

SOUTH AFRICA / JUDGMENT

Fundsatwork Umbrella Pension Fund v Guarnieri and Others (830/2018) [2019] ZASCA 78; 2019 (5) SA 68 (SCA) (31 May 2019) [2019] ZASCA 78

COURT

Supreme Court of Appeal

BEFORE

Cachalia, Wallis, Mbha, Mocumie, Eksteen

CASE / FILE NUMBER

830/2018

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 830/2018

In the matter between:

FUNDSATWORK UMBRELLA PENSION

FUND APPELLANT

and

ANNA MARIE GUARNIERI FIRST

RESPONDENT

ALBERTO JACOMO GUARNIERI SECOND

RESPONDENT

MAXINE GUARNIERI THIRD

RESPONDENT

MMI GROUP LTD FOURTH

RESPONDENT

STEFFANUTTI STOCKS (PTY) LTD FIFTH

RESPONDENT

PENSION FUNDS ADJUDICATOR SIXTH

RESPONDENT

Neutral citation: Fundsatwork Umbrella Pension Fund v Guarnieri and Others (830/2018)

[2019] ZASCA 78 (31 May 2019)

Coram: Cachalia, Wallis, Mbha and Mocumie JJA and Eksteen AJA

Heard: 28 May 2019

Delivered: 31 May 2019

Summary: Distribution of pension benefit on death of member of fund – s 37C(1)(a) of the Pension Funds Act 24 of 1956 (PFA) – meaning of dependant in terms of definition in s 1 of the PFA – when such dependants are to be identified for the purpose of making a distribution under that section – such to be at the date of distribution not the date of death of the member – accordingly dependants do not include a person who died before the distribution was made – distribution to such person contrary to statutory scheme and not a distribution of member's pension benefit – fund obliged to distribute the outstanding balance to the member's dependants.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J, sitting as court of first instance);

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

Wallis JA (Cachalia, Mbha and Mocumie JJA and Eksteen AJA concurring)

- [1] On 22 February 2014, Mr Massimiliano Guarnieri and his girlfriend were killed in a motor vehicle accident. At that time he was still married in community of property to the first respondent, Mrs Anna Marie Guarnieri (Mrs Guarnieri), although they had been living apart for somewhere between 18 months and two years and she had commenced divorce proceedings against him. Mr and Mrs Guarnieri had two children, the second and third respondents, respectively a son and a daughter, who were at the time of his death 24 and 21 years old respectively. Both lived with their mother. The son was employed, earning a salary of R5 500 per month, and claimed to be self-supporting, while the daughter was studying.
- [2] Mr Guarnieri was also survived by his mother Mrs Anna-Maria Guarnieri (Mrs Guarnieri Snr), who was then 71 years old and a pensioner, resident in an old age home in Durbanville, Western Cape and suffering from emphysema. In May 2014, shortly after her son's death she moved into the frail care section of the home where she resided. Mr Guarnieri also had a sister, Ms Barbara Swart, who resided in Australia.

- [3] At the time of his death Mr Guarnieri was a member of the appellant, the Fundsatwork Umbrella Pension Fund (the Fund). The gross death benefit due to him by virtue of his membership was R1 468 501.75. After the deduction of tax the amount available for distribution was R1 164 657.19. On 25 July 2014 the board of the Fund resolved in terms of s 37C(1)(a) the Pensions Funds Act 24 of 1956 (the PFA) to allocate 42 percent of the death benefit to Mr Guarnieri's mother; 37 percent to his widow; eight percent to his son and 13 percent to his daughter. Mrs Guarnieri Snr had died four days before that decision was made. However, pursuant to a power of attorney in favour of Ms Swart and an election form completed before her death, the amount of the award to her, less an advance payment on 23 May 2014 in an amount of R75 555.25, was paid to Old Mutual on 1 August 2014^[1] and used to purchase an annuity in her favour. The beneficiary of that annuity after her death was her daughter Ms Swart.
- [4] Mrs Guarnieri challenged that distribution in an attempt to secure an allocation in favour of herself and her children of that portion of the death benefit awarded to her late mother-in-law. The initial distribution was set aside by the Sixth Respondent, the Pension Funds Adjudicator (the Adjudicator), and referred back to the board of the Fund to take the decision afresh in the light of the terms of the Adjudicator's determination. The Board then made exactly the same decision as previously in regard to the distribution of the death benefit. Mrs Guarnieri and her children challenged this by way of an application to the Gauteng Division of the High Court (Pretoria).^[2] The second determination was set aside by Prinsloo J and replaced with an order that an amount of a little over half a million

Rand, being the amount allocated to Mrs Guarnieri Snr, less an initial payment made to her during her lifetime, be distributed to Mrs Guarnieri and her children in proportions to be determined by the board. The appeal against that order is with his leave.

- [5] The issue in this appeal arises from the fact that s 37C of the PFA removes the allocation of pension benefits on the death of a pension fund member from the unfettered choice of the member, whether by will or by nomination. It reflects a legislative decision that funds becoming available in that way should be available to be used for the benefit of the deceased's dependants so that they are less likely to be a drain on the State's resources. This serves the social purpose of providing some protection for dependants, without entirely overriding the wishes of a deceased who has nominated beneficiaries or made a will.^[3]
- [6] There is no indication that Mr Guarnieri made a will or nominated any beneficiaries. Accordingly the decision as to the distribution of the death benefit vested in the board of the pension fund under s 37C(1)(a) of the PFA.^[4] The relevant provision reads:

'(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall . . . not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.'

