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

Appeal No.: A236/2013

In the appeal between:

JACOBUS JOHANNES SNYMAN	First Appellant
E. NIEUWENHUIZEN	Second Appellant

and

THE STATE	Respondent

CORAM:	VAN ZYL, J *et* DAFFUE, J
HEARD ON:	17 MARCH 2014
JUDGMENT BY:	DAFFUE, J
DELIVERED ON:	27 MARCH 2014

INTRODUCTION

[1] This is an appeal by two appellants, J.J. Snyman, the first appellant and E. Nieuwenhuizen, the second appellant, against sentences of four years' imprisonment imposed on both of them by the regional court.

[2] Both were initially charged together in respect of the contravention of six counts of fraud, alternatively theft. After negotiations with the prosecutor, counts three and five were withdrawn against both whilst counts one and six were withdrawn against first appellant and counts two and four withdrawn against second appellant.

[3] On 17 May 2012 first appellant pleaded guilty of theft in respect of the alternatives to counts two and four and second appellant pleaded guilty of theft on the alternatives to counts one and six. The prosecutor accepted the pleas and they were duly convicted,

[4] On 14 January 2013, eight months after their convictions, both appellants were eventually sentenced to four years' imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the CPA").

[5] They successfully applied for leave to appeal against their sentences. First appellant is out on warning and second appellant is on bail pending this appeal.

[6] It is deemed necessary to state already at this stage that the first appellant was convicted of stealing R100 000.00 and R61 500.00 from two different complainants respectively whilst second appellant was convicted of stealing R250 000.00 and R500 000.00 from two other complainants respectively.

THE GROUNDS OF APPEAL

[7] First appellant's grounds of appeal can be summarised as follows, i.e. that the court *a quo* erred in the following respects:

7.1 In not individualising the sentences insofar as he stole much less than second appellant and their personal circumstances are materially different.

7.2 In not accepting the factual basis upon which first appellant pleaded guilty, but instead finding that the crimes were planned and formed part of an overall scheme.

7.3 In neglecting to allow the state and the defence an opportunity to address the court before sentence.

7.4 In not accepting that the state and defence agreed upon the basis of the pleas and a possible sentence to be prayed for.

7.5 In not accepting the first appellant's remorse and his attempts to arrange funds to settle the complainants' claims.

7.6 In imposing direct imprisonment and concluding that it was the only appropriate sentence and in so doing ignoring correctional supervision as a sentencing option.

[8] Second appellant's grounds of appeal are the following:

8.1 The sentence is shockingly excessive and the crimes were overemphasised.

8.2 The court failed to properly take his personal circumstances and the fact that he was a first offender into consideration.

8.3 He was not given an opportunity to address the court before sentence.

8.4 That the state did not support the sentence.

<u>THE APPROACH ON APPEAL</u>

[9] The imposition of sentence is the prerogative of the trial court. Appellate courts should not interfere with that exercise of discretion unless it is convincingly shown that the discretion has not been properly exercised, either because the sentence is so disturbingly inappropriate or sufficiently disparate, or one or more material misdirections have been committed in arriving at the sentence ultimately imposed.

<u>THE COURT *A QUO*'S MISDIRECTIONS</u>

[10] Several misdirections have been committed by the court *a quo,* some of which are dealt with in the next paragraphs.

[11] <u>The court *a quo* failed to allow the state and the defence in particular an opportunity to address it prior to sentence.</u> Mr Nel, on behalf of first appellant, did not rely on any authority or any particular section of the CPA for his submission, but Mr Reinders, on behalf of second appellant, relied on section 175 of the CPA without referring to authority. Section 175 is irrelevant. It deals with the process before judgment is to be

delivered on the merits. The applicable section of the CPA is section 274. Subsection (1) thereof deals with the leading of evidence before sentence is passed, while section 274(2) reads as follows:

> "(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court."

