IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 3216/2018

In the matter between:

E L Applicant

and

I L 1st Respondent

IAN ELLIS INCORPORATED 2nd Respondent

HEARD ON: 18 OCTOBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 25 OCTOBER 2018

I INTRODUCTION

[1] Applicant seeks temporary relief pending institution of action in terms of the *actio communi dividundo.* She and her former husband, the first respondent in this application, were married out of community of property with inclusion of the accrual system, but notwithstanding their intention at conclusion of the marriage to keep and maintain separate estates, they *inter alia* purchased a holiday home situated at Dana Bay, Mossel Bay in co-ownership.

[2] A decree of divorce was issued on 3 September 2015 and further orders were made by agreement to facilitate adjudication of first respondent's claim that he is entitled to share in the accrual of applicant's estate in terms of the ante-nuptial contract, read with s 3 of the Matrimonial Property Act, 88 of 1984. A period of three years has lapsed and that dispute has still to be set down for hearing.

II THE PARTIES

[3] Applicant is E L, a business woman of Ladybrand. Adv PJJ Zietsman appeared for her before me.

[4] First respondent is I L, a businessman residing in Ladybrand with business interests in this country as well as Lesotho. Adv MC Louw appeared for him before me.

[5] Second respondent is Ian Ellis Inc, a firm of attorneys who has been authorised to effect transfer of the former spouses' Dana Bay property (also referred to as "the property") to the purchaser. This respondent does not oppose the application and consequently I shall for the sake of convenience refer to Mr L as the respondent.

III **THE RELIEF SOUGHT**

[6] As a consequence of an urgent application lodged by applicant a rule *nisi* was issued on 29 June 2018. It is quoted *verbatim*:

"1. Condonation is granted to the applicant for the non-compliance with the Uniform Rules pertaining to form and service and that this application be heard as an urgent *ex parte* application in terms of the provisions of Uniform Rule 6(12).

2. A *rule nisi* is issued calling upon the first and second respondent to show cause, if any, to this Honourable Court, on **2 August 2018** at **09:30** why the following orders should not be made final:

2.1 That, subject to paragraph 2.2 infra, the second respondent is interdicted to execute any instructions given to it by the first respondent with regards to the payment and/or transfer of the proceeds of the funds available from the sale of Erf […], […], Danabaai, Western Cape Province (hereafter "the property') after having settled the transfer costs, agent's commissions, outstanding municipal charges and the balance due and owing to Standard Bank in order to discharge the bond registered over the property;

2.2 That the second respondent is ordered to preserve the first respondent's half (50%) share of the proceeds from the sale of the property, on an interest bearing account in terms of the provisions of Section 78A of the Attorney's Act, 1973, (sic) pending finalization of the action referred to in paragraph 4 infra.

2.3 That the first respondent be ordered to pay the cost of this application on the scale as between attorney and client.

3. That the relief set out in subparagraphs 2.1 and 2.2 supra operates as interim interdict pending the institution and finalization of the action referred to in paragraph 4 infra.

4. That the applicant institute an action, within thirty (30) days after finalization of this application, against the first respondent for the payment of the first respondent's half share of the proceeds from the sale of the property, or any other amount which the applicant alleges that the first respondent is indebted to her and pending finalization of the action instituted in the Free State High Court under case no 2613/2014."

IV THE ISSUES IN DISPUTE

[7] Respondent's main defence is based on the premise that "this claim ought to have been dealt with in the accrual action."

[8] Respondent also denies that applicant paid more than what she was *pro rata* liable to pay. On his version much of the expenses were paid from their joint funds and he personally made payments which applicant conveniently disregarded. He also made improvements to the property in the amount of at least R450 000.00. He is of the view that he has made greater contributions than applicant, but "…. it was his understanding that there would never be a quibble about who contributed what amounts to the property as well as other properties…." Therefore applicant has no claim against him.

V THE UNDISPUTED BACKGROUND

[9] The following facts appear from the application papers as well as the divorce file which is about 15 cm thick, which I perused. The facts are mainly undisputed. Where there is not full agreement, it will be stated:

1) The applicant and respondent were married out of community of property with inclusion of the accrual system, but this marriage was dissolved on 3 September 2015, more than three years ago.

