

SOUTH AFRICA / JUDGMENT

Berry and Another v SPE Security Patrol Experts and Another (2011 (4) SA 520 (GNP)) [2010] ZAGPPHC 260; 3211/10 (6 August 2010) [2010] ZAGPPHC 260

COURT
North Gauteng High Court, Pretoria

BEFORE
Goodey

CASE / FILE NUMBER
3211/10

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REPORTABLE
IN
THE NORTH GAUTENG HIGH COURT,
PRETORIA
(REPUBLIC OF SOUTH AFRICA)
CASE
NUMBER: 3211/10

DATE: 06/08/2010
BERRY,
DAPHNE
CAROL.....First
Plaintiff
BERRY,
THEUNIS
GERHARDUS.....Second
Plaintiff
and
SPE
SECURITY PATROL
EXPERTS.....First
Respondent
ROAD
ACCIDENT
FUND.....
Second Respondent

JUDGMENT

GOODEY AJ:

[1]

INTRODUCTION:

1.1 This matter is about what is commonly referred to as "golf cars".

1.2 The appearances in this matter were as follows:

On behalf of the Plaintiffs:

Adv LF Bezuidenhout

On behalf of the First Defendant:

Adv E Labuschagne SC

On behalf of the Second Defendant:

Adv N van der Walt SC

1.3 This matter was very thoroughly debated over a period of two days and I wish to extend my gratitude towards counsel for their assistance.

[2]

BACKGROUND:

2.1 The Plaintiffs' claim against the Defendants arises out of a collision on 1 March 2001 between the Plaintiffs on the one hand and; on the other hand, a six caddy petrol driven personnel carrier, also referred to as "the shuttle".

2.2 The gist of the First Defendant's defence is contained in paragraph 3 of it's special plea which reads as follows:

"In terms of the provision of Section 21 of the Act read together with Section 17(1)(a) thereof:

3.1 Any claim for compensation which the Plaintiff might have arising out of the foregoing circumstances lies against the ROAD ACCIDENT FUND ("the Fund") only:

3.2 The Plaintiff is precluded from claiming compensation from any party other than the fund,"

2.3 The gist of the Second Defendant's defence is contained in paragraph 3 of it's special plea which reads as follows:

"It is pleaded that the battery powered golf cart which collided with the Plaintiff is not a motor vehicle in terms of the provisions of section 1 of the Act and, in the premises, the Defendant incurs no liability to compensate the Plaintiff for any loss of damage contemplated in terms of the provisions of Section 17 of the Act."

2.4 At the pre-trial conference the same counsel (referred to above) appeared and it was agreed as follows, as per paragraph 4 of the pre-trial minute:

"The parties agree that only the special plea, namely whether the vehicle in question is a vehicle as contemplated in the Road Accident Fund Act, 1996 will be adjudicated on at this junction."

2.5 At the commencement of the trial counsel informed me that they intended to call various expert witnesses. At the end of the day, due to various concessions made (and wisely so to my mind) only one, namely Mr Johnson was called by the First Defendant.

2.6 Agreements reached and concessions made by the Parties:

2.6.1 The parties confirmed that it is common cause that the vehicle which Mr Johnson (only witness) inspected and pertaining to the vehicle he testified about, is the one that was involved in the collision;

2.6.2 The parties confirm that it was common cause that the photo's on pages 66, 67 and 68 of exhibit A indicate the main entrance for vehicles at the Unitas Hospital;

2.6.3 It is further common cause that the Plaintiffs were allegedly injured by a vehicle similar to the one on page 69 of exhibit A (second photo);

2.6.4 Counsel submitted that I should apply an objective test and that the development of our Constitution as such does not play a role in this instance;

2.6.5 They assured me (I am of opinion rightly so) that licensing is irrelevant in this instance.

[3] ORDER I AM REQUESTED TO MAKE:

3.1 Mr Bezuidenhout (on behalf of the Plaintiffs) confirmed that he supported the arguments and submissions of Mr Labuschagne SC (on behalf of the First Defendant), namely that the vehicle in question is indeed a "motor vehicle" for purposes of the Road Accident Fund.