[12] Although the word "may" is used in subsection 274(2) it is generally accepted that both the accused and the state have a right to address the court regarding the appropriate sentence. In **S v Mokela** 2012 (1) SACR 431 (SCA) the court opined as follows at para [14]:

> "Although s 274 of the Criminal Procedure Act uses the word 'may', which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court."

[13] It may be argued that fairness not always dictates that address should be allowed, especially where the accused elected to testify under oath in mitigation of sentence and raised all relevant aspects fully in order to present the trial

court with the full picture as both appellants tried to do *in casu*. The purpose of the evidence was to show that they may well succeed in settling the claims of the complainants if given an opportunity to do so by means of a sentence of imprisonment suspended on condition that they settle the claims. I have given ample consideration to this possibility, but am of the view that the court *a quo*'s misdirection is fatal.

[14] The court *a quo* did not differentiate between the two appellants. The amounts stolen by first appellant are much less than those stolen by second appellant, i.e. R161 500,00 in total as against R750 000.00. Yet, the trial court found that both should be sentenced exactly the same. The court *a quo*, and incorrectly so, took into consideration that first appellant was not a first offender, whilst second appellant was. Fact of the matter is that it should have disregarded first appellant's previous convictions totally. The first previous conviction of theft relates back to 1982, thirty years ago, and the other in respect of the purchase of unpolished diamonds occurred in 1992, twenty years ago. First appellant should have been considered a first offender. It is also apparent from the record that first appellant would have been in a much better position to reimburse the complainants if the court *a quo* considered a suspending sentence on conditions as suggested under oath. He is in stable employment, a breadwinner and father with dependent children who partially rely on him for their maintenance. Second appellant's personal circumstances, the enormity of the amounts involved and his overall attitude and lack of

commitment evident from his testimony made his case much worse. The order that I have in mind will clearly reflect the differentiation applied in imposing sentence afresh.

[15] Pre-planning and the crimes being part of a scheme. No such evidence was led. It is difficult to ascertain what factors the court *a quo* took into consideration to come to this conclusion. It made a material misdirection in doing so.

[16] The sentence of second appellant was based on an incorrect assumption that he was convicted of fraud in respect of count one. It is evident from the record that second appellant pleaded guilty on the alternative to count one, being theft as opposed to fraud, and that the court *a quo* convicted him on that basis. The long delay between conviction and sentence – eight months – might be blamed for this mistake, but again it is a material misdirection.

[17] Lack of individualisation between the various counts for purposes of sentence. The court *a quo* did not even attempt to explain why the counts were taken together for the purpose of sentence. This error is not so material that we would be able to interfere with the sentences based on this aspect only, but it is salutary practice to state why courts are taking counts together for purposes of sentence and if this is not done, to sentence an accused separately in respect of each count. Justice did not demand that composite sentences be imposed in order to for example avoid duplication or undue harshness. Separate sentences

contribute to correct sentencing and avoid difficulties on appeal when the appellate court sets aside one or more of the convictions taken together for sentencing.

[18] The judgments relied upon are not on all fours with the matters *in casu.* I shall deal with the approach of our Supreme Court of Appeal in respect of white collar crime *infra*, but wish to state that the court *a quo* misdirected itself in relying on those judgments without recognising that they are distinguishable insofar as the accused in all those matters were convicted of multiple crimes over extended periods of time.

EVALUATION OF THE COURT *A QUO*'S SENTENCE, THE ARGUMENTS OF COUNSEL AND THE AUTHORITIES

[19] In view of the serious misdirections by the court *a quo* we are at liberty to reconsider the matter and impose sentences afresh. The misdirections will not be dealt with again, but the reader is referred to what I stated *supra*.