2) The parties' deed of settlement was made an order of court. It is actually ironic to refer to the document as such as it merely serves as proof that the parties did not settle anything except that they both forfeited their right to claim maintenance from each other.

3) There was a dispute about the correctness of the parties' financial statements prior to divorce and the dispute remains.

4) The parties' ante-nuptial contract provides for commencement values as will be indicated *infra* and an unusual term that the spouse with the smaller accrual will only be entitled to 30% of the difference in the respective accruals.

5) Contrary to the provisions in the deed of settlement, the parties failed to file their affidavits setting out assets and liabilities together with supporting documents within 30 days. Applicant filed hers on 3 May 2017 and respondent his on 31 August 2016. Neither of the parties has applied for new hearing dates as they agreed to do in the event of a failure to settle. There was no request for a pre-trial hearing *ex facie* the court file.

6) Applicant's net estate based on her affidavit (which includes her claim against respondent in respect of the Dana Bay property in the amount of R720 406.54) amounts to R2 621 935.00. The net estate of respondent is R1 557 586.00 and for obvious reasons he did not indicate that he was indebted to applicant. The difference in the net estates on the information tendered by the parties is R1 064 349.00. Based on this figure respondent would have a claim of R319 304.00 against applicant. Obviously, if he provided the same amount relied upon by applicant as a debt, his estate would be worth some R700 000.00 less and his right to accrual greater. As mentioned, the parties remain at loggerheads. My *prima facie* impression from the papers is that respondent and the truth might be strangers to one another. I shall explain *infra*.

7) The Dana Bay property has been sold for R1 500 000.00 and the attorney and conveyancer, Mr Ian Ellis of second respondent (the firm carries his name) was instructed to undertake registration of transfer in the name of the purchaser.

8) The parties are in agreement that the net proceeds of the sale will be about R940 000.00, the effect being that they as co-owners are each entitled to about R470 000.00, unless applicant succeeds in proving that she contributed more in respect of the property than obliged to do, or put otherwise, that she subsidised respondent who failed to pay his fair share.

9) The documents were sent to Mr Ellis' correspondents in June 2018 for submission at the Deeds Registry for registration. This, and the apparent dispute between the parties as to who of them made greater contributions than the other in respect of the property, triggered an urgent application.

10) As indicated *supra,* on 29 June 2018 a rule *nisi* returnable on 2 August 2018 was issued. Answering and replying affidavits were filed, the rule *nisi* was extended and the matter was eventually set down for hearing on 18 November 2018.

VI ACCRUAL IN TERMS OF THE MATRIMONIAL PROPERTY ACT, 88 OF 1984 AND THE ANTE-NUPTIAL CONTRACT

[10] It is not my task to adjudicate respondent's accrual claim. However, respondent raised the issue and submitted that the present dispute should be adjudicated as part and parcel of the accrual dispute. Therefore I regard it apposite to briefly refer to the principles applicable to accrual.

[11] In order to provide some background to the accrual system I quote selectively from sections 3, 4, 6 and 7 of the Matrimonial Property Act, 88 of 1984:

> "**3 Accrual system**
>
> (1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

(2) Subject to the provisions of section 8 (1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.

4 Accrual of estate

(1) *(a)* The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.

6 Proof of commencement value of estate

(1) ….

(2) ….

(3) An antenuptial contract contemplated in subsection (1) or a certified copy thereof, or a statement signed and attested in terms of subsection (1) or a certified copy thereof contemplated in subsection (2), serves as *prima facie* proof of the net value of the estate of the spouse concerned at the commencement of his marriage.

(4) ….

7 Obligation to furnish particulars of value of estate

When it is necessary to determine the accrual of the estate of a spouse or a deceased spouse, that spouse or the executor of the estate of the deceased spouse, as the case may be, shall within a reasonable time at the request of the other spouse or the executor of the estate of the other spouse, as the case may be, furnish full particulars of the value of that estate." (emphasis added).

