

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 6241/2009

In the matter between:

ELDA COETZEE

Applicant

and

GERT ABRAHIM COETSEE
ELMA NEL

1st Respondent
2nd Respondent

CORAM: RAMPAL, J

JUDGEMENT: RAMPAL, J

DELIVERED ON: 24 FEBRUARY 2011

REVIEW JUDGMENT

[1] These are review proceedings. The applicant, in other words the plaintiff, applies for the review of the taxation of her bill of costs by the taxing officer. She is aggrieved by the decision of the taxing officer to reduce her bill by R5 998,25. The respondent, in other words the first defendant, does not oppose the review application although he had earlier during the taxation raised many objections to certain specific items.

[2] The applicant and the respondent were previously husband

and wife. They were married to each other out of community of property with the inclusion of the accrual system. They tied the marital knot in Bloemfontein on 6 February 1999. Approximately 11 years later, on the 17 December 2009, the applicant filed for a divorce. The respondent defended the action. Soon after doing so she brought an application in terms of rule 43 against the respondent. The respondent also opposed the application.

- [3] The application for interim maintenance was scheduled for hearing on the 6th May 2010 but had to be postponed because the respondent was not ready. On the 13th May 2010 the matter was allocated to Cillie J. On that day the parties signed a deed of settlement. Consequently the application was removed from the roll and the action was summarily enrolled in its place. The applicant's evidence was heard and the marital bond dissolved. The deed of settlement was incorporated in the final decree of divorce. The respondent is obliged in terms of clause 7 to pay the applicant's taxed costs on the party and party scale (the pap scale).

[4] On the 28th July 2010 the applicant delivered notice of taxation of her bill of costs. On the 9th July 2010 the respondent delivered notice of his intention to oppose the bill. The bill was presented for taxation on the 28th July 2010. Attorney Pretorius of Rossouws Prokureurs appeared for the applicant whereas Ms Lubbe, an independent costs consultant, appeared for the respondent on the instructions of Peyper Majaphage Prokureurs. Ms Lelane van Blerk was the taxing officer.

[5] Several items were taxed off. The applicant claimed fees in the sum of R17 553,70 and disbursements in the sum of R5 560,05. Her pre-taxation total was therefore R19 212,02. The post taxation picture was as follows: Fees R17 553,70 less R5 560,05 equalled R11 893,65 disbursements R1 658,32 less 438,20 equalled R1 220,12. The applicant's original total claim of R19 212,02 was therefore slashed by R5 998,25 to R13 113,77. According to the taxing officer's allocatur issued on 17 August 2010, the applicant's bill was taxed and allowed in the sum of R15 972,24. The applicant was aggrieved by part of the sum taxed off viz R5 998,25. This completes the historical background of the matter.

[6] I could find no notice in terms of rule 48(1) which the applicant as an aggrieved party was required to deliver. It was incumbent upon her, within 15 days of the allocatur, to call upon the taxing officer to prepare a stated case. I wanted to take the matter up with the taxing officer but I was reliably informed that she was no longer in the employ of the Department of Justice and Constitutional Development. Therefore, there was a procedural lacuna in the sense that the record was incomplete.

[7] The taxing officer stated her case in terms of rule 48(3) on the 16 November 2010. Copies thereof were served upon the applicant's attorney on the same day and upon the respondent's attorney the next day. It stands to reason, therefore, that the taxing officer would not have reacted in terms of rule 48(3) if the applicant had not filed the required notice in terms of rule 48(1). I also assume that the taxing officer reacted within 20 days of such notice.

[8] The parties were required in terms of rule 48(5) to deliver their submissions within 15 days after the service upon them

of the stated case – that is the taxing officer written reasons for her rulings. The applicant exercised her right on the 7 December 2010. On that day, she caused her written submissions to be served and filed. However, the respondent elected to file no written submissions.

[9] The taxing officer was required in terms of rule 48(5) to deliver a report with 20 days after the filing of the applicant's written submissions. She did not file a report. On 24 January 2011 the taxing officer advised all concerned that she had decided to file no supplementary reasons to her stated case and that she would abide by the decision of the court.

[10] In the absence of the taxing officer's report, there were obviously no supplementary written submissions by the applicant. Naturally no submissions were expected from the respondent since he had hardly filed any original written submissions in response to the stated case.