3.2 Mr Van der Walt SC (on behalf of the Second Defendant) submitted the contrary.

3.3 The parties then came to an agreement that, depending on my finding whether the vehicle in question is a "motor vehicle" or not, that I then should make the following order:

"A. Should it be found that the shuttle is a vehicle in terms of the act:

- (i) The First Defendants special plea is upheld;
- (ii) The Second Defendant's special plea is dismissed;

(iii) The Second Defendant is ordered to pay Plaintiff's and First Defendant's costs including costs of senior counsel and preparation

fees of Mr Van Onselen.

B. Should it be found that the shuttle is not a vehicle in terms of the act:

(i) The First Defendant's special plea is dismissed;

(ii) The Second Defendant's special plea is upheld:

(iii) The First Defendant is ordered to pay Plaintiff's and Second Defendant's costs including the costs of senior counsel.

[4] WHAT IS A "MOTOR VEHICLE"?:

4.1 A "motor vehicle" is defined as follows in Sec 1 of the Road Accident Fund Act, 56 of 1996:

"Any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, and agricultural or any other implements designed or adapted to be drawn by such motor vehicle" (my underlining).

4.2 It is clear that the underlined portions of the definition deserves attention, namely:

4.2.1 "any vehicle";

4.2.2 "designed or adapted";

4.2.3 "propulsion or haulage";

4.2.4 "a road".

4.3 AD: "Any vehicle"

4.3.1 The word "any" clearly confirms that the approach is not limited. Moreover, so as "anybody" means "a person, no matter who; whichever person" and "anything" means "something, no matter what; whatever thing" [See OXFORD ENGLISH DICTIONARY], any vehicle similarly must mean "any vehicle, no matter what, whatever vehicle" as long as it complies with:

(a) "designed or adapted for propulsion or haulage";

(b) "on a road";

(c) By means of fuel, gas or electricity".

4.3.2 AD: "Designed or adapted"

(a) "According to the brochure (which is not in dispute) the vehicle in casu (shuttle) has been designed "with heavy duty leaf springs... This is the ideal vehicle for any resort, hotel, park or shopping mall".

(b) The brochure (front page thereof) reads as follows:

"Need more space but demand the manoeuvrability of a golf car? The E-Z-GO Shuttle 6 was made for you. Available in either gas or electric models, the Shuttle 6 has seating for up to 6 adults and is designed with heavy duty leaf springs and hydraulic shocks for comfort and support. This is the ideal vehicle for any resort hotel, park, or shopping mall. With options and accessories such as hydraulic brakes and a light package, you can customize

it to your specific needs. What else would you expect from the world's finest utility vehicle maker?" (my underlining)

4.3.3 AD: "Propulsion or haulage"

(a) "Propulsion" = the action or act of driving or pushing something forward.

See; Mathie v Yorkshire Insurance Company Limited 1954(4) SA 731 A at 734- 735

Where the following was said: "Designed or propulsion" means "designed to be propelled by the vehicle's own power".

(b) "haulage" = pull or draw with force; 4.3.4 AD: "a road"

(a) The RAF Act, 56 of 1996 does not provide a definition of a "road". A predecessor of the Act, i.e. Sec 2(1) of Act 56 of 1972 made reference to "a public road or street or ... any other place to which the public has access".

(b) Sec 17 of Act 56 of 1996, relating to the liability of the Fund under the Act, refers to driving "at any place within the RSA".

(c) The requirement of a "road" being a reference to a "public road" has fallen away - see Bell v RAF 2007(6) SA 48 SCA

(d) "Bearing these various definitions in mind, it seems to me that although a "road" as envisaged in the definition is not necessarily limited to a public road, the natural meaning of the word implies a prepared surface having a determined path leading from one place to another and to which a number of people and vehicles may have access at any given time." - See Prinsloo v Santam Insurance Ltd [1996] 3 All at 225 (my underlining)

(e) The word "road" has been dealt with in various cases:

(i) "... a line of communication, especially a prepared track between places for use by pedestrians, riders and vehicles."

See ; Chauke v Santam Ltd [1996] ZASCA 120; 1997 (1) SA 178 (A) at p 181 G

(ii) "...the road referred to in the definition is not just any kind of road however restricted public access, whether vehicular or on foot, may be, but the road which the public at large and other vehicles are entitled to use and do use; in general parlance, a public road."