[12] Notwithstanding the principle set out in s 3, the parties explicitly agreed in their ante-nuptial contact that the spouse whose estate accrued the lesser of the two, shall be entitled to 30% only, and not 50%, of the difference between the accrual of the respective estates. They agreed that the commencement values of their estates were R10 000.00 in respect of applicant and R20 000.00 in respect of respondent.

[13] The accrual in the parties' respective estates must still be determined by the court as the parties will apparently not settle their differences. There are serious disputes between them. I shall mention some *infra.*

[14] The law is clear: the date for determination of accrual is the date of dissolution of the marriage by either death or divorce. Therefore any accrual taking place after divorce and prior to adjudication by the court cannot be taken into account. The same should apply to a decrease in a spouse's estate during such time.

[15] Respondent who is the plaintiff in the divorce action seeks compliance with the parties' ante-nuptial contract. Clearly he believes that applicant's estate accrued more than his. Applicant, on the other hand, seeks an order that respondent forfeits the benefits flowing from the ante-nuptial contract. The inference is obvious: she also believes that her estate has accrued more than that of respondent.

VII <u>THE *ACTIO COMMUNI DIVIDUNDO*</u>

[16] The parties are co-owners of the property that has been sold, but they are disputing the basis upon which the proceeds should be distributed. This is a classical case where the *actio communi dividundo* should come into play, was it not for the accrual dispute. This aspect will be dealt with during my evaluation i*nfra*, but it is apposite to first consider the relevant authorities relating to the *actio*.

[17] In *Robson v Theron* 1978 (1) SA 842 (AD) at 856H and further the court stated the following:

(B) The principles of the common law applicable to the *actio communi dividundo* may be briefly summarised as follows:

1. No co-owner is normally obliged to remain a co-owner against his will.

2. This action is available to those who own specific tangible things (*res corporales*) in co-ownership, irrespective of whether the co-owners are partners or not, to claim division of the joint property.

3. Hence this action may be brought by a co-owner for the division of joint property where the co-owners cannot agree to the method of division. Since a partnership asset is joint property which is held by the partners in co-ownership, it follows that a partner may as a co-owner bring this action for the division of a partnership asset where the co-partners cannot agree to the method of its division. This would obviously cover the position where, after dissolution of a partnership, a continuing partner as a co-owner retains possession of an undivided partnership asset. A retiring partner as a co-owner would accordingly be entitled to institute this action against the continuing partner as co-owner to compel a division of the partnership asset in question.

4. It is for purposes of this action immaterial whether the co-owners possess the joint property jointly or neither of them possesses it or only one of them is in possession thereof.

5. <u>This action may also be used to claim as ancillary relief payment</u> *of praestationes personales* relating to profits enjoyed or <u>expenses incurred in connection with the joint property</u>.

6. A court has a wide equitable discretion in making a division of joint property. This wide equitable discretion is substantially identical to the similar discretion which a court has in respect of the mode of distribution of partnership assets among partners as described by *Pothier*." (emphasis added).

[18] In *Rademeyer & others v Rademeyer & others* 1968 (3) SA 1 (CPD) the court stated the following:

> "In an action brought to terminate community of property, with the division of the property held in common, <u>the settlement of all outstanding claims between the parties in respect of the community takes place also</u>. With the division of the property are settled all claims which the owners may have one against the other in respect of the property and they receive each one his share free of any lien that any joint owner may have in respect of money spent on protecting, maintaining or improving the common property." (at p 12).

"Before the proceeds of a sale are divided among the joint owners, they are entitled to have all accounts in respect of the property adjusted *inter se* because, when community of property comes to an end, then all the obligations in respect of that community should also be terminated through fulfilment. In fact there is a debate of account between the joint owners in respect of the property they own jointly and are now seeking to divide between them." (at p 14 – emphasis added).