[11] This then completes the procedural dimension of the matter. Notwithstanding the lacuna, the procedure was substantially

complied with in my view. Therefore the matter was ripe to be reviewed.

[12] All in all there were thirteen items in dispute of which five were consultation items. They, more than any other item, were the real war zones. They accounted for the bulk of the total disallowed by the taxing officer. Therefore the principal issue in the review is whether the taxing officer properly exercised the discretion entrusted to her in disallowing the disputed total of the consultation fees involved. Most of the rulings were taken on the grounds that the consultation had endured for an unreasonably long time or that the consultation was entirely unnecessary.

[13] The court has the power to interfere and correct the taxing officer's ruling(s) on various recognised grounds but also when it is satisfied that the taxing officer was clearly wrong. To interfere and correct on the strength of the latter ground the court must be in the same position as the taxing officer or even better than (s)he to determine the point in issue. See **LEGAL AND GENERAL ASSURANCE SOCIETY LTD v LIEBERUM, NO AND ANOTHER** 1968 (1) SA 473 (A) at

478G – H per Potgieter JA:

“With these remarks I find myself in full agreement and I consider that the review referred to in Appellate Division Rule 9 (1) confers upon this Court the wider exercise of supervision envisaged by INNES, C.J., in this decision. The Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in Shidiack's case but also when it is clearly satisfied that he was wrong. Of course, the Court will interfere on this ground only when it is in the same or in a better position than the Taxing Master to determine the point in issue.”

- [14] The various grounds on which the court can interfere with the discretion of the taxing officer were enumerated in **PRELLER v JORDAAN AND ANOTHER** 1957 (3) SA 201 (O) at 203B – E per Smith AJP. There are two instructive features in the judgment. The one is that a taxation of the bill is pre-eminently a matter which falls within the discretion of the taxing officer. The other is that the scope of interference by the court is limited. Thus we, on review, cannot interfere with the exercise of that discretion merely because we would have exercised such discretion differently.

- [15] The ostensible purpose of an award of costs is to recompense the successful litigant. The objective is usually attained in one of two ways. The one method is called the “pap” scale. See **CITY DEEP LTD v JOHANNESBURG CITY COUNCIL** 1973 (2) SA 109 (W) and **DBM HUURMASJIENE v ADMINSTRATEUR, OVS** 1987 (4) SA 264 (O).
- [16] The other method is called the attorney and client scale (the “aac” scale). See **BEN McDONALD INC AND ANOTHER v RUDOLPH AND ANOTHER** 1997 (4) SA 252 (T) and **PROTEA LIFE CO LTD v MICH QUENET FINANCIAL BROKERS EN ANDERE** 2001 (2) SA 636 (O).
- [17] In **VAN ROOYEN v COMMERCIAL UNION ASSURANCE CO OF SA LTD** 1983 (2) SA 465 (O) M T Steyn J made some important comments about the various stakeholders in a taxation matter. He aptly described the role of an attorney, a taxing officer and a judge. He saw the essence of the process of taxation as a joint venture between an attorney and a taxing officer aimed at insuring that justice was properly done between the winner and the loser – vide para

468 C – 469C.

[18] The current dispute revolves around 13 items. From now on I shall refer to the applicant as the plaintiff and the respondent as the defendant. However this will not apply to the order. As regards item 2, the fee claimed was R71,00. The whole amount was disallowed. The item concerned an application by the attorney to the Department of Home Affairs for a duplicate marriage certificate. The defendant objected to the plaintiff's claim on the grounds that the plaintiff's attorney's fee, for services rendered before the divorce proceedings were initiated, was not recoverable by means of "pap" scale from the loser but by means of "aac" scale, from the winner herself. The taxing officer upheld the defendant's objection. She added that because every married couple is provided with a marriage certificate on the day of the marriage, the plaintiff's application for a duplicate marriage certificate on the 7 December 2009 was unnecessary.

[19] In his original written submission the plaintiff alleged that she had to apply because the defendant had taken away the

original marriage certificate when he left the common home. She contended that in terms of the practice rule of this provincial division issued on 1 February 2008 her divorce summons would not be issued without the relative marriage certificate.

[20] The defendant's objection was correctly upheld. There is no substance in the plaintiff's submission. Her reliance on the provincial practice rule does not assist her claim for this pre-litigation service. According to the plaintiff's particulars of claim it is clear and obvious that the defendant, just like the plaintiff, no longer wanted to go on with the marriage. Therefore, he would probably have handed the marriage certificate to the plaintiff to expedite the process of having the unwanted marriage bond dissolved.

[21] If requested, I am almost certain that he would readily have done so. However, it is not the plaintiff's case that she ever tried to get the original marriage certificate from the defendant. Perhaps he would have provided it free of charge. Since there was a high probability or a good chance that there would have been no charge, her application to the

Department of Home Affairs was unnecessary. In the circumstances I would uphold the ruling of the taxing officer.

[22] I turn now to items 3 and 4. Both were related to item 2. Item 3 concerned a fee for the candidate attorney's attendance at the Department of Home Affairs. The whole R54.00 fee claimed was disallowed. The plaintiff also claimed a disbursement in the amount of R15,00 (item 4) paid to the Department for supplying her with a duplicate marriage certificate.

[23] Since the defendant's objection, the taxing officer's reasons and the plaintiff's submissions are precisely the same as in the case of item 2 *supra*, my views there apply *mutatis mutandis* to these items here. There is no need for judicial interference in respect of these two items. The items were correctly disallowed.

[24] As regards item 43 the fee claimed was R71,00. The whole amount was disallowed. The item was about a letter written. The defendant's objection was that the letter was part of abortive settlement negotiations. The reason of the taxing

officer for disallowing the fee was that costs (fees, disbursements or both) of unsuccessful settlement negotiations were not recoverable by means of “pap” scale from the loser. The plaintiff’s submission was that she did not foresee that attempts to settle the dispute would become futile in the end.

[25] The parties did not hold a pre-trial conference as provided for in para 6, section A of the tariff. Instead they elected to engage each other by means of an informal exchange of correspondence from the 10 March 2010 until the 16 April 2010. The plaintiff did so at her own peril. When litigants embark on such an informal way of negotiations it is always wise in practice to agree, right from the outset, that costs occasioned by such negotiations would be borne and paid by the loser to the winner on the “pap” scale irrespective of the outcome. It was never so agreed in this case.

[26] To expect the loser to be liable to the winner for the costs of a fruitless joint exercise is inequitable. Such an unregulated process would be open to serious abuses if it were sanctioned and rewarded by the taxing officer by means of a

“pap” scale. The principle whereby unsuccessful negotiations to settle the proprietary rights of the litigants are not at all recompensed – is a sound one. It is not the plaintiff’s submission that such principle is unfair, inequitable or in any other way unjust.

[27] As a matter of fact the plaintiff has advanced no grounds as to why the decision of the taxing officer in this regard should be set aside. To say that she did not expect or foresee the negotiations to collapse is, of course, no grounds of review. I am, therefore, inclined to uphold the ruling of the taxing officer not only in respect of the item under consideration but also in respect of similar items 46, 48 and 52.

[28] The next disputed item was item 56. The fee claimed for consultation between the plaintiff and her attorney was R1 242,50, disallowed R621,25 and allowed R621,25. The defendant objected to the item on the grounds that its duration of 105 minutes was unreasonably long and that parts thereof related to the aforesaid abortive negotiations. The taxing officer reasoned that a portion of the consultation of the 4 May 2010 was unnecessary because by then the

plaintiff had already rejected the defendant's settlement proposals. The decision to reject was taken way back on the 16 April 2010 (vide item 51). The taxing officer explained that she allowed half the consultation time for the plaintiff to prepare her own proposals.

[29] I am not persuaded that the taxing officer was wrong in sustaining the defendant's objection. There is no indication as to the length of the defendant's letter or document in which his proposals for the settlement of the matter were embodied. In her submission the plaintiff made no attempt to justify the long duration of 105 minutes for the consultation, which according to her was exclusively devoted to discussing the defendant's proposals, which she rejected in any event. All she did was to repeat that such consultation endured for 1 hour and 45 minutes. Her assertion that the taxing officer allowed only 45 minutes is factually incorrect. The taxing officer in fact allowed half the time claimed.

[30] In my view the plaintiff failed to justify the alleged long duration for a consultation. Therefore it cannot be said that

the taxing officer had no valid reason for reducing the fee claimed as she did. It appears that the whole fee claimed and not just half thereof should have been disallowed in accordance with the principle applicable to unsuccessful negotiations. According to the plaintiff's submission which is contrary to the defendant's objection and the taxing officer's opinion, the entire consultation revolved around the defendant's proposals which she had already rejected. Since the defendant did not attack the item as a whole, there is no need to interfere with the decision of the taxing officer.

[31] The next source of the dispute was item 57. Like item 56, it also concerned a consultation fee. The fee claimed was R355,50 which was totally disallowed. The subject-matter of such consultation was discussion a draft deed of settlement. The taxing officer explained that she had already allocated a fee of R621,25 under item 56 for this particular consultation because it was held on 4 May 2010 just like item 56.

[32] The crux of the taxing officer's reason was that the plaintiff would have been doubly recompensed for the same service rendered by her attorney if she had allowed item 57 in

additions to the allowance she had already made in respect of item 56. The reason is understandable. The ruling cannot be interfered with. The plaintiff has given no reason why such ruling should be reversed.

[33] Now item 62. It was also about a consultation fee. The consultation was held on 6 May 2010. Its scope was limited to the marital dispute between the plaintiff and the second defendant only. The fee claimed was R532,50, disallowed R177,50 and allowed R355,00. The subject-matter of the consultation revolved around certain proposals to the draft deed of settlement which were raised by the first defendant.

[34] The first defendant objected to the fee claimed on the grounds that 45 minutes was too long for the purpose. The taxing officer upheld the first defendant's objection and reduced the alleged duration of 45 minutes by 15 minutes. In her further submissions the plaintiff stated that the consultation was necessitated by the first defendant's insistence that the second dispute, in other words the dispute between plaintiff and the second defendant, should also be resolved and that provision of its terms and

conditions should be made in one and the same deed of settlement as the first dispute, in other words, the dispute between the plaintiff and the first defendant. The plaintiff submitted that the consultation of 45 minutes was necessary to take the case further.

[35] It would seem that before the 6 May 2010 the plaintiff was under the impression that the settlement negotiations concerned the first dispute only. The first defendant has filed no further submission to show that the plaintiff was wrong and that, all along, the plaintiff was well aware that the negotiations concerned the settlement of both disputes. It must be accepted, therefore, that prior to the consultation the scope of the negotiations was a narrow one.

[36] It follows from the foregoing that on the 6 May 2010 the first defendant unilaterally decided to broaden the scope of the negotiations. His sudden decision to fight the second defendant's battle dismayed the plaintiff who was determined to settle a score with the second defendant in a different way at some other time in the future. It must have been difficult for the plaintiff to suddenly consider and decide such an

important and emotionally hurtful matter. Even worse was the tormenting thought of letting the second defendant off the hook on such easy terms and conditions as the first defendant proposed.

[37] It is apparent that the taxing officer did not appreciate the cutting edge of the negotiations. She was persuaded by the first defendant's argument that the consultation was too long and that the plaintiff and her attorney had discuss the aspect of the settlement on various previous occasions. Like the first defendant, the taxing officer did not refute the submission of the plaintiff concerning the new dimension which the first defendant introduced in the negotiations on the 6 May 2010. In the circumstances it could not be convincingly submitted that the consultation was unreasonably long.

[38] In my view the taxing officer did not properly apply her mind to this particular item. That consultation was different from the previous consultations. Its duration was reasonably commensurate to its subject-matter. The plaintiff had invested a great deal of time, expense, resources and

emotions in her decision to sue the second defendant for the alleged alienation of her husband's affection. Taking 45 minutes to decide whether to abandon all that, was not unreasonable. Therefore I would interfere with the taxing officer's ruling in this regard.

[39]

- “• Dit dien verder vermeld te word dat telkemale nadat die verteenwoordigers 'n skikkingsvoorstel bespreek het en nadat daar instruksie geneem is vanaf die Eiser, die 1ste Verweerder daarna verdere wysigings aan die skikkingsvoorstel verlang het. Elke keer was dit nuwe aspekte. So byvoorbeeld is 'n lys van die goedere wat aan 2de Verweerder moet toekom aan die Eiseres verskaf, en sodra die Eiseres toegestem het tot al die items vermeld in die lys, het die 2de Verweerder verdere items vermeld.”