See ; Road Accident Fund v Vogel 2004 (5) SA (1) (SCA) at p 4 D-E

Bell v Road Accident Fund 2007 (6) SA 48 on 51 E

- (f) The word "public road" used in some of the decided cases must not be interpreted to mean a "public road" within the definition of Road Traffic Acts or Regulations.

See: Bell (supra)

- (g) The Supreme Court of Appeal found that the "road" includes a "haul road"

See; Road Accident Fund v Mbendera & Others, All SA 2004 (4) 255 SCA

- (h) In casu it is clear (and it also seems to be, to a certain extent, common cause) that the area at the Unitas Hospital is used by pedestrians and cars and therefore falls within the definition of a road.

[5] CHARACTERISTICS OF THE VEHICLE IN QUESTION:

5.1 The vehicle in question was rented in February 2001 from Golf Carts Inc (known known as E-Z-Go) by the Pretoria East Hospital in terms of a written lease agreement. The shuttle in question is supplied by E-Z-Go as sole distributors in Southern Africa of the American manufacturers thereof.

5.2 The vehicle in question has a longer wheelbase than a golf cart and has bench seating for 6 (six). It is provided with the following:

5.2.1 A petrol driven engine;

5.2.2 Steering wheel;

5.2.3 Headlights (optional);

5.2.4 Rear lights (optional);

5.2.5 Rear braking lights (optional);

5.2.6 Horn;

5.2.7 Both parking brakes and normal brakes (incorporated into one brake pedal);

5.2.8 Forward and reverse gears;

5.2.9 A choke;

5.2.10 Canopy;

5.2.11 Heavy duty leaf springs and hydraulic shocks;

5.2.12 It has no side or rear mirror/mirrors.

[6] EVIDENCE OF MR JOHNSON:

6.1 According to the evidence of Mr Seiwyn Johnson, a director of E-Z-Go, the shuttle 6 model is widely used as a people mover or personnel carrier on road surfaces at various locations, for example:

6.1.1 Holiday-resorts;

6.1.2 Large shopping complexes;

6.1.3 Large factories;

6.1.4 Residential estates;

6.1.5 Airports;

6.1.6 Hospitals; and

6.1.7 Hotels.

6.2 He further confirmed the brochure, referred to in paragraph 4.3.2 above.

6.3 Under cross-examination by Mr Van der Walt SC he conceded:

6.3.1 The vehicle in question has no proper canopy;

6.3.2 Has no rear mirror;

6.3.3 Has no arm rests;

6.3.4 Has no safety belts;

6.3.5 Could be, to a certain extent, unsafe;

6.3.6 Denied that it is inherently unsafe.

[7] ARGUMENTS ON BEHALF OF THE FIRST DEFENDANT:

7.1 On behalf of the First Defendant it was argued that I, in line with *Chauke v Santam Limited* 1009(1) 178 AD apply the following test formulated by Olivier JA:

"The correct approach... is to take [the definition] as a whole and to apply to it an objective common sense meaning."

7.2 Further, it was argued that I should follow the authorities which are more or less analogous.

7.3 Lastly, it was submitted that I should find the parking area at the Unitas Hospital as depicted as per paragraph 6 above, to be a "road" as per the definition referred to above.

[8] ARGUMENTS ON BEHALF OF THE SECOND DEFENDANT:

8.1 Mr Van der Walt SC argued that the photo's (par 6.2 above)

do not confirm a "road" as required;

8.2 He further argued that the shuttle was inherently unsafe and not fit to convey passengers;

8.3 He further (relying on the brochure - par 4.3.2(b) above) argued that the vehicle was not designed to travel on a "roati,; but for "...any resort, hotel, park or shopping mall".

8.4 He also argued that the almost similar authorities which ostensibly are against him, have in essence been decided as they were because of the finding, in each instance, that the vehicle was used on roads, which is not the case in this instance.

