



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **2609/2021**
Heard: **20/12/2021**
Date available: **31/12/2021**

In the matter between:

**KAMIESBERG LOCAL MUNICIPALITY
THE MUNICIPAL MANAGER OF KAMIESBERG
LOCAL MUNICIPALITY**

1st Applicant

2nd Applicant

and

**KOINGNAAS BELASTINGBETALERSVERENIGING
JOHAN G GRÄBE**

1st Respondent
2nd Respondent

JUDGMENT

Mamosebo J

- [1] The first applicant (Kamiesberg Local Municipality or KLM) and the second applicant (the municipal manager) brought an urgent application that I heard on the afternoon of Monday 20 December 2021 calling upon the respondents to show cause why they should not be interdicted and restrained from performing certain acts and conduct set out in detail hereunder. The applicants are represented by Adv Van Tonder and the respondents by Adv Kriel.

[2] The applicants are seeking a rule *nisi* in these terms:

- "1. *That the applicants' failure to adhere to this Court's rules relating to time periods and service be condoned, and the application be heard as an urgent application in terms of the provisions of Rule 6(12)(a) and (b);*
2. *That a rule nisi be issued, returnable on Friday, 04 February 2022 at 09:30 alternatively upon such date as this Court deems meet, calling upon the respondents to show cause if any, why the following orders should not be made final:*
 - 2.1 *That the first and second respondents are interdicted and prohibited from interfering with the rights of access of any member of the public to the municipal and public roads situated within the town of Koingnaas;*
 - 2.2 *That the first and second respondents are interdicted and prohibited from conducting any roadworks, maintenance and/or repairs to any municipal and public roads situated within the municipal district of the Kamiesberg Municipality;*
 - 2.3 *That the first and second respondents are interdicted and prohibited from entering the first applicant's sewerage plant, water plant, and rubbish dump situated in the town of Koingnaas;*
 - 2.4 *That the first and second respondents are interdicted and prohibited from interfering with any of the first applicant's infrastructure including water and sewerage systems within the municipal district of the first applicant;*
 - 2.5 *That the first and second respondents are interdicted and prohibited from conducting any works, construction, maintenance and/or repairs to any of the first applicant's infrastructure, including water and sewerage systems, buildings, assets or property situated within the town of Koingnaas;*
 - 2.6 *That the first and second respondents are interdicted and prohibited from interfering with the second applicant and/or any of the employees and staff of the first applicant;*
 - 2.7 *That the first and second respondents are interdicted and prohibited from interfering with the administration and/or day to day running of the first applicant's functions at:*
 - 2.7.1 *The Kamiesberg municipal service point at Koingnaas;*
 - 2.7.2 *The Koingnaas sewerage plant and sewerage systems;*

- 2.7.3 *The Koingnaas water system;*
- 2.7.4 *The Koingnaas municipal rubbish dump;*
- 2.7.5 *The Kamiesberg municipal offices situated at 22 Main Road, Garies;*
- 2.8 *That the first and second respondents be interdicted and prohibited from threatening the second applicant and/or any of the employees and staff of the first applicant;*
- 2.9 *That the South African Police Service be directed and authorised to take all reasonable and necessary steps to give effect to this order.*
- 2.10 *That the first and second respondents be ordered to pay the costs of this application jointly and severally, the one to pay the other to be absolved.*
- 3. *The order contained in 2.1 to 2.9 above serve as an interim interdict with immediate effect, pending the finalisation of this application.*
- 4. *That the rule nisi be served as follows:*
 - 4.1 *Upon the first and second respondents in terms of the uniform rules of Court and per e-mail;*
 - 4.2 *Upon the members of the first respondent by means of publication in the Plattelander [newspaper].*
- 5. *Further and/or alternative relief."*

[3] The Notice of Motion, Founding Affidavit and Annexures "RCB1" to "RCB10" were served on the respondents on 15 December 2021 at 12:30 by email and by the sheriff personally on the second respondent, Johann G Gräbe, as the chairperson of the first respondent, the Ratepayers' Association. The respondents had until 15 December 2021 at 16:30 to file their notice of intention to oppose and their opposing papers by 17 December 2021. No notice of intention to oppose was filed. Mr Van Tonder explained that he only received the opposing papers at 11:30 on the day of the hearing. The filing sheet bears the heading "*filing sheet respondents replying affidavit*" signed by JC Kidson, of Stupel & Berman Inc. for the respondents. It was not signed by Engelsman Magabane, the local correspondent attorneys. It is therefore unclear who the attorneys are in respect of the filing sheet.