[20] Ms Thiart, the complainant in respect of the alternative to count six, testified in the court *a quo*. She is a pensioner who, during November 2007, lost R500 000.00 - her pension money - which landed in the pockets of second appellant via her son-in-law. Second appellant made several promises to her over a period of five years, since January 2008, as to how he would repay her. During this period he paid an amount of approximately R25 000.00 to her to cover her

medical expenses and made some unidentified smaller payments, but in essence nothing came from his empty promises. She stated under oath the following in reply to inappropriate questions by second appellant's attorney:

> "So dit is vir u belangrik om die geld terug te kry?
> (It should be mentioned that she had nothing left of her pension and that her children were supporting her.)
> … Dit is reg.
> En as ons 'n bedrag van sê byvoorbeeld R20 000.00 of R25 000.00 per maand aan u betaal, sal dit vir u aanvaarbaar wees?
> (It should be mentioned that this question was posed as if it was certain that the second appellant would be able to make these payments.)
> Dit sal heeltemal aanvaarbaar wees."

Prior to this line of questioning the attorney also indicated that interest would be added from date of conviction – 17 May 2012 - and paid over and above the capital. No reasonable person in the shoes of the complainant would reject such an offer, but unfortunately, as can be gleaned from second appellant's version, no facts were placed before the trial court to suggest that there was a reasonable probability or even a possibility that he would be in a position to honour his undertaking. Ms Thiart's trust in society has been damaged to such an extent that she testified that she could not trust anybody anymore.

[21] A letter of Mr van Rooyen, the complainant in respect of count one, was handed in by agreement. He could not attend the proceedings, but indicated that he was prepared to accept payment of the amount of R250 000.00 in one amount, alternatively in four instalments. He stated that if neither of the two options could be complied with, the court should sentence second appellant appropriately. This letter, as is the case with the other complainants referred to *infra*, was handed in by the prosecutor, indicating earlier communication with the complainants in respect of their willingness to accept payment as part of the sentences to be imposed.

[22] A letter of Mr Liebenberg, the complainant in count two, was also handed in as exhibit. He was also prepared to accept one payment of R100 000.00, alternatively the amount to be paid in four instalments, failing which an appropriate sentence should be imposed.

[23] Mr Fourie, the complainant in count four, informed the court in writing that if the full amount of R61 500,00 was not settled by 14 January 2013, the court should proceed with sentence.

[24] The theft of R250 000.00 (count one) took place in August 2008. The theft of R500 000.00 (count six) took place in November 2007. The theft of R100 000.00 (count two) took place in June 2008 and the theft of R61 500.00 (count four) took place in September 2008. The crimes were thus committed between four years and four months and five

years and two months prior to the date of sentence and save for a few thousand rand paid to Ms Thiart by second appellant, the complainants were not reimbursed at all by the time that sentence was imposed.

[25] First appellant is for all practical purposes a first offender. He is 48 years old, engaged in his second marriage and his two children from his first marriage, aged 22 and 18 years respectively, are both students and partially dependent upon him for their support. He is a project manager and earns a salary of between R35 000.00 and R40 000.00 per month.

[26] First appellant applied for a home loan to enable him to settle his debts towards the two complainants, but when he testified under oath the loan had not been granted yet. He was prepared to be sentenced to imprisonment suspended on condition that the complainants are paid back. He testified that he could settle the R100 000.00 in four instalments from February 2013 and the R61 500.00 in full by 1 March 2013. He could not settle the outstanding amounts earlier, but was able to do so by the time of sentence as he obtained stable employment in the meantime. His home was worth about R600 000.00 and he applied for a loan of R160 000.00 only. He believed that he would obtain the required finance.

[27] Although we were strictly not entitled to rely on any evidence since sentence or consider submissions from the Bar in respect of factual issues since sentence, Mr Nel was invited

to inform us from the Bar what his client's financial situation was at the time when the appeal was heard. We were informed that an amount of R50 000.00 was paid into his attorney's trust account to be paid over to the complainants if we would be prepared to interfere with the sentence of the trial court and impose a sentence which provides for justice to be restored to the complainants. We were also informed that first appellant would be in a position to settle the outstanding amounts of both complainants in not more than two instalments.

[28] Second appellant testified as well. He is a 35 years old unmarried male, but has a 6-year old child who stays with the mother. He practiced as an attorney at a stage, but started a diamond digging business in 2012. Although it is not clear from the record whether he was struck off the roll or whether he voluntarily quitted the legal profession, it was confirmed by his counsel, Mr Reinders, during argument before us that he was in fact struck off the roll in 2008. Second appellant has not earned any income from his diamond digging operations yet. He admitted that the case was postponed several times to allow him and his co-accused an opportunity to settle the complainants' claims. Regarding his prospects he stated the following:

> "Ek is tans besig met die delwery soos ek sê, so ek hoop maar vir die beste daarso… So die vooruitsigte is van so aard dat ek bedrae kan terugbetaal."

He vaguely testified about money that might accrue to him in respect of a diamond digging site which he had to vacate earlier. He also mentioned that a machine belonging to him which was in possession of a friend at the time might be sold for R500 000.00. Why this has not been sold earlier, is unknown, although he was positive that it could be sold urgently. He furthermore testified about his dealings and transactions in commodities, but again in such vague terms that nobody can accept a word of his evidence. He promised under oath that he would start paying back the R250 000.00 in four instalments from February 2013, the month after he gave his evidence. No indication was given as to where he would get the finances from to pay approximately R64 000.00 per month in that regard.

[29] The possible R500 000.00 refund to Ms Thiart, together with interest thereon from 17 May 2012, was dealt with in the following words:

> "Sy het gesê sy is bereid om paaiemente van minstens R25 000.00 per maand te aanvaar? - Oorspronklik sal ek sê dit sal my pas so. Soos ek sê ek is besig met 'n delwery, sou dit gebeur dat daar 'n steen (diamonds) wat genoegsame waarde het dan kan ek onmiddellik die hele bedrag betaal."

This appears to be nothing but a pie in the sky. This person is the only one that might believe his own stories. It appears from his cross-examination that he was involved in diamond digging since February 2012, but that his front-end-loader had broken down and consequently he was not successful in digging one diamond from the soil ever since he started his business. He was living from the resources of a friend who paid him R8 000.00 per month at the relevant time. He cannot even pay a fixed amount on a regular basis towards his 6-year old child's maintenance. After his testimony he, apparently to the surprise of his own attorney, *mero motu* submitted to the court that he was in a position to sell his diamond diggings' equipment worth approximately R2 million to pay the complainants.

[30] I have sympathy for first appellant, but none so for second appellant. He appears to be a compulsive chancer, or at the very best, an ingenuous entrepreneur who believes that his business deals would come off good against all odds and expectations. *Ex facie* the record he made a terrible impression as a witness. He appears to be a manipulator of the first degree.

[31] Having expressed my sympathy towards first appellant I fail to understand why he could not obtain finances earlier. Well knowing that the shoe is pinching, he could have sold his house immediately after he was convicted or applied then already for the necessary finance. Instead he waited for several months in order to apply for a home loan just before the 2012 Christmas season, which he then blamed for the delay. A year later his position has apparently not changed as the full amount needed to settle the debts of the complainants is still not available.

[32] There is no rule that a first offender may not be sentenced to direct imprisonment. I quote the following from **S v Kekana** 2013 (1) SACR 101 (SCA) at 105d – i:

> "It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence…Moreover, as the version of the appellant was found by the trial court to be false and in effect contrived, it is difficult to conclude in his favour that he has demonstrated any remorse or contrition. In all of the circumstances of the case, therefore, the moral reprehensibility of the appellant's conduct remains undiminished."

[33] Thus even previously law-abiding citizens with good and stable family relationships and fixed employment may be incarcerated if the offence committed is sufficiently serious and the interest of the community demands it. An accused's personal circumstances must take a backseat in the evaluation of what is an appropriate sentence in such instance.

