original particulars of claim, which became paragraph 7.2 of its amended particulars, the plaintiff pleaded that it had complied with all its obligations in terms of the agreements. These allegations have always been denied by the defendants.
- 9.4 In addition to this denial, the defendants now plead that the plaintiff had been complicit in a fraud perpetrated (it seems) by the supplier of the goods or the person(s) who supplied the alignment letter(s).
- 9.5 Allegations of fraud should neither be made nor be taken lightly. Whilst the allegations of fraud have been pleaded in a somewhat opaque fashion, I am inclined, in the exercise of my discretion, to allow the ventilation thereof rather than prevent its ventilation as a result of poor pleading. The issue seems sufficiently limited that the plaintiff would not suffer prejudice thereby. Any possible prejudice might be mitigated by allowing the plaintiff to lead evidence on the issues on which it had at the pre-trial conference accepted the onus (together with the duty to begin) and thereafter to have the defendants lead evidence on the issue on which they bear the onus, which will be the allegations of fraud, whereafter the plaintiff can lead rebuttal evidence thereon.
- 9.6 The proposed amendments dealing with the issue of the alleged fraud will therefore be allowed. I do so mindful of the possible contradictions between reliance on an alignment letter for purposes of satisfying a condition precedent which could be waived and the argument that the letter was forged and that the plaintiff was part thereof and could therefore not validly have relied thereon. I am of the view that the issue of fraud is sufficiently distinguishable from mere contractual compliance to allow it to be ventilated despite ostensible contradictions occurring as a result thereof.

[10] Suretyship

10.1 The second defendant had never denied the existence of the suretyship and had confirmed same at the pre-trial conference of 21 September 2021. These admissions cannot now be withdrawn, particularly as no basis for such withdrawal has been made.

10.2 What must still remain in place though, is the fact that the suretyship obligation, even though it bound the second defendant as co-principal debtor to the first defendant, remains an accessory obligation, dependent on the existence of the principal obligation. The second defendant is equally entitled to rely on the defenses raised by the principal debtor, being the first defendant,

[11] The counterclaim

11.1 The chronology regarding the advancement of the loan by the plaintiff have been set out on paragraphs 2.1 to 2.4 above.

11.2 As basis for the cause of action for the proposed counterclaim, the defendants pleaded that: *“on or around 8 October 2015 the plaintiff requested FNB under clause 3.2.2. of the collection agreement, as conceded in the plaintiff’s amended particulars of claim, to pay the money out of the CTF collection amounted to Cosmo but was negligent in doing so because it relied on an obviously fraudulent letter purportedly received by it from Cosmo (SITCO appointed by Cosmo as globally renowned inspection and verification company for fruit, on behalf of Cosmo)”*.

11.3 Hereafter the allegations contained in paragraphs 7.4, 7.5 and 7.6 of the proposed amended plea are incorporated, which paragraphs contain *facta probantia* regarding the disbursement.

- 11.4 Reliant hereon, the first defendant proposes to claim a loss of profit of R63 million, by way of the amendment.
- 11.5 Apart from the fact that the loss of profit, constituting the first defendant's alleged damages, has not been pleaded properly in accordance with Rule 18 and apart from the fact that the defendants again attempt to rely on improperly pleaded allegations of negligence and wrongful conduct, the plaintiff objects to the proposed counterclaim, on the basis that, even if it were based on allegations of fraud, it has become prescribed.
- 11.6 By 8 October 2015 the defendants were aware or ought to have been aware of the facts giving rise to its alleged counterclaim. The notice to institute the counterclaim was only served on the plaintiff on 27 January 2022.
- 11.7 In terms of section 11 (d) of the Prescription Act 68 of 1969, the period of prescription for a "debt" such as the counterclaim, is three years.
- 11.8 In terms of section 15(1) of the said Act, the running of the aforesaid three year period of prescription, which started on 8 October 2015, shall (unless the plaintiff had acknowledge liability as provided for in section 15(2), which it had not), "*be interrupted by service on the debtor of any process whereby the creditor claims payment of the debt*". Clearly, by the time of the delivery of the notice of amendment, the three year period had elapsed.
- 11.9 The best that the defendants could do in this regard, was to refer to a letter by the defendants erstwhile attorneys on 11 January 2021. Apart from the fact that the letter does not constitute a "process", it was also dated long after the expiry of the three year period. The affidavit in support of the application for amendment mentions no other fact in respect of the issue of extinctive prescription. The denial of an obligation to pay and a reference to a breach of contract raised obliquely in the defendants' original plea of