Points in limine

[4] It was on that basis that Mr Van Tonder submitted that:

- 4.1 The respondents' papers are not properly before Court and should be disregarded. However, should the Court decide to accept the papers, it should find that the opposing affidavit is not clear and legible. I must indicate at this early stage that the opposing affidavit is indeed not legible and counsel was alerted thereto.
- 4.2 That whereas the second respondent deposed to the opposing affidavit which was signed by him on 17 December 2021 and commissioned on the same day, it is inexplicable why it was only served on the applicants less than three hours before the hearing (on 20 December 2021) and describe it as a hearing by ambush.
- 4.3 That there has not been full compliance with the regulations governing the administration of an oath or affirmation issued under s 10 of the Justices of the Peace and Commissioner of Oaths Act¹ in that the purported Commissioner of Oaths failed to print his or her names and surname in full. Regulation 3 stipulates:

"(2) *The commissioner of oaths shall –*
 (a) *sign the declaration and print his full name and business address below his signature; and*
 (b) *state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio.*"

Undoubtedly, the Commissioner of Oaths has not complied with Regulation 3(2)(a) above. Counsel for the respondents has nonetheless indicated that the respondents wish to argue urgency of the matter contending that the application is not urgent.

¹ 16 of 1963

The historical background.

- [5] Mr Rufus Comarco Beukes is the Municipal Manager of the first applicant, Kamiesberg Local Municipality. KLM is responsible for the provision of municipal services in 16 small towns in the Namakwa District. Koingnaas is one of the 16. Koingnaas was a mining town established, owned and controlled by De Beers Consolidated Mines (Pty) Ltd who provided services to its residents. In 2010 De Beers partially transferred municipal services of Koingnaas to the Kamiesberg Local Municipality in terms of an agreement relating to the transfer of Municipal Services. In 2016 De Beers transferred the remainder of the services to the Municipality. The applicants concede that rendering services to the small towns is impaired by the distances involved. For example, in order to provide water to Koingnaas it has to be pumped over a distance of about 20km's from Hondeklipbaai.
- [6] About a year ago, the residents of Koingnaas established a ratepayers' association in Koingnaas. The chairperson of the association, Mr Gräbe, directed correspondence on behalf of the association making certain demands from the Municipality and setting ultimatums pertaining to issues of service delivery. The ratepayers maintain that their services have deteriorated since the transfer from De Beers to the Municipality. They therefore demand that:
- (i) The Municipality should furnish them with the information pertaining to the amounts collected from the Koingnaas residents monthly;
 - (ii) The residents take control of the said monthly accounts;
 - (iii) The applicants furnish them with a monthly statement of income and expenses on or before the 7th of each month; and
 - (iv) they be furnished with the founding documents of KLM to enable an independent monthly audit of the finances of

Koingnaas to be conducted. The applicants maintain that it is impossible to furnish such information as its responsibility covers 16 municipalities.

[7] On 06 December 2021 Mr Ceril Cook, one of KLM's general workers, telephonically contacted Mr Beukes informing him about construction work being performed on the Koingnaas roads by the first and/or second respondent and/or any of the first respondent's members. The Municipal Manager contacted the South African Police Services (SAPS) whose members reportedly later confronted the respondents, which led to an altercation between the two sides. The issue was around lack of skills or alleged incompetence and shoddy work by employees of the first applicant.

[8] On 09 December 2021 the Municipal Manager received an e-mail from the second respondent asserting that the association will continue to do the work, raising the defence of *negotiorum gestio*, because they had commenced with repairs to the town itself on 06 December 2021. The respondents further threatened to take control of the infrastructure of Koingnaas at the end of December 2021 stating:

"Verder stel die KBBV die Kamiesberg Munisipaliteit in kennis dat sodra die KBBV klaar is met die paaie einde van Desember 2021 gaan ons ook beheer vat oor die water, riool, geboue en vullis werke van Koingnaas onder die regsbeginseel 'negotiorum gestio'".

(Loosely translated: The KBBV also informs the Kamiesberg Municipality that as soon as the KBBV has completed the roads at the end of December 2021, we will also take control of the water, sewage, buildings and refuse works of Koingnaas under the legal principle 'negotiorum gestio'). "KBBV" is an acronym for Koingnaas Belastingbetalersvereniging.