[19] In *Claassen v Quenstedt* 2014 JDR 0534 (ECP) the court made a comprehensive order, catering for every eventuality, in order to terminate the co-ownership of two co-owners. In the process the following orders were made as well:

"[25.3.3.4] the distribution to both parties of the net residue as to be determined in accordance with the provisions of prayers [25.4] to [25.6] below;

[25.4] In the event of
[25.4.1] the valuation not agreed upon; and/or
[25.4.2] the property not being sold within such 21 day period; and/or
[25.4.3] the parties failing to reach an agreement as to the amounts due to them respectively;
that each party render to the other a full account, supported by vouchers, of all expenses incurred in respect of the property, and how he/she proposes the net proceeds are to be divided;
[25.5] Debate of the said amounts;
[25.6] Division of the net proceeds of the sale of the property between the parties in accordance with the Court's final finding on such amount;"

[20] C G van der Merwe, *Sakereg*, 2nd ed at 389 and further is adamant, with reference to Grotius and other authorities, that when the *actio communi dividundo* is instituted, "…word nie slegs verdeling van die saak nie, maar ook 'n onderlinge verrekening tussen die eienaars aangevra. Alle uitstaande uitgawes vir noodsaaklike verbeterings, die onproporsionele insameling van vrugte en verliese gely as gevolg van die skuld van 'n mede-eienaar, word dan ook in verrekening gebring." The effect of this is that distribution can take place, in the absence of agreement, only once a proper debatement of the amounts claimed has taken place. See

also: Badenhorst *et al, Silberberg and Schoeman's The Law of Property* 5th ed, 136.

VIII **EVALUATION**

[21] The two advocates have divergent views on the topic. Mr Zietsman submitted that applicant seeks an *interim* interdict requiring her to prove the four customary requirements for such interdicts in order to succeed. In the process of adjudication, so he argued, the court is entitled to consider the probabilities. Mr Louw argued that applicant's relief can be described as an anti-dissipation interdict *in securitatem debiti.* Therefore she had to show that, objectively considered, there are good grounds for fearing that the respondent intends to dissipate his assets in order to defeat the applicant's claim. The kind of interdict to which Mr Louw referred is also an *interim* interdict, the purpose of which is to restrain a respondent from dissipating his assets for the purpose of avoiding execution of a judgment. See: *Knox D'Arcy Ltd and others v Jamieson and others* 1994 (3) SA 700 (WLD) at 706B-J. In essence, and as stated by Stegmann J in the second *Knox D' Arcy* judgment reported in 1995 (2) SA 579 (WLD) at 600B, the legal requirements for an *interim* interdict *in securitatem debiti* are no different from the legal requirements for any other *interim* interdict. Mr Louw tried to make too much of the fact that applicant stated under oath that if an interdict is not granted, she may not be in a position to recover from respondent what is due to her. The test in this regard is the same as is applicable to the second requisite for *interim* interdicts, to wit a well-grounded apprehension of irreparable harm which must be objectively considered.

[22] It is apposite to refer to the following *dicta* in *RS v MS* 2014 (2) 511 (GJ) at paras [14]-[18] as Mr Louw also relied on this judgment in support of his argument:

"[14] Whatever claim the applicant therefore might have at this juncture in respect of the separate property of the first respondent or a part thereof, it is not a vested right, but a right contingent upon the divorce that she seeks. But at this juncture her claim of a right is disputed.

[15] The applicant therefore has no general right to prevent the first respondent from freely dealing with his own separately held property in respect of which she has no vested right; and neither does she have a general right to seek to compel the first respondent to regulate his bona fide expenditure and use of his property so as to ensure that funds are available for the settlement of her alleged contingent right.

[16] In this regard, therefore, when it is submitted on behalf of the respondent that the applicant has failed to establish a prima facie right to the funds held in the various accounts targeted by the relief she seeks, I agree. I also agree with the submission that the applicant will only have a claim for payment of moneys <u>if it is established at the dissolution of the marriage</u> that there was, at the effective date agreed by the parties, <u>an accrual in the first respondent's estate that is greater than the accrual in the applicant's estate.</u>

[17] However, it is trite that even a contingent right to claim half of the accrual in the estate of the other spouse could be protectable by interdict pendente lite, but then an applicant for such relief must show:

(a) that the respondent has assets within the jurisdiction of the court;

(b) that the respondent, prima facie, has no bona fide defence against the applicant's alleged contingent rights;

(c) that the respondent has the intention to defeat the applicant's claim or to render it hollow by dissipating or secreting assets.