Certainly that was not consistent with the behaviour of a litigant who, right from the onset, genuinely desired to settle in order to avoid further legal costs.

[40] Item 66 was also in dispute. It concerned a fee for a letter written. The fee claimed was R71,00, but the whole amount

was disallowed.

[41] At para 6 of the stated case, the taxing officer wrote:

“Item 66: op dieselfde dag is daar ‘n skrywe toegelaat waar die eiser eers die akte van dading aanheg en afstuur vir ondertekening deur die verweerder (sien item 65) en dan by item 66 steeds op dieselfde datum stuur die eiser weer ‘n skrywe aan die teenkant waarin hulle versoek dat die akte onderteken word, die tweede skrywe op dieselfde dag is dus afgetakseer;”

[42] At par 2.4 of the plaintiff’s further submissions, she replied:

- “• Op 6 Mei 2010 is ‘n ongetekende Akte van dading aan die teenkant gestuur vir oorweging. (Item65) Dit is die eerste Akte van Dading wat opgestel is en waaruit die samesprekings wat in item 63 gemeld is, gevolg het.
- Na die partye skikkingsamesprekings gevoer het en die akte van dading gewysig het, het die Eiseres die gewysigde akte van dading onderteken en is dit per brief afgestuur na die 1ste Verweerder. (item 66).”

[43] The preceding item 65 refers to the letter from plaintiff’s

attorney to the defendant's attorney dated 6 May 2010. A draft deed of settlement was annexed to the letter. The plaintiff's attorney wrote the letter dated 6 May 2010 to the defendant's attorney. The draft deed of settlement was annexed to the letter. The plaintiff had apparently signed the proposed deed of settlement. In the draft the plaintiff addressed the first dispute only. She expected the first defendant only to sign. Therefore, the letter had nothing to do with the second defendant.

[44] Upon receipt of the letter the first defendant's attorney apparently contacted the first defendant. The first defendant declined to sign the draft deed of settlement attached to the letter because, as we already know, no provision had made for the secondary dispute in the original draft. After such consultation, the first defendant's attorney telephoned the plaintiff's attorney (vide item 62) and informed him about the first defendant's attitude and new demand, viz provision for the settlement of the secondary dispute in the same draft (vide item 65).

[45] The refusal of the first defendant to sign the original draft

deed of settlement, as I have already pointed out, made it necessary for the plaintiff's attorney to call the plaintiff back for necessary consultation on the same for the further instructions (vide item 63). During that further consultation on 6 May 2010 the plaintiff acceded to the first defendant's proposal concerning the settlement of the secondary dispute as well. Her attorney accordingly amended the draft deed of settlement. The amended draft deed of settlement was then resent to the first defendant's attorney on the same day for signing by the first defendant as well as the second defendant (vide deed of settlement, signed 13 May 2010). Herein lies the difference between item 65 and item 66. The latter concerned both the primary and secondary disputes and was accepted by the defendants whereas the former concerned the primary dispute only and was rejected by the defendants.

[46] The taxing officer failed to recognised the important distinction. She erroneously reckoned that what was stated in the letter (item 66) could as well have been embodied in the earlier letter (item 65) to which the original draft deed of settlement was annexed. What the taxing officer regrettably

failed to grasp was that item 65, in other words the first letter, referred to the original draft whereas item 66, the second letter, had a bearing on an amended draft. The difference between the two was of great significance. The amendment was material. It was effected on the specific insistence of the defendants.

[47] The taxing officer was persuaded by the first defendant's objection that item 66 was a duplication of the fee already allowed under item 65. There was no substance in such an objection. In my view the taxing officer was clearly wrong to sustain the defendant's objection. I am in a better position than the taxing officer to make a decision on the disputed item. See LEGAL AND GENERAL ASSURANCE SOCIETY LTD v LIEBERUM, NO AND ANOTHER *supra*. Therefore I am inclined to interfere. The plaintiff's objection is sustained. The taxing officer's ruling is set aside.