[9] The Municipal Manager avers that for the repairs to the construction of the road, the respondents have intimated that they will serve an invoice to the applicant in the amount of R120,000.00. The

explanation furnished pertaining to the delay in the repairs to the sewerage plant is that it has been put on tender and the successful tenderer was to prepare a business plan to be lodged with the Department of Water and Sanitation to resolve the sewerage problems. In as far as the water problems are concerned, the first applicant takes water samples regularly for testing which tests have confirmed that the Koingnaas water is fit for consumption. The applicants also deny that the Koingnaas residents were without water for 35 days as alleged by the respondents. They do, however, confirm that there are sometimes challenges with the water pressure. The respondents concede that they have commenced with the repairs of the roads and will, after completion thereof, take over the infrastructure, water and sewerage projects as they deem it justified to do so.

- [10] Despite the fact that the applicants have urged the respondents to discontinue with their operations as they have no official mandate from the first applicant, the respondents persisted in their conduct, resulting in this application being brought on an urgent basis. Mr Van Tonder contended that the respondents are simply obfuscating by raising constitutional issues. Counsel also submitted that the respondents had not followed the correct procedures as was the case in the *Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and Others*² because they failed to approach the court first before taking over the services. They have not, as argued by Mr Van Tonder, put the Kamiesberg Local Municipality on terms first before taking over the services. This issue may be dealt with on the return date, if so advised. In his heads of argument, Mr Kriel stated the following pertaining to this aspect:

² (UM 271/2020) [2020] ZANWHC 95 (18 December 2020)

"the respondents raise constitutional issues in the papers but due to the extremely urgent manner in which they were dragged to Court, no notices in terms of Rule 16A(1)(a), as a Constitutional issue is raised for consideration."

- [11] The respondents argue that the applicants have an alternative remedy of resorting to the SAPS. However, it is worth noting that a paragraph in an email marked "RCB6" dated 08 December 2021 written in the morning by the second respondent in his capacity as the chairperson of the ratepayers' association addressed to the Municipal Manager, the following was said:

"Sonder dat u, Mr R Beukes, 'n hofbevel het u die hoof van die SAPD by name, Adjudant B Jacobs en mislei u die SAPD om die inwoners wat hulle dorp wil herstel te intimideer met hulle voertuie, verhoor en tronk praatjies." (Emphasis added)

(Loosely translated: You, Mr R Beukes, without a court order, are misleading the head of the SAPS, W/O B Jacobs to intimidate the residents who want to restore their town with their SAPS vehicles, trial and prison talks).

- [12] In a later email from the chairperson to the Municipal Manager, also on 08 December 2021 in the afternoon marked "RCB 7" the following passage is relevant:

"Elkeen van die 14 werkers teenwoordig gister en [vandag] het reeds [te kenne] gegee dat hulle teen [Konstabel] Afrika sal getuig sou die KBBV voortgaan met regstappe. Daarom word die SAPD hiermee amptelik die volgende drie dinge van die KBBV se kant versoek.

- *Kla Konstabel Afrika aan vir wangedrag. Koingnaas het die getuienis wat nodig is om Afrika uit die SAPD te ontslaan.*
- *Konstabel Afrika is in sy offisiële hoedanigheid nie welkom in Koingnaas nie die KBBV het deur Afrika se varklik gedrag alle vertroue in die SAPD Hondekliptbaai verloor.*
- *Voor jy Adjudant B Jacobs weer teen enige mens of instelling optree maak seker jy het die nodige magtiging van die howwe van RSA het volgende keer mag dit jou dalk duur te staan kom."*

(Loosely translated: Each of the 14 workers present yesterday and today have already intimated that they will testify against [Constable] Africa should the KBBV continue with legal action.

Therefore, the KBBV hereby officially requests the following three things from the SAPS side.

- *Charge Constable Africa with misconduct. Koingnaas has the requisite evidence to have Africa fired from the SAPS.*
- *Constable Africa is in his official capacity not welcome in Koingnaas. The KBBV has lost all confidence in the SAPS Hondekliipbaai due to Africa's despicable behaviour.*

"Before you, W/O B Jacobs, take any steps against any person or institution again, make sure you have the necessary authority from the courts of RSA because next time it could cost you dearly."

- [13] From the opposing affidavit, it is unclear which aspects of the applicants' case or averments are admitted or denied by the respondents. For example, in response to paras 17 to 26 of the founding affidavit which set out a detailed background of the events leading to this application, the respondents merely answer at para 17 in this manner:

"17.1 In as much as these paragraphs contain factual allegations, relaying inter alia the correspondence between the parties, same is noted.

17.2 Save as aforesaid, the contents is denied."

Gleaning from the founding papers and the responses thereto it is evident that the respondents do not deny the facts as set out by the applicants, more particularly, the fact that they had commenced with the repairs of the roads and will not be deferred.

- [14] Mr Kriel, for the respondents, pointed out that the papers were prepared under tremendous pressure by a client in a rural setting, hence their resolve to communicate by e-mail. He says that the second respondent was unassisted when he drafted the opposing papers and urged that the quality of the opposing papers not be visited on the respondents with an adverse finding. In any event, the argument went, that the Court should find that there was substantial compliance. I find it hard to fathom because the terminology used by the deponent to the answering affidavit does

not reflect the vocabulary of a lay person. For example *he*: '*does not intend to deal seriatim with each and every allegation*', '*raise the point in limine that this application is contrived*', '*in limine application contrived and not urgent*', '*6.1 in my capacity as the chairperson of the first respondent, I am aware that an applicant in an application for urgent relief in terms of rule 6(12)(a) of the Uniform Rules of Court needs to concisely set out the reasons why an application is urgent and why a substantial redress in due course could not be obtained.*'

- [15] Mr Kriel submitted that even if the Court should find that the application is urgent it must be established, first if the respondents were afforded adequate opportunity and secondly, whether there is prejudice to the administration of justice if the application is brought at short notice. But this is not the test. The correct approach emanate from *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and Others*³ where the Court held:

"It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent. Once such prejudice is established, the other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between the notice of the application to them and the actual hearing, other prejudice to the respondent's and administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. The last factor is often called, usually by counsel acting for the respondents, self-created urgency." See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin's (t/a Makin's Furniture Manufacturers)*⁴.

³ (2014) JOL 32103 (GP) at paras 64; [2014] 4 All SA 67 (GP)

⁴ 1977 (4) SA 135 (W)

- [16] According to Mr Kriel nowhere in their papers do the respondents threaten to damage any of the infrastructure. What they are engaged in is to provide self-service to the consumers as a result of the failure by the applicants to provide adequate service. The fact that raw sewerage flow into their homes and have been without water for an extended period should cause the Court to find in their favour. The Court accordingly ought to find that this application is not urgent and to strike it from the roll. This will also give the respondents an opportunity to bring a counter-application.
- [17] The respondents also raised the issue of non-joinder of the South African Police Services as interested parties in the matter. This submission was countered by Mr Van Tonder, correctly so in my view, that the relief sought by the applicants is not against the police but the respondents only. The role of the police in this application would be to give effect to this Court's order.
- I therefore find that the argument pertaining to the non-joinder of the SAPS lacks merit.
- [18] Mr Kriel cautioned that should the relief sought be granted against the respondents the *status quo* of direct infringements of fundamental rights will prevail. On the other hand should the relief not be granted, the respondents will continue with the repair to the road, sewerage system, water supply, and potholes.
- [19] It is clear to me that this matter involves the public purse. The fact that the respondents are effecting repairs to the roads and rendering invoices to the first applicant, without any formal procurement processes it is in conflict with the provisions of section 217 of the Constitution⁵ of our country which would result in wasteful and

⁵ Sec 217 (1) When an organ of state in the national, provincial, **or local sphere of government**, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

irregular expenditure. The association has therefore arbitrarily arrogated to itself a monopoly as sole service provider. The services have not been sanctioned by the municipal council and have closed the door to fairness, equity, transparency and competition.

[20] In *Safcor Forwarding (Johannesburg) Pty Ltd v National Transport Commission*⁶ Corbett JA stated:

"The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law.... This is recognised by implication in the Rules (see, eg, Rule 6(8) and Rule 6(13)). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order to adequately protect his immediate interests. It is a useful procedure and one to be encouraged rather than to be disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to court by way of notice of motion or summons. The rule nisi procedure must be considered in conjunction with the provisions of Rule 6(12) which, in the case of urgent applications, permits the Court to:

'dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet'.

(And see in this connection Republikeinse Publikasies (Edms) Bpk Republikeinse v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 781H – 782G). In fact, the rule nisi procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief."

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.

⁶ 1982 (3) SA 654 (A) at 674H – 675C.