[18] But, even if these jurisdictional requirements are present, then an applicant must still show a well-grounded apprehension of irreparable loss, should the interdict pendent lite not be granted. It is perhaps apposite here to point out that, because of the Draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in the clearest of cases. See generally: *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A)([1996] 3 All SA 669; [1996] ZASCA 58) at 372C; *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 2004 (5) SA 388 (D) ([2003] 2 All SA 279) at 396E; *Reeder v Softline* supra at 849 – 851."

[23] The extract from the aforesaid judgment clearly shows that the facts therein are distinguishable from the facts *in casu*. The present applicant claims an entitlement based on excessive payments as co-owner of the property and debatement of accounts as part of division of the co-ownership. It is true that her notice of motion is somewhat confusing insofar as the intention is created that she wants the dispute in terms of the accrual system to be adjudicated simultaneously.

[24] The authors of *Wille's Principles of South African Law*, 9th ed at 558 refer to co-ownership as "communion est mater rixarum" or in English, co-ownership is the mother of disputes. We all too often experience the consequences of this maxim when partnerships are dissolved, marriages in community of property come to an end and co-owners of especially immovable property held in undivided shares do not see eye to eye anymore. People who were either in love relationships, or who trusted each other, often get entangled in fierce fighting over money, the root of all evil as the saying goes.

[25] There is some uncertainty on the papers as to the amount of applicant's claim. I indicated *supra* that she stated that her claim against respondent in respect of the property was an amount of R720 406.54 on the date of divorce for purpose of accrual adjudication. In paragraph 6.4 of the founding affidavit she alleged that her excess contributions amounted to R1 533 404.58. She then referred to annexure "EL3" consisting of numerous bank statements and entries thereon marked by her. Surely it could not be expected of the court in application procedure to do its own forensic investigation and analysis to establish whether her version under

oath corresponds with the exhibit relied upon. Mr Zietsman conceded that the allegation in paragraph 6.4 is wrong and he was at pains to indicate what was in fact owed by respondent. In annexure "E3.1" to the founding affidavit applicant presented a detailed summary of all payments by the parties in respect of the property. On her version she made payments in the total amount of R1 820 813.08 and respondent in the amount of R780 000.00. Therefore she paid R1 040 813.08 more than respondent. In order to break even – or for the parties to have contributed evenly – Mr Zietsman submitted that respondent owes her 50% of the latter amount, to wit R520 406.54. This is more than half of the net amount due to respondent in respect of the property as mentioned *supra*.

[26] Respondent raised the point that applicant did not indicate in her financial statements as at 28 February 2015 that she had a claim against him pertaining to the Dana Bay property or at all. I do not think too much should be read into this. The correspondence exchanged during 2015 between the attorneys pertaining to the possible sale of the property, attached to the replying affidavit, indicate that applicant held the view that she contributed more than respondent and if the property was to be sold, his 50% share ought not be paid out to him.

[27] It is my *prima facie* view that respondent is not playing open cards with the court. I say this for the following reasons:

1) His allegation that he made a contribution of R1 487 218.49 in respect of bond instalments and other expenses is improbable and false. Applicant has shown beyond any doubt that she had lent the

total amount of R1.2m to respondent's company, Lago Park as indicated in this close corporation's 2014 financial statements. Her explanation as to how this debt was settled is convincing and probable.

2) Respondent's version that the rental of one of his properties was to be used to settle expenses in respect of the Dana Bay property is denied by applicant. She explained that the rental was paid to her long before the Dana Bay property was purchased and such payments were respondent's contribution to the parties' communal home and for the upbringing of their child and respondent's child from a previous marriage. Her version is more probable.

3) According to respondent he spent at least R450 000.00 in respect of improvements. Save for mentioning the type of improvements, he failed to take the court in his confidence to inform us what amounts were spent on each of the improvements, which contractors were used and when and how much each of them were paid. Applicant dealt with this allegation in reply and her detailed version appears more probable than that of respondent.