[48] Also in dispute was item 70. The item was about a consultation held for 45 minutes on the 12 May 2010. The fee claimed was R532,50, disallowed R177,50 and allowed R355,00. The subject-matter of the consultation was

perusing defendant's list of lose tools and alleged amended draft. The defendants objected to the item on the grounds that the consultation was too long and not supported by any contemporary written note. The taxing officer sustained the objection albeit on different grounds. Firstly, she stated that the list did not make it necessary to amend the draft deed of settlement. Secondly, she stated that the list in question was a one-page document. The taxing officer was therefore of the view that the whole business of considering the least could have been properly done in no more than 30 minutes.

[49] It is significant to remark that the plaintiff did not re-joined issue with taxing officer's reasons for her conclusion that 45 minutes consultation was unreasonably long in the circumstances. It indicated that the plaintiff must be taken to have conceded the merits of the taxing officer's ruling. In this instance, I would decline to interfere with the ruling of the taxing officer. In this circumstances it cannot be said that the taxing officer took a decision which no reasonable taxing officer would have taken.

[50] Finally, I turn to item 72. That item was also about the

holding of a consultation. The fee claimed and wholly disallowed was R355,00. The plaintiff submitted that a 30 minutes consultation was a necessary pre-trial consultation. The defendants objected to the length of the consultation.

[51] The taxing officer motivated her decision by stating that pre-trial consultation was not allowed on a “pap” scale in uncontested divorce actions which were disposed of in the general motion court for uncontested matters. She went on to comment that an attorney was allowed a standardised fee for strictly 30 minutes. Such a fee was all-inclusive of the necessary court attendance for the finalisation of a matrimonial action (vide item 73) seeing that an advocate had been briefed (vide item 82).

[52] The contention of the first defendant was that the final decree was not granted in the general motion court as an uncontested divorce action. According to the first defendant, a divorce action was not on the court roll of the 13 May 2010. What was on the court roll in the separate motion court for the contested matters was a rule 43 application. The submission of the first defendant was therefore that

seeing that the first defendant was opposing the plaintiff's application for interim maintenance, a pre-hearing consultation was necessary.

[53] The deed of settlement was signed on the 14 May 2010. It was then faxed by the plaintiff's attorney to the defendant's attorney. The transmission appears to have started 13:58 and ended at 14:04. That tended to give credence to the plaintiff's case that her application in terms of rule 43 for interim maintenance was opposed by the first defendant; that it was settled on the very day of the hearing; that as a result of its late settlement it was removed from the roll; that the main divorce action was then fast-tracked enrolled and finalised.

[54] I am persuaded by the plaintiff's submission. Although the plaintiff eventually took the divorce order on unopposed basis and by virtue of the deed of settlement hers was not a typical undefended action disposed in the uncontested motion court by virtue of a deed of settlement reached without hassles and signed long before the matter or the action was enrolled for hearing. In these circumstances it

would be inequitable to deprive the plaintiff of a fee for holding a pre-trial consultation.

[55] The taxing officer erred in finding that the instant case was an uncontested matter and that the deed of settlement was already signed by the two parties. The true facts were that, at the time the consultation was held, there was no signed deed of settlement. The matter was eventually settled after 14H00 when proof of settlement was evidenced by the signatures of all the parties. I have to mention that, in principle, the defendant(s) did not dispute the necessity *per se* of such a consultation. They merely questioned the alleged length thereof.

[56] I am of the firm view that such pre-hearing consultation was indeed necessary. It follows from this that the plaintiff was entitled to recover the fees relative thereto on the “pap” scale. The taxing officer considered factors which she was not supposed to consider but failed to consider those which she has supposed to have consider – **PRELLER v JORDAAN** *supra*. The result was that she ended up misapplying the principle which applies to undefended but

settled matrimonial matters in the unopposed motion court to defend but ultimately settled matrimonial matters in the contested motion court. The misdirection was so material that it warranted interference, by the ultimately arbiter, with the injudicious exercise of the discretion.

[57] Accordingly, I make the following order:

57.1 The applicant's review application succeeds in respects of items 62, 66 and 72.

57.2 The applicant's review application fails in respect of items 2, 3, 4, 43, 46, 48, 52, 56, 57 and 70.

57.3 The respondent is directed to contribute R400,00 plus 14% value added tax thereon towards the applicant's costs of review.

57.4 The taxing officer is directed to adjust the allocatur accordingly.

M. H. RAMPAL, J

Applicant's attorneys: Rossouws Prokureurs
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