

SOUTH AFRICA / JUDGMENT

Anderson v Hlongwane (11648/2006)

[2012] ZAGPJHC 107 (13 April 2012)

[2012] ZAGPJHC 107**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Weiner

CASE / FILE NUMBER

11648/2006

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Source record**REPORTABLE****IN THE SOUTH GAUTENG HIGH****COURT****(JOHANNESBURG)****CASE NO: 11648/2006****DATE:13/04/2012****In the matter between:**

ANDERSON,
ALEXANDRA.....Plaintiff
and
HLONGWANE, MBUYISELWA
NICHOLAS.....Defendant

JUDGMENT**WEINER J**

- [1] The Plaintiff instituted action against the Defendant for damages to her vehicle which were a consequence of a collision that occurred between her motor vehicle and a motor vehicle owned by the Defendant.
- [2] The Defendant is a taxi operator, whose vehicle, with registration number NCP 538 GP, was being driven by one Kanyisa Ndlovu (Ndlovu) on the day of the collision.
- [3] The Plaintiff was the owner of a Jeep Cherokee, with registration RFL 855 GP.
- [4] It is common cause that a collision occurred on William Nicol Drive, close to the T-Junction with Erling Road in the district of Randburg.

- [5] The Plaintiff initially pleaded that Ndlovu was employed by the Defendant as a driver, and was acting in the course and scope of his employment. It emerged during the course of the pleadings and at trial, that in fact, Ndlovu was not employed by the Defendant.
- [6] Apparently the Defendant's employee, one Pumlani Makaza (Makaza) to whom the vehicle had been allocated, requested Ndlovu to take over his duties for the day, which Ndlovu did.
- [7] In regard to the cause of the collision, the Plaintiff and her husband, Bruce Anderson (Anderson), gave evidence. Their evidence corroborated each other in all material respects, and in summary, was the following:

They were travelling along William Nicol Drive, towards Erling Road;

They had slowed down to turn into Erling Road, which was approximately 100 meters ahead of their vehicle;

They both noticed the Defendant's vehicle on the other side of the road, because the traffic on that side of the road was heavy, and the cars were bumper-to-bumper;

At the back of the queue, at the top of the hill, was an ice-cream van;

The Plaintiff and Anderson noticed the Defendant's vehicle coming up behind the van at a speed;

The defendant's vehicle then suddenly swerved onto the Plaintiff's side of the road (which was a single lane) over the solid white line, and was coming towards them;

Anderson flashed his lights and hooted, but the Defendant's vehicle continued towards them;

As a result, Anderson swerved to the left, but at that point, the Defendant's vehicle attempted to swerve to his right to get off the road. Anderson swerved to his right to attempt to avoid the defendant's vehicle, but was unable to do so, and the collision occurred.

- [8] It was a clear morning and there was nothing impeding the view of either driver. Immediately after the impact, the airbags had inflated. The plaintiff and Anderson then checked their children and took them out of the vehicle. One of the passengers in the Defendant's vehicle had flown through the front windscreen and landed on the Plaintiff's vehicle. The Plaintiff did not speak to the driver of the vehicle, but noticed that there were about ten other passengers in the taxi, who were injured. Anderson did speak to the driver of the vehicle, who was evasive and would not give his details to Anderson. Anderson stated that the driver of the vehicle was evasive, and another unknown male intervened and became very aggressive. They obtained the information of the driver from the medical personnel. The driver's name was Ndlovu, and his identity number (8012225360087) and cell-phone number were provided.
- [9] Quinton Pretorius, a constable in the Metro Police Department, who deals with accidents and traffic-related incidents testified on behalf of the plaintiff. He gave evidence in regard to a printout from the 'eNatis' system reflecting traffic fines in respect of Ndlovu. A traffic fine had been given to Ndlovu on William Nicol Road near Uranium Road, on the 29th of August

2005. His identity number was 8012225360087, and he was driving a vehicle with registration KZC 909 GP. It is common cause that that vehicle is also owned by the Defendant, and was being driven by Ndlovu on that day.

- [10] On the merits, that was the evidence for the Plaintiff. The Defendant initially informed the court that no witnesses would be called; more particularly because the Defendant himself was in fear of his life, for a reason apparently unrelated to this particular case, but related in some way to his ownership of certain taxis. There was no evidence led in relation to the cause of the collision. Ndlovu is apparently deceased. Defendant's counsel cross-examined the plaintiff and Anderson in an attempt to establish negligence on Anderson's behalf. This will be dealt with below.
- [11] However, the Defendant then called two witnesses in relation to the defendant's liability. The first was Dumisane Xulu (Xulu) who is the younger brother of the Defendant. He was in charge of the Defendant's fleet of taxis and assigned the vehicles to specific drivers each morning. On the day of the collision, he was employed by the Defendant and was in charge of the vehicle NCP 538 GP, which he assigned to Makasa. He recalls receiving a call from Makasa, mid-morning, informing him that the vehicle had been involved in a collision, but that he was not the driver. He stated that Ndlovu was the driver.
- [12] Xulu telephoned the tow-truck company to go to the scene of the accident. Makasa was apparently fired as a result of this incident, and was only found the day before the trial, in KwaZulu-Natal. Xulu stated that Makasa did not have permission to hand the vehicle to another driver, and that this was not the practice of the Defendant's employees. He also testified that the fares are collected by the drivers and are handed over to him on a Sunday. There was some inconsistency in his evidence as to whose function it was to ensure that the vehicles were in a roadworthy condition. But as no evidence was placed before the court as to the condition of the Defendant's vehicle, and whether its condition led to the collision, this aspect is of little relevance.
- [13] He understood from Makasa that the latter was feeling ill, and accordingly asked Ndlovu to drive his route for him, and collect passengers and fees which would later be handed to Makasa, who would hand them over to Xulu on the Sunday. He stated that he was unaware of the fact that drivers often asked informal drivers to take over their duties. If a driver is sick, he is obliged to bring the vehicle back to the office and Xulu would reassign the vehicle. He denied that Ndlovu was ever employed by the Defendant. He however admitted that the vehicle driven by Ndlovu in the August of that year, with registration number KZC 909 GP, was also owned by the Defendant. This vehicle was apparently assigned to one Hlatshwayo, who had also asked Ndlovu to take over his duties for that day. Both Ndlovu and Hlatshwayo are apparently deceased and accordingly, their evidence could not be led. Xulu stated that he spelt it out to each driver that only the designated driver could drive the particular vehicle.

[14] Xulu denied that the driver of an allocated vehicle may use the vehicle for his own use, as well as for business purposes. This evidence was in conflict with paragraph 6.3 of the Defendant's plea. The relevance of this will be dealt with later.

[15] As a result of the pleadings and the information obtained prior to the trial, the Plaintiff sought only to rely on the alternative claim, not on the claim that Ndlovu was acting within the course and scope of his employment with the Defendant. The alternative claim was that, *"7.1 the vehicle owned by the Defendant was driven on his behalf and/or in his interests by Kanyisa Ndlovu.*

7.2 at all relevant times the relationship between the Defendant and Kanyisa Ndlovu was such that the Defendant retained the right to control the manner in which the vehicle was to be driven;

7.3 the Defendant did not exercise proper control over the vehicle."

[16] Makasa's evidence was that on the day of the collision he was allocated the vehicle, NCP 538 GP, to go on his route which was the William Nicol Road, from Randburg to Diepsloot. His duties were to drive the route, collect the fares from the passengers, and check them in on the following Sunday. According to him the vehicle was in good working order, although the way in which he checked it seemed rather perfunctory. But as stated above, this issue was not taken further by the Plaintiff. Makasa stated that on the day in question, he was feeling ill. He saw Ndlovu, who was at the taxi rank where the Defendant kept all of his vehicles, and asked him to drive his route for him.

[17] He stated that Ndlovu was a person well-known to the other employees of the defendant at the rank, and that they would regularly ask Ndlovu to drive vehicles for them. He arranged with Ndlovu that payment would be made to Ndlovu, and that the fares paid to Ndlovu would be given to Makasa who would hand them over to Xulu. He handed the vehicle to Ndlovu at the rank that morning when it was allocated to him. He could not explain why he handed it to Ndlovu and did not go to Xulu to ask him to allocate another driver., save that it seemed from his evidence that he did not regard it as out of the ordinary to rather ask Ndlovu to drive for him. Makasa stated that, after the collision, he was frightened because of what he had done, and he did not know how to explain it to Xulu. He did not see Ndlovu again and did not collect the money from him. He stated (as did Xulu) that he attended at the Defendant's offices about 4-5 days after the collision, to explain to him what had happened. His employment was terminated He went to KwaZulu-Natal where he was found by Xulu the previous day. He stated that he was not allowed to give the vehicle to Ndlovu because he did not ask permission.

[18] Under cross-examination, he stated that he had not been warned about giving the car to other drivers and he had seen this happen at other places. However, he reiterated that the Defendant and Xulu did not allow this.

- [19] The pertinent portion of Makasa's evidence is that he was employed by the Defendant in April of 2005. He was asked if he had a driver's license, and he said he did. This was simply accepted by the Defendant without any further investigation, and the truth was that Makasa did not have a driver's license. However, despite this, he was employed by the Defendant and, for approximately 5 months, drove the Defendant's vehicle without a driver's licence. In regard to the procedures involved, he stated that when the vehicle was driven for a day it was taken back to the office where it was checked-in by the security guards. When Ndlovu had driven on the previous occasion, Ndlovu himself had taken the vehicle back to the office.
- [20] Makasa however, clarified this, by stating that on that occasion he had informed Xulu that Ndlovu was driving the vehicle, and Xulu had said that it was alright as long as Makasa knew the driver.
- [21] He confirmed that when he gave the vehicle to Ndlovu on the previous occasion, he had notified Xulu, who was satisfied with Ndlovu driving on his behalf. He stated that that case was different because he had made prior arrangements and that was an acceptable arrangement for the Defendant. However, it appeared that the only condition was that Makasa knew the driver who was to drive the vehicle.

THE ISSUE OF NEGLIGENCE

- [22] In regard to the merits of the Plaintiff's case, the Plaintiff argued that it was clear that the negligence that was shown in the collision, was purely that of the Defendant's driver. From the evidence that was given by the Plaintiff and her husband, it seems clear that the negligence was that of Ndlovu, and that the Plaintiff's husband was in no way contributorily negligent in this regard. Defendant's counsel's attempts to discredit Anderson on the basis that the latter could have avoided the collision if he had braked, cannot be accepted. The question is whether Anderson acted reasonably in the circumstances. The court finds that he did. See *Road Accident Fund v Grobler* 20 07 (6) SA 230 (SCA).

LIABILITY OF THE OWNER

- [23] The next question is whether or not the Defendant is liable for the negligence of a driver who is not in his employ. In this regard the Plaintiff relies on the alternative claim in its Particulars of Claim, as set out paragraph 14 above. The Plaintiff referred to LAWSA, Volume 8 (2nd ed) Part 1, on Vicarious Liability; and in particular, the section which reads as follows,

"Vicarious liability is not limited to employment relationships. in Messina Associated Carriers v Kleinhaus [2001] 3 All SA 285 (SCA) at [13], the Court noted that "the law will permit the recovery of damages from one person for delict committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, ... where 'in the eye of the law' the one was in the position of the other's servant."

- [24] See also *Van Drimmelen and Partners v Gowar and others* [2004] 1 All SA 175 (SCA) at [6], where it was held by Zulman JA:

“In order to render a master liable the servant must have committed the delict “while engaged upon the master’s business” (Carter & Co (Pty) Ltd v McDonald 1955 (1) SA 202 (A) at 207B–C). Ownership by the master, for example of a vehicle, through which the harm was done, may provide material for inference, but by itself is irrelevant.”

- [25] In *H Mohammed & Associates v Buyiye* 2005 (3) SA 122 (C), at 129 I–J, Davis J held that, in order to hold the owner of a minibus taxi vicariously liable for the delicts of another, the plaintiff would have to show that the owner was the driver’s employer, “or that he was the owner of the taxi, and consequently liable for the negligent driving of his agent.”

Davis J further held that,

“[i]f it is accepted that the ownership of the vehicle is not the criterion for liability, but no more than one of the indicia which establishes the necessary relationship between himself and the driver, and that his liability arises from his right as owner to control the vehicle, logically, it must follow that if such a right is transferred to another that that might be sufficient to establish a relationship on which vicarious liability will arise.” At 132 B.

- [26] In dealing with this concept, the necessary link can be created between the owner and driver of a motor vehicle in certain circumstances. In *South African General Investment and Trust Co Ltd v Mavaneni* 1963 (4) SA 89 (D), Fannin J held that the owner of a motor vehicle will be liable for the negligent driving of it by another person authorised by him to drive it if: (a) the vehicle is being driven on behalf of the owner, and (b) the relationship is such that the owner retains the right to control the manner in which the car shall be driven.

- [27] See also, *Messina Associated Carriers v Kleinhaus* supra at [15] H–I. Scott JA applied, but qualified the dictum in *Mavaneni* supra. Scott JA dealt extensively with the concepts of the “right to control” and “the power to control” and the previous authorities which were divided on this point. He held:

In regard to the *Mavaneni* Case: “The above passage has been repeatedly quoted with approval in subsequent cases. Nonetheless, the decisions in the various Provincial Divisions both prior and subsequent to *Mavaneni*’s case are in many instances not reconcilable. The reason is largely attributable to a greater emphasis being placed on one or other of the elements referred to by Fannin J.

- [11] In two reported judgments the requirement that there be the right to control was increased to a requirement that there be the power to control. The first was *Kinnear v Ruto Flour Mills (Pty) Ltd* 1968 (2) PH 051 (T). In that case, of significance is that one of the grounds upon which Nicholas J held the owner not to be vicariously liable was that he was not present in the vehicle and therefore he -

“was not in possession, and was not in a position to exercise direct control over the driving of the motor car”. (My emphasis.)

The second was *Braamfontein Food Centre v Blake*, (1982 (3) SA 248 (T), which is the decision referred to by McCreath J in the Court below and by which the judge considered himself bound. Goldstone J, with whom Nicolas J concurred, referred to Boucher’s case, *supra*, and relying on certain dicta of Van Heerden J held that for the owner to be vicariously liable he had to have the “power to control” the driver and not merely the “right to control” him. Accordingly, although on the facts of the case the owner retained the power to determine the route to be followed, the time of departure and the approximate speed, this was held “not sufficient to have constituted the retention of control” by the owner necessary to render him liable (at 251 E). The learned judge doubted “whether this kind of liability can arise where the owner or other person sought to be held liable ... is not actually present in the vehicle” (at 251F). On the basis of the Court’s reasoning it is difficult to see how it could. Both decisions have been the subject of trenchant criticism. (See *Cooper Delictual Liability in Motor Law* 446.) Their correctness was similarly challenged by counsel for the appellant in this Court.....But direct control or the power to control has never been a requirement of vicarious liability. The right to control, being an element of the employer - employee relationship, is regarded as an important factor in determining whether such a relationship exists, but once it is found to exist it is of no consequence that at the time the employee commits the delict the employer is not present to exercise his right of control. In these circumstances there would seem in principle to

be no reason why, in the case of an owner who is not the employer of the driver, the physical presence of the former and the power to control (as opposed to the right to control) should be introduced as a requirement for vicarious liability.

[13] It is true that in many, if not all, reported cases in which an owner (in the absence of an employer - employee relationship) has been held vicariously liable, he has been a passenger in the vehicle when it was negligently driven. But that is no reason for requiring his presence in the vehicle as a rule of law. Such a requirement is not only difficult to justify on a rational basis but strikes me as likely to produce anomalous results.....But once it is accepted that he has such a right there is no reason why his added presence in the vehicle should be treated as a *sine qua non* for vicarious liability. It is interesting to note that although English law proceeds on a somewhat different basis, there is no requirement that the owner must be present in the vehicle in order to incur vicarious liability. (*Ormrod and Another v Crossville Motor Services and Another* [1953] 2 All ER 753 (CA).) In the United States of America vicarious liability has been imposed on owners who were not passengers both by way of statute

and the development of judicial theories such as the “joint enterprise” and “family purpose” doctrines. (See *Prosser Wade Schwartz Cases and Materials on Torts* 7 ed at 696 et seq.)

[15] As important as the requirements identified in the Mavaneni case may be, they are, I think, in reality no more than indicia and should be recognised as such. Ultimately the true inquiry is whether the relationship between the owner and the driver and the interest of the former in the driving of the latter is sufficiently analogous to the case of an employee driving in the course and scope of his employment to justify the negligence of the driver being attributed to the owner. The answer will depend on not only a careful analysis of the facts of each case but also on considerations of policy. As I have indicated, depending upon the circumstances the presence or otherwise of the owner in the vehicle may prove to be a determinative factor, but not necessarily so.

[28] Scott JA also dealt with the other situation in which the owner may be held liable. He referred to Watermeyer J in *Van Blommenstein v Reynolds* 1934 (CPD) 265 at 269, where liability would attach if, “in the eye of the law” the driver was in the position of the owner’s servant. In such a situation one is really dealing with an analogous extension based on policy considerations of the employer’s liability for the wrongful conduct of an employee. In *Messina* supra Scott JA dealt with this statement at 291 and stated as follows:

“Over the years the elements of the legal relationship between employer and employee and the interests of the one in the conduct of the other have been isolated in order to determine whether, in the absence of such a relationship, one person should nonetheless be held liable for a delict of another. This is particularly so in the context of a motor vehicle being driven negligently by someone other than the owner.”

[29] In regard to the vehicle being driven on behalf of the owner, Fannin J in *Messina* supra held that it is sufficient if the journey is partly for the purposes of the driver, and partly for those of the owner, as long as the interests of the owner are not peripheral. Reference is made in LAWSA to *Kern v Minister of Safety and Security* – SCA 11 November 2004, Unreported. In paragraph 4, the Court noted,

“that the test commonly referred to as the standard test, has been repeatedly applied by this court. Where there is a deviation, the enquiry, in short, is whether the deviation was of such a degree that it can be said that in doing what he or she did, the employee was still exercising the functions to which he or she was appointed, or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly, or dishonestly, or negligently, those functions or instructions were being exercised by the employee.”

Scott JA then referred to the questions as formulated by Fannin J, referred to above.

[30] Fannin J referred to the case *Ormrod and Another v Crossville Motor Services Ltd and Another* 1953 (2) AER 753 CA in which, at 55A-B Denning LJ said,

“the law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner’s business or for the owner’s purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern.”

- [31] The case of *Ormrod and Another v Crossville Motor Services Ltd* supra was also discussed with apparent approval by Scott AJ, in *Messina Associated Carriers v Kleinhaus* supra at 875 D-E.
- [32] Plaintiff’s counsel in referring to the principles enunciated above, referred also to the National Road Traffic Act 93 of 1996, which provides the framework for a quality control system aimed at more effective control and management of vehicles, drivers and operators, as well as enforcement programmes. In terms Chapter VI, there are certain duties imposed on an operator of a motor vehicle. Section 49(c) provides as follows: The operator of a motor vehicle shall exercise proper control over the driver of such motor vehicle to ensure the compliance by such driver with all the relevant provisions of this Act. Section 49(e) provides that the operator of a motor vehicle, shall conduct his or her operations with due care to the safety of the public.
- [33] The definition of “operator” contained in section 1 of the Act refers to ‘the person responsible for the use of a motor vehicle of any class contemplated in Chapter VI, and who has been registered as the operator of such vehicle.’ The plaintiff did not establish whether the Defendant has been registered as the operator of the vehicle. In the Plaintiff’s Particulars of Claim it is alleged that ‘the Defendant is a major male taxi operator’, and this is admitted in the Defendant’s Plea. However, no evidence was led as to whether ‘operator’ was being used loosely or within the parameters of the definition.
- [34] The Plaintiff must show that her case falls within the parameters of the law rendering the Defendant liable for the negligence of the driver. The Plaintiff argued that the facts in this case show that it appeared to be common knowledge and common practise, that drivers would ask other parties to drive for them, and that the same driver, Ndlovu, had been asked by at least two members of the Defendant’s fleet to drive on their behalf. The only limitation appeared to be that the driver had to know the person to whom he was handing the vehicle.
- [35] One cannot fathom a reason for this strict limitation on the drivers, when the Defendant had employed Makasa, the driver, with total disregard as to whether or not Makasa had a valid driver’s licence. In regard to this strict limitation, the evidence of Xulu and Makasa seems contrived and cannot be accepted. For reasons which the court was informed related to the defendant’s safety, he chose not to testify. However, this lack of evidence for whatever reason, leads to an adverse inference being drawn. One must remember that a material allegation in the pleadings of the defendant was denied, in evidence by Xulu. This related to the defendant’s averment that the drivers could utilise his vehicles for both his business and for their own concerns. This highlights the fact that the control which he exercised over the

drivers was much more lax than Xulu and Makasa tried to show. Regard being had to Makasa's lack of a valid driving licence, the defendant obviously had no concern as to whether or not the drivers were responsible or not, or who was driving the vehicles, as long as his business continued. In addition, if one has

regard to the National Road Traffic Act, the Defendant, if the admission is that he was a registered operator is accepted, has not acted within the parameters of that Act in controlling his vehicle and the way in which it was operated. The owner would have a duty to ensure that the driver concerned was the only one driving, and that such driver had a valid driving license. The authorities quoted above suggest that, the common law, in any event, covers the present situation.

[36] In this case, the Defendant showed total disregard for the control which he was obliged to exercise over the driver of his vehicles. The taxi was being driven on behalf of the Defendant in that the "owner's business" was being carried on by the driver, Ndlovu. In terms of the Mavaneni case, the Defendant retained the right to control the manner in which the car was being driven. The words of Denning LJ referred to above in *Ormrod and Another v Crossville Motor Services Ltd and Another* supra at 55A-B are apposite in this regard:

"If it is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern."

In the present case, Ndlovu, on behalf of Makasa, was carrying on the defendant's business.

QUANTUM

[37] In regard to the quantum, the Plaintiff called the evidence of one Ebrahim Khan, who had been assessing motor vehicles for over 10 years. He assessed the Plaintiff's motor vehicle in 2005 and concluded that the vehicle had been damaged beyond repair. He took the photos at the assessment and received a repair estimate on the 4th of October 2005. The total repair cost was approximately R192 000.00 to place the vehicle in its pre-collision condition. Having perused the quotation, he deemed that each item was necessary and that the price was fair. The pre-collision value of the vehicle was approximately R242 600.00 and the book value was a similar amount, according to the Mead and McGrouther Auto-Dealer's Digest. The vehicle was not repaired because it was uneconomical to repair it if the repairs were more than 70% of the value of the vehicle. In regard to the salvage he sold it to a salvage company for R 65 732.70, which he believed to be a fair and reasonable price.

[38] Khan did not see the wreck and could not ascertain whether or not it was correct, but stated that he assessed the value of the wreck by looking at the quote. His opinion was that the salvage price was reasonable because it was based upon 26% of the gross settlement figure and it is common trade usage for the insurance company to use such percentage in these sorts of cases. He stated the exact market value and mileage of this particular car was not taken into account, but the Mead and McGrouther estimate was acceptable as the insurance

companies utilise those figures and decide upon the amount applicable. He confirmed that looking at the accident and the condition of the vehicle, the 26% used by the salvage company would have been reasonable in the circumstances and that this is the method that is used on a daily basis. The Defendant did not call any witnesses to challenge this testimony, which the court accepts as establishing the quantum claimed.

[39] The court accordingly finds that the defendant is liable to compensate the Plaintiff for the damages suffered.

[40] In the result:

Judgment is granted for the Plaintiff for:

Payment in the amount of R 176 867.30;

2. Interest on the amount of R 176 867.30 at 15,5% per annum from date of judgment to date of payment.

Costs of suit.

Weiner J

Date of hearing: 10 February 2012

Date of judgment: 13 April 2012

Counsel for Plaintiff: C Denichaud

Attorneys for Plaintiff: Smit Sewgoolam Inc.

Counsel for Defendant: L Naaidoo

Attorneys for Defendant: Logan Naaidoo Attorney

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