3 October 2017 also do not constitute a process whereby the counterclaim was (then) instituted.

11.10 In argument, counsel for the defendants sought to rely on section 13(2) of the prescription Act. This provides that “*a debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed*”.

11.11 On the issue of reciprocal contractual obligations, Corbett, J (as he then was) has concluded in *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809 D as follows: “*for reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and due by the other party as to indicate that one was undertaken in exchange for the performance of the other ...*”. See also *Union Finance Holdings Ltd v Bonugli and Another NNO* 2013 (2) SA 449 GSJ, applying those principles to the application of section 13(2) of the Prescription Act.

11.12 A consequential damages claim is clearly not an obligation reciprocally undertaken in the contracts which form the subject matter of this action. It is a separate cause of action to be pursued pursuant to a successful establishment of a ground for such a claim. The exception to the completion of the running of prescription as provided for in section 13(2) is therefore not applicable to the proposed counterclaim. The facts in unreported judgment of *Ferriera v Rademeyer* [2021] ZAHCECPE (1256/15) on which the defendants sought to rely are clearly distinguishable and the judgment does not assist the defendants.

11.13 The proposed counterclaim has therefore become prescribed and the proposed “insertion” thereof by way of the belated amendment, is impermissible.

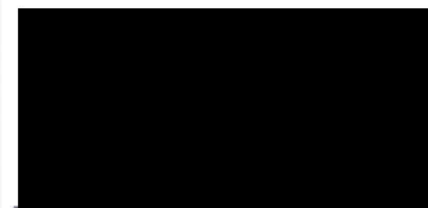
[12] Costs

12.1 A party seeking leave to amend its papers is in effect seeking an indulgence and should be liable for the costs occasioned thereby. Having regard to the extent of the proposed amendments which are to be disallowed as well as the unsuccessful attempt at resurrecting a prescribed counterclaim, I find that the objections to the proposed amendments were reasonable and that the plaintiff was substantially successful in this regard. Costs should follow this event. As a mark of displeasure at the unjustified lateness of the amendment and the failure to adhere to undertakings and a court order, I determine, in the exercise of my discretion, that the scale of costs shall be as between attorney and client.

[13] Order

1. The following paragraphs (or portions thereof) of the defendants’ proposed amendment (with reference to the proposed paragraph numbers) dated 27 January 2022 are disallowed: 4.6; 4.6.7.2; 6.3; 7.1; 7.2; 7.3; 7.8; 7.10; 7.11; 7.12; 8.1; 8.2; 10 and 10.1 and the contents of paragraphs 4.6.5; 4.6.7.1; 4.6.7.3; 6.5 and 7.9 insofar as they refer to or rely on any form of alleged negligence.
2. The proposed introduction of a counter-claim by the defendants is disallowed on the basis that it had become prescribed, which shall include the disallowing of paragraphs 4.6.7.2; 4.6.7.3 and 4.6.7.4 of the proposed amended plea.

3. The defendants are ordered to pay the costs occasioned by their proposed amendment, including the opposed hearing in respect thereof, on the scale as between attorney and client.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 February 2022

Judgment delivered: 4 March 2022

APPEARANCES:

For the Plaintiff:

Attorney for the Plaintiff:

Adv L Kutumela

Werksmans Attorney, Johannesburg
c/o Mabuela Attorney, Pretoria

For the Defendant:

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