[34] In **S v PRETORIUS**, a judgment of the Free State High Court reported in SAFLII (25/2006) [2007] ZAFSHC 39, and

confirmed on appeal by the SCA on 26 November 2008 under case no 145/2008 – neutral citation: **PRETORIUS v THE STATE** (271/2008)[2008] ZASCA 132 (26 November 2008) - the court came out strongly in favour of stricter sentences for white collar crimes and quoted the following from **S v SADLER** 2000 (1) SACR 331 SCA at 335g – 336b:

> "[11] So called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle.
>
> Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
>
> [12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it."

Particular attention is directed to the approach of the SCA in paragraphs 4 to 7 and 9 of **PRETORIUS** *loc cit* pertaining to payment by an accused to a complainant to make good losses suffered, correctional supervision and the approach of a court of appeal to a sentence imposed by the court of first instance. The time has arrived to send white collar criminals to jail. They cannot in all circumstances be heard to say that they will reimburse the complainants as this will mean that the rich, or those with the ability to obtain money, would always be entitled to buy themselves out of prison.

[35] Mr Nel has conceded that although he is of the personal view that short-term imprisonment does not have any value insofar as reform is concerned, that two to three years imprisonment would be an appropriate sentence in respect of his client, the first appellant. However he argued strenuously with reference to several passages in Terblanche: **Guide to Sentencing in South Africa**, 2nd ed, that correctional supervision was an appropriate sentence option *in casu* and that this aspect together with the element of restorative justice was not considered at all by the court *a quo*. He therefore argued that such a sentence should have been imposed. I am of the view that the crimes call for imprisonment in light of the urge to make a stand against white-collar crime for the reasons pronounced by the Supreme Court of Appeal in **Sadler** and **Pretorius** *supra*. In any event, we cannot at this stage consider imposing a sentence of correctional supervision even if we held that it was an appropriate sentence as in such instance we would

have to refer the matter back to the regional court for the required reports to be obtained whereafter a sentence of correctional supervision may, or may not be, imposed. Bearing in mind the full diaries of the legal practitioners as well as the backlog in the regional courts, a delay of anything between six to twelve months may be caused. I am of the view that there was so much delay in having finalised these matters that further delay should not be allowed. Justice must now be seen to be done and finality is of the utmost importance, especially insofar as the complainants are concerned.

[36] Second appellant's personal circumstances are quite different from that of first appellant. He not only stole much more money, but was an attorney at the time and his position as such apparently caused the complainants to trust him. Mr Reinders, on his behalf, informed us during his argument that his attorney, Mr Giorgi, who was present in court and who also conducted the second appellant's defence in the court *a quo*, had received clear and unambiguous instructions to inform us that his client would be prepared to reimburse the full amounts owing to the complainants within thirty days from the date of our judgment if we were prepared to interfere with the sentence of the trial court and impose imprisonment suspended on condition that the complainants be reimbursed. Mr Reinders conceded that, bearing in mind the amounts involved, a period of four years' imprisonment as imposed by the trial court, could be regarded as rather lenient and that the second appellant could count himself

lucky to have received such a lenient sentence. However bearing in mind the availability of funds to settle the debts of the complainants and particularly Ms Thiart, who is a pensioner and who is in dire financial straits according to the evidence, it would be appropriate *in casu* to impose a suspended sentence as this will also ensure that justice is restored to the complainants.

[37] Me Van Wyk, who appeared on behalf of the state and also represented the state in the court *a quo*, supported the sentences imposed by the trial court. She submitted that appellants' were in breach of their undertakings to settle the debts. She emphasised that the state was at all relevant times prepared to accept sentences providing for orders in terms whereof the complainants be reimbursed and she particularly emphasised that Ms Thiart was in urgent need of funds as she was relying on the mercy of her children. However she was of the view that the appellants had sufficient time to get their finances in order and their attitude demonstrated a clear lack of understanding and appreciation for the rights of the complainants in particular and the legal system in general. I tend to agree with these submissions and am of the view that the appellants' attitude evidences a clear defiance of the rights of the complainants and our legal system and is also indicative of gross arrogance.