4) Respondent wants the court to believe that he is a successful businessman. He is the sole member of Lago Park CC which "generates a substantial income." He is also the sole member of a hardware store in Ladybrand and he holds 50% of the shares in a Lesotho company that manufactures roof trusses. Yet, none of these assets, consisting of his membership and shareholding, are set out in his financial statement made under oath for purposes of the accrual adjudication.

5) Standard Bank issued a demand in terms of s 129 of the National Credit Act during October 2017, claiming an amount in excess of R380 000.00 from Lago Park CC. Applicant is concerned that respondent may relocate to Lesotho, based on what he told her, which may cause difficulties in executing any judgment she may obtain against him which is denied by respondent.

[28] I am satisfied that the following factors must be taken into account in order to come to an equitable outcome:

1) The principles applicable to the *actio communi dividundo* should be considered, bearing in mind the action applicant intends to institute.

2) The parties are co-owners in equal shares of the property and the increase or decrease in value of the property does not play a role in adjudicating accrual of their estates as would have been the case if the property belonged only to one of them.

3) The parties have decided to sell the property and the conveyancer is on the verge of registration of transfer thereof in the name of the purchaser – in fact, registration would have taken place in the absence of the rule *nisi*.

4) The proceeds must be distributed once the parties’ claims emanating from expenses to this property only, has been considered and adjudicated; however, respondent does not seriously lay any claim in respect of applicant’s one half share in the property and therefore it is not necessary to “freeze” the whole net proceeds.

5) There is no reason why this transaction should be considered as part of the accrual dispute especially as the parties hold it in co-ownership and further expenses have been incurred in respect thereof over the past three years that cannot be considered during adjudication of accrual.

IX **CONCLUSION**

[29] Although the net proceeds are normally distributed to the co-owners in the event of a dispute only once a debatement has taken place, there is no reason why applicant should not now be entitled to 50% of the net proceeds of the property. Respondent has not requested the court, either in the answering affidavit, or in a counter-application, that the whole of the net proceeds shall be kept in trust pending finalisation of the dispute. I am satisfied that the only equitable solution to the dispute is to make orders in line with the relief sought. Therefore I exercise my discretion in favour of applicant. It is necessary to preserve respondent’s share pending institution and finalisation of an action by applicant in order to prove that she contributed a greater amount than respondent in respect of the property. No other claims, relating to accrual or from any other source shall be instituted and adjudicated in this regard. The order will provide for this. It needs to be mentioned that the reference in the notice of motion and rule *nisi* to the 1973 Attorneys Act is wrong. The correct Act is the Attorneys Act, 53 of 1979. Nothing turns on this and the mistake was not even picked up by any of the parties. It is a patent error which is hereby rectified *mero motu* in terms of rule 42(1)(b).

[30] Although applicant is entitled to relief, I have decided in the exercise of my discretion not to grant her costs of the application at this stage of the proceedings. In my view it would be equitable to order the costs of the application to be adjudicated at the trial and after having had the advantage of *viva voce* evidence tested in cross-examination.

X **ORDERS**

[31] The following orders are issued:

1) Paragraphs 2.1 and 2.2 of the rule *nisi* issued on 29 June 2018 (as amended) are confirmed.

2) Second respondent is authorised and ordered to pay applicant's 50% (fifty percent) share of the net proceeds from the sale of the property to her on registration of transfer in the name of the purchaser.

3) Applicant shall within 30 (thirty) days institute action against first respondent for payment of the amount due to her in respect of her payments made in excess of 50% (fifty percent) of all bond payments, municipal costs and all other incidental costs relating to the property, failing which second respondent is authorised and ordered to pay to first respondent his 50% (fifty percent) of the net proceeds from the aforesaid sale.

4) The costs of the application shall stand over for adjudication during the trial.

J P DAFFUE, J

On behalf of applicant : Adv P J J Zietsman
Instructed by: Kramer Weimann & Joubert Inc
BLOEMFONTEIN

On behalf of the 1st respondent: Adv M C Louw
Instructed by: Honey Attorneys
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