[9] APPLICABLE LAW PERTAINING TO THE VEHICLE IN QUESTION:

9.1 There are no previous decisions on this point that I could find and counsel assured me that there aren't any.

9.2 However, there are various analogous decisions which should be referred, to:

9.2.1 RAF v MBENDERA AND TWO OTHERS [2004] 4 ALL SA 25 SCA

- (a) The question to be determined in this appeal was whether a Caterpillar 769 truck was a motor vehicle for the purposes of the RAF Act. According to the manufacturers description the truck was an off-highway diesel power haul truck designed for use in the mining and construction industry. It is very large, being 5 metres wide, 4 metres high and weighing in the order of 68 tons. It was too heavy and too wide for use on typical roads:
- (b) It is designed for use on specially prepared haul roads on which it can travel at approximately 75 km/h;
- (c) There is a large network of such roads, especially for opencast mines and these roads also carry other vehicle and pedestrian traffic. The truck was fitted with various safety features indicative of design and suitability for use on roads that carry traffic. It had direction indicators, rear and side view mirrors, brake lights, reverse lights, parking lights and a hooter. It was common cause that it was neither designed nor suitable for use on ordinary roads since it was simply too large.
- (d) The Court accepted that it must adopt a common sense approach in determining whether a vehicle is a motor vehicle for purposes of the Act.
- (e) That a vehicle is not safe for use on a public road cannot be a determinative criterion as to whether it is a motor vehicle for the purposes of the Act, since the truck in question was designed and suitable for use on haul roads and the RAF Act applies throughout the Republic and not just to vehicles used on public roads.
- (f) The truck in question looks like a motor vehicle and its purpose is to travel on roads to haul loads. It is designed and suitable for that purpose.

9.2.2 In Chauke v Santam Limited 1997(1) SA 178 A the following test was formulated by Olivier JA:

"The correct approach is to take [the definition] as a whole and to apply to it an objective common sense meaning.

The word "designed" in the present context conveys the notion of the ordinary, every day and general purpose for which the vehicle in question was conceived and constructed and how the reasonable person would see it ordinary, and not some fanciful, use on a road. If the ordinary reasonable person would perceive that the driving of the vehicle in question on a road used by pedestrians and other vehicles would be extra-ordinarily difficult and hazardous, unless special precautions or adaptation were effected, the vehicle would not be regarded as a "motor vehicle" for purposes of the Act."

9.2.3 This dictum was clarified by the SCA in *Road Accident Fund v Vogel* 2004(5) 1 SCA where the SCA clarified the apparent conflict between the subjective test posed (the purpose for which the vehicle was conceived and constructed) and the "objective test" (the reasonable person's perception of the vehicle). This conflict was clarified by stating that "while the legislature has not entirely ignored the subjective test of the designer, it is not per se conclusive and the item's objective suitability for use in the manner contemplated by Sec 1 is to be the ultimate touchstone." See: Mbendera at par [5] thereof.

9.2.4 *RAF V VOGEL* 2004(5) SA 1 SCA

- (a) The question was whether a mobile Hobart ground power unit which supplied electricity to jumbo jet aircraft while they were on the ground was a motor vehicle in terms of Sec 1 of the RAF Act. The unit was equipped with a four cylinder diesel engine and a three speed gearbox with a reverse gear. It had a conventional rack and pinion steering mechanism and a conventional steering wheel, the shaft of which was almost vertical. There were left and right turning indicators at both the front and the back of the unit. There were also broad yellow and black striped chevrons which extended over the full width of the unit at both the front and the back. Its lighting system comprised two headlights which could be dimmed or brightened, reflectors at the front, rear and sides of the unit and brake lights. In its original designed state it had no windscreen, but for use in South Africa a cab with a windscreen, side windows and window wiper was fitted. The top speed of the unit was between 40 and 60 km/h. The operators view in the unit's originally designed state was unobstructed. The addition of the cab resulted in minor impairment of the view on the right hand side of the unit. It had no speedometer and no safety belt. It had a hooter. Its turning arc was restricted but comparable to that of a motor vehicle of equivalent size. It was said to steer and handle like a Land Rover, it was not equipped with rear and side view mirrors in its original designed state, but in South Africa the standard procedure was to have them fitted to the

unit. There was no provision for the conveyance of passengers or anything else, but it was fitted with a tow bar. Its ground clearance

was 300 mm, which was comparable to that of a light delivery vehicle. It had no tendency to oversteer or understeer and its weight was evenly distributed. The location of the gear lever was unlike that which was ordinarily found in motor vehicles designed for general use on public roads. It was situated between the drivers legs.

- (b) The SCA found that it was not a "motor vehicle" Its sole purpose, namely the provision of electrical power to stationary

aircraft at airports, made it impossible to conclude that it was designed for general use on public roads other than those which would be encountered within the operational area of airports.

- (c) The fact that the vehicle had some features common to motor vehicles did not take the matter any further since they were merely added to make the unit fulfil its function as a mobile power plant. It did not follow that they were provided to enable the unit to be used on public roads other than the roads to be found within the operational area of airports. The reference to "public roads" is however to be qualified in the light of the Mbendera and Bell judgments.

- (d) The limited adaptations to the original design of the unit commissioned by its owner were not sufficient to convert a unit which

was not designed for the purposes set forth in the definition in Sec 1 of the Act into one which was by virtue of the adaptation to be regarded as having been successfully adapted for such purposes.

- (e) The vehicle failed on the application of the objective test of whether the unit, objectively regarded, was reasonably suitable for such purposes as set out in Sec 1 of the Act.

- (f) The Court held that an item may have been designed primarily for a purpose not covered by the definition of "motor vehicle" in the Act, but this does not necessarily disqualify it from being regarded as a motor vehicle as defined. If it was also designed to enable it to be used on public roads in the usual manner in which motor vehicles are used and, if it can be so used without the attendant difficulties and inherent hazards to its operator and other users of the road, it would qualify as a motor vehicle as defined. In short, such latter use need not be the only or even the primary use for which it was designed.

- (g) A motor vehicle may, according to the SCA test set out in Vogel (supra), be intended for one purpose, but may be suitable for

another. The first test is subjective and the second objective. At par [11] the apparent conflict between the objective and subjective

purposes of a vehicle are addressed as follows:

"The manufacturer of the item under consideration may not have designed it to be used generally on ordinary public roads at all."

- (h) Yet it may, objectively regarded, be eminently suitable for that purpose. The nett result is that while the legislature has not entirely ignored the subjective intention of the designer, it is not per se conclusive and the items objective suitability for use in the manner contemplated by Sec 1 of the Act is to be the ultimate touchstone.

9.2.5 BELL V RAF 2007(6) SA 48 (SCA)

- (a) The appellant had been involved with a self-propelled vehicle called a flatbed transporter, which was designed for propulsion on an airport road. The issue before Court was whether the definition of a motor vehicle in articles 1 and 40 of the Agreement establishing the Multilateral Motor Vehicle Accident Funds (the agreement) required that a vehicle be designed for propulsion on a public road.
- (b) Since it was common cause that the flatbed transporter was designed for propulsion on an airport road, the only issue was whether it was required that it be designed for propulsion on a public road.
- (c) The SCA endorsed the Chauke definition of "designed for" (per Olivier J) as conveying the notion "of the ordinary

everyday and general purpose for which the vehicle was conceived and constructed and how the reasonable person would see its ordinary, and not some fanciful, use on a road." See; Chauke at 183B.

9.2.6 Streicher JA in RAF v Van den Berg 2006(2) SA 250 SCA endorsed Olivier J's aforesaid reasoning and described the test as being "the general purpose for which the vehicle, objectively determined, was conceived and constructed". See; Van den Berg at 253D - G.

9.2.7 ROAD ACCIDENT FUND V VAN DEN BERG 2006(2) SA 250

- (a) The question was whether a Hamm 18 pneumatic tyre roller (a PTR) qualifies as a "motor vehicle" as defined in Sec 1 of the RAF Act. The vehicle has four separate wheels in the front, is 2 metres wide, 4,7 metres long and 3,3 metres high. It weighs 13,8 tons but may carry ballast of up to 28 tons. It is fitted with a three speed gearbox, pneumatic tyres, headlights, rear-lights, parking lights, hazard lights, rotating beacon, a hooter, two side view mirrors, direction indicators and reflectors. It has a footbrake similar to those found in trucks, a handbrake and an emergency handbrake. It is powered by a four cylinder turbo diesel engine commonly used in trucks and has power steering. It was common cause that the PTR was designed for propulsion by means of fuel, but it was in dispute whether it was designed for propulsion on a road.
- (b) The vehicle is used in the construction of roads. One of its general uses is to travel on public roads from one construction site to another. Counsel for the RAF contended that it was not designed for propulsion on a road because it was inherently dangerous to do so. This was because:
 - (i) The maximum speed was 20 km/h;
 - (ii) Its tyres are smooth, with the result that it may prone to skid;and
 - (iii) Its central of gravity is high, as a result of which it may tip over.

- (c) The Court held that an objective observer would not perceive the danger of a vehicle travelling at 20 km/h to be of such a magnitude

that he would conclude that the vehicle was not designed for use on a road. The vehicle was clearly visible and with its rotating beacon even more so.

9.2.8 On the other hand, If objectively regarded, the use of the vehicle on a public road would be more than ordinarily difficult and inherently potentially hazardous to its operator and other users of the road.

See ; Vogel (supra) at p 4 H Chauke (supra) at p 183 C

9.2.9 However, the fact that an item may have been designed primarily for a purpose not covered by the definition of motor vehicle in the Act does not necessarily disqualify it from being regarded as a motor vehicle as defined. If it was also designed to enable it to be used on public roads in the usual manner in which motor vehicles are used and, if it can be so used without the attendant difficulties and hazards, it would qualify as a motor vehicle as defined. The latter use need not be the only or even the primary use for which it was designed.

See :Vogel (supra) at p 5 B- D

[10] THE VEHICLE IN CASU:

10.1 I have been requested to find whether the "shuttle" in question is a "motor vehicle" (in terms of the Act) or not.

10.2 The parking area at the Unitas Hospital:

10.2.1 In view of what is set out [Pars 2.6.2 and 4.3.4 above], I find that the incident occurred on a "road" as per the requirement in the Act as per paragraph 4.1 above.

10.3 The brochure [par 4.3.2a] above:

10.3.1 If I confine (narrow approach) myself exclusively to the brochure [as Mr Van der Walt SC wishes me to do] then the vehicle in question has not been designed or adapted for use by and at hospitals in their parking lots let alone for public roads.

10.3.2 However, if the evidence of Mr Johnson is taken into account, the vehicle in question has been (at least) adapted for use at hospitals and as such to be used on "roads" although not for "public roads".

10.3.3 The aforesaid is further enhanced by an objective, common sense approach. There can be little or no doubt that the vehicle in question (and for that matter similar vehicles which are generally used at parking areas, airports, , shopping malls etc) are motor vehicles in terms of the act

10.3.4 This approach is even further enhanced by the fact that the public at large needs protection.

- (a) It is a fact of life that "motor vehicles" (in the normal and ordinary sense) move around in parking areas of hospitals,

resorts, parking lots, airports etc. What is more important is that pedestrians and "shuttles" (like the one in this instance) also move around in ever increasing numbers in these areas.

- (b) Common sense and the reality of the situation call for these "shuttles" to be classified as "motor vehicles".

If not so; third parties sustaining injuries flowing from the negligent operation of these "shuttles" would be left without any recourse against the Road Accident Fund. It may be well and good to say that these third parties in the examples have

recourse against the driver or owner of the vehicle/shuttle or that the owner of the shuttle may or must be covered by insurance

pertaining to at least public liability/indemnity.

- (c) But what is the reality?

- (i) The third party will not effectively be able to recover his or her losses from the driver who normally do not possess all that much;

- (j) The solvency and ability to pay damages by the owner or the fact that he has public indemnity insurance is far from certain, let alone guaranteed.

- (d) The aforesaid are merely examples of the situation that cannot be ignored.

[11]

CONCLUSION:

11.1 Consequently, I am of opinion that these vehicles ("shuttle") used at hotels, airports, shopping malls and hospitals are motor vehicles in terms of the Act. However, I have not been requested to make a finding in this regard.

11.2 As far as the "shuttle" in question is concerned, I find that it is a "motor vehicle" in terms of the Act.

11.3 I therefore (in light of paragraph 3.3B above) make the following order:

11.3.1 The First Defendant's special plea is upheld.

11.3.2 The Second Defendant's special plea is dismissed.

11.3.3 The Second Defendant is ordered to pay Plaintiff's and First Defendants costs including costs of senior counsel and preparation fees of Mr Van Onselen.

GOODEY AJ

On behalf of the Plaintiffs: Adv LF Bezuidenhout

On behalf of the First Defendant: Adv E Labuschagne SC

On behalf of the Second Defendant: Adv N van der Walt SC:

Attorneys for the Paintiffs:N. Van Der Merwe

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