[38] Although I am personally of the view that the crimes committed by the appellants are so severe that the community at large would feel that they deserve

incarceration, it cannot be disregarded that restorative justice as an aim of punishment should not be overlooked *in casu*. The complainants and in particular Ms Thiart, a pensioner, would welcome sentences which might ensure that they be reimbursed. I have considered an order in terms whereof not only the capital, but also interest be payable at a rate of 8% *per annum*, the rate which the complainants would have obtained if the monies were invested with a financial institution, but that would mean a further financial burden of several hundred thousand rand bearing in mind the period of five to six years that has passed. The effect of not allowing interest to be paid to the complainants may be seen as the court allowing appellants to pay back what could be regarded as interest free "loans" to the severe detriment of the complainants. However, if repayment of the capital could be achieved, the complainants would be in a much better position than would be the case if the sentences of the trial court were confirmed on appeal.

[39] As stated there should be a differentiation between the sentences to be imposed on the two appellants. Also, the appellants shall be sentenced separately in respect of the different counts and there are no valid reasons why their sentences should run concurrently. The orders are so structured merely to avoid having the effect of increasing the sentences on appeal which we are not at liberty to do. The lenient nature of the sentences is clearly demonstrated in this manner, but there is nothing that we can do in this regard.

[40] Consequently and with a great measure of reluctance I propose that the following orders be made:

1. The appeals of both appellants are upheld and the sentences of the court *a quo* are set aside and replaced by the following.

2. Jacobus Johannes Snyman is sentenced as follows:

2.1 On the alternative to count two: Eighteen (18) months' imprisonment.

2.2 The sentence is wholly suspended on the following conditions:

2.2.1 that the accused reimburses the complainant, JJ Liebenberg, in full by way of two instalments in the amounts of R50 000.00 each to be payable not later than 30 April 2014 and 31 May 2014 respectively.

2.2.2 that he shall not be convicted of theft or any crime involving any element of dishonesty for which he is sentenced to imprisonment without the option of a fine during a period of five years from the date hereof.

2.3 On the alternative to count four: Eighteen (18) months' imprisonment.

2.4 The sentence is wholly suspended on the following conditions:

2.4.1 that accused reimburses the complainant, JM Fourie in full by way of two instalments in the amounts of R30 750.00 each to be payable not later than 30 April 2014 and 31 May 2014 respectively.

2.4.2 that he shall not be convicted of theft or any crime involving any element of dishonesty for which he is sentenced to imprisonment without the option of a fine during a period of five years from the date hereof.

3. Ebrahim Nieuwenhuizen is sentenced as follows:

3.1 On the alternative to count one: Two (2) years' imprisonment.

3.2 The sentence is wholly suspended on the following conditions:

3.2.1 that accused reimburses the complainant, JA van Rooyen, in full by way of two instalments in the amounts of R125 000.00 each to be payable not later than 30 April 2014 and 31 May 2014 respectively.

3.2.2 that he shall not be convicted of theft or any crime involving any element of dishonesty for which he is sentenced to imprisonment without the option of a fine during a period of five years from the date hereof.

3.3 On the alternative to count six: Two (2) years' imprisonment.

3.4 The sentence is wholly suspended on the following conditions:

3.4.1 that accused reimburses the complainant, Ms Thiart, in full by way of two instalments in the amounts of R250 000.00 each to be payable not later than 30 April 2014 and 31 May 2014 respectively.

3.4.2 that he shall not be convicted of theft or any crime involving any element of dishonesty for which he is sentenced to imprisonment without the option of a fine during a period of five years from the date hereof.

J. P. DAFFUE, J

I agree and it is so ordered.

C. VAN ZYL. J

On behalf of first appellant: Adv J Nel
Instructed by:
Kramer Weihmann & Joubert
BLOEMFONTEIN

On behalf of second appellant:	Adv S.J. Reinders Instructed by: Giorgi & Gerber Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv A van Wyk Instructed by: Office of the Director of Public Prosecutions BLOEMFONTEIN

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