- [21] The truth of the matter is that an application was launched against the respondents to prohibit and restrain them from continuing with what they refer to as “self-service” until the matter is properly ventilated in Court. The basis for the respondents to take over the municipal services has not been tested and endorsed by the Court. It will be a travesty of justice to strike such a matter from the roll when it has the potential to create precedent for all the other towns and cities aggrieved by poor service delivery.
- [22] The applicants have to meet the test for interim relief, namely, the well-known requirements for the grant of an interim interdict set out in *Setlogelo v Setlogelo*.⁷ The test requires that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) a balance of convenience which favours the grant of the interdict and (d) that the applicant has no other remedy.
- [23] Legislatively, the responsibility to render municipal services lies with the Municipality. They not only carry the mandate from the Constitution but also from the subsidiary legislation. That gives the applicants the right to carry out their obligation as the accounting office and officer. Whether there stands to be apprehension of harm suffered by the applicants is irrefutable. The intentions of the respondents may be well and good but without following proper processes and ensuring that they are fair, equitable, transparent, competitive and cost-effective, is impermissible.
- [24] Mr Kriel argued that the alternative remedy for the applicants may be resorting to the SAPS. The mere thought of such intervention has

⁷ 1914 AD 221 at 227

been deprecated by the Courts. SAPS cannot act without a court order. The balance of convenience favours the granting of interim relief to the applicants since they stand to suffer irreparable and imminent harm should an order interdicting the ratepayers association not be granted in the applicants' favour.

- [25] I am therefore of the view that good grounds exist for me to exercise my discretion to grant interim relief in favour of the applicants for which they have made out a proper case.

Costs

- [26] It is trite that the awarding of costs is in the discretion of the court. The Constitutional Court in *Ferreira v Levin NO and Others*⁸ pronounced:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings."

There is no reason why costs should not follow the results.

- [27] The following order is made:

1. The applicants' failure to adhere to this Court's rules relating to time periods and service are condoned, and the application is

⁸ 1996 (2) SA 621 (CC) at 642B – C (para 3)

heard as an urgent application in terms of the provisions of Rule 6(12)(a) and (b).

2. A rule *nisi* is issued calling upon the first and the second respondents to show cause on Friday 04 February 2022 at 09:30 or as soon thereafter as the parties may be heard why an order in the following terms should not be made final:

- 2.1 That the first and second respondents are interdicted and prohibited from interfering with the rights of access of any member of the public to the municipal and public roads situated within the town of Koingnaas.

- 2.2 That the first and second respondents are interdicted and prohibited from conducting any road works, maintenance and/or repairs to any municipal and public roads situated within the municipal district of the Kamiesberg Municipality.

- 2.3 That the first and second respondents are interdicted and prohibited from entering the first applicant's sewerage plant, water plant and rubbish dump for purposes of conducting work in the town of Koingnaas.

- 2.4 That the first and second respondents are interdicted and prohibited from interfering with any of the first applicant's infrastructure including water and sewerage systems within the municipal district of the first applicant.

- 2.5 That the first and second respondents are interdicted and prohibited from conducting any works, construction, maintenance and/or repairs to any of the first applicant's infrastructure, including water and sewerage systems, buildings, assets or property situated within the town of Koingnaas.

- 2.6 That the first and second respondents are interdicted and prohibited from interfering with the second applicant

and/or any of the employees and staff of the first applicant.

2.7 That the first and second respondents are interdicted and prohibited from interfering with the administration and/or day to day running of the first applicant's functions at:

2.7.1 The Kamiesberg municipal service point at Koingnaas.

2.7.2 The Koingnaas sewerage plant and sewerage systems.

2.7.3 The Koingnaas water system.

2.7.4 The Koingnaas municipal rubbish dump.

2.7.5 The Kamiesberg municipal offices situated at 22 Main Road, Garies.

2.8 That the first and the second respondents are interdicted and prohibited from threatening the second applicant and/or any of the employees and staff of the first applicant.

2.9 That the South African Police Service are directed and authorised to take all reasonable and necessary steps to give effect to this order.

2.10 That the first and second respondents are ordered to pay the costs of this application jointly and severally, the one to pay the other to be absolved.

3. The order contained in 2.1 to 2.9 above serve as an interim interdict with immediate effect, pending the finalisation of this application.

4. That the rule *nisi* be served as follows:

4.1 Upon the first and second respondents' attorney of record by e-mail.

4.2 Upon the first and second respondents by the sheriff.

- 4.3 Upon the members of the first respondent by means of publication in the Plattelander newspaper.

A handwritten signature in black ink, appearing to read 'M.C. Mamosebo', is written over a horizontal line. The signature is stylized with large, looping letters.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicants:
Instructed by:

Adv. A.G. van Tonder
Van de Wall Inc

For the Respondents:
Instructed by:

Adv. Z.F. Kriel
Stupel & Berman Inc.
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