[7] The distribution of death benefits must, where there are dependants of a deceased member, be dealt with under this section.[5] The term 'dependant' is defined in section 1 of the PFA as follows:

"Dependant', in relation to a member, means—

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person —
 - (i) was in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member;
 - (iii) is a child of the member, including a posthumous child . . .
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died '.

[8] The effect of s 37C(1)(a), as read with the definition of 'dependant', is to require a fund, within a period of 12 months from the death of the member, to identify the dependants of the deceased who may potentially qualify for an equitable distribution from the deceased's death benefit in terms of s 37C.[6] Having once identified the potential class of dependants, the board of the fund is vested with a large discretion to determine, in the light of its assessment of their respective needs, in what proportions the death benefit will be distributed among the class of dependants.

[9] The primary issue in this case is whether Mrs Guarnieri Snr was a dependant for the purposes of the distribution of her son's death benefit. If she was not, then the distribution to her was contrary to the provisions of s 37C(1)(a) and the high court correctly set it aside. Answering the question requires us to determine at what stage a person must be a dependant in order to be entitled to participate in a distribution under the section. Is it the date of the member's death, or the date upon which the decision in regard to the distribution is made, or the date of the distribution itself? The issue arises because, in the ordinary course of human affairs and given that the board of the fund has twelve months to investigate the existence of dependants, the situation may arise where someone who was qualified to be recognised as a dependant at one stage ceases to be qualified at a later stage. The Fund's contention was that the determination had to be made at the date of death of the member and that subsequent changes in circumstances should be ignored.

[10] The first task is to identify who is a dependant and to ascertain whether the definition of the expression provides any clue to the question of when someone must be a dependant for the purposes of a s 37C(1)(a) distribution. It is to the definition of a dependant that I turn. The starting point is the reference to a ‘member’ of a fund in the preamble to the definition of a ‘dependant’ referring to a ‘dependant in relation to a member’. Counsel submitted that this necessarily referred to a former member as Mr Guarnieri had ceased to be a member on his death. In my view that was incorrect. The definition of ‘member’ in s 1 of the PFA reads as follows:

“‘member”, in relation to—

- (a) a fund referred to in paragraph (a) or (c) of the definition of “pension fund organisation”, means any member or former member of the association by which such fund has been established;
- (b) a fund referred to in paragraph (b) of that definition, means a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.’

[11] The definition provides expressly that, depending on the type of fund, former members of funds, or people who belonged to a class of persons for whose benefit the fund was established, are members until they have received all the benefits due to them from the fund. There seems to be no reason therefore to read the word ‘member’ where it appears in the definition of ‘dependant’ as referring to the member in the past tense or as a former member. Death benefits are among the benefits to which members of pension funds are entitled. Until they have been fully distributed in accordance with the fund’s rules it is appropriate and necessary for the fund to continue to deal with them as a member. Their continued membership is what entitles their representative to enforce whatever rights they may have in relation to the fund. Their continued membership also has implications for the operation of the fund and would have to be taken into account, along with that of all other members, in an actuarial valuation of the obligations of the fund. In my view therefore a deceased member remains a member for the purposes of the PFA, although they will necessarily have to be represented in any dealings with the fund by their executor.

[12] The first sub-section of the definition provides that ‘a person in respect of whom the member is legally liable for maintenance’ is a dependant. Counsel submitted that this should be construed as if it read ‘a person in respect of whom the member was legally liable for maintenance at the time of their death’. This involved a considerable re-writing of the sub-section. It recast it in the past tense and added a qualification that does not appear from the language. Such a substantial adjustment of the language used in the provision could only be permissible if it was incapable of being given a sensible meaning without such adjustment.

- [13] In my view no such adjustment is necessary. This part of the definition says that a person is a dependant if there is an existing liability for maintenance on the part of the member. A person's death does not necessarily put an end to their obligation to maintain another person, although the obligation will necessarily have to be performed by their estate. The Maintenance of Surviving Spouses Act 27 of 1990 created and protects a surviving spouse's right to maintenance. There is a continuing obligation on a parent's deceased estate to maintain a minor child who is in need of such maintenance.[7] It appears that paragraph (a) of the definition of 'dependant' is directed at situations such as these.
- [14] The duty of a child to support a parent, and other similar situations where a person is obliged to maintain another, is extinguished by death.[8] This situation is accommodated in paragraph (b)(i) of the definition. That provides that a dependant is a person in respect of whom 'the member is not legally liable for maintenance', but whom in the opinion of the board was in fact 'upon the death of the member' dependent on them. That language is consistent with the understanding that membership of the fund continues after death until terminated once all benefits due to the member have been paid. This paragraph is also careful in its use of tenses. It operates where the member is not liable to maintain the person concerned. That refers to a current situation. It goes on to say that the member 'was' so liable 'upon the death of the member'. That refers to a past situation. The choice of language is consistent with an appreciation that for some purposes it is necessary to look to the current position and at others to the position at the time of the member's death. The fact that no similar qualification appears in the other portions of the definition weighs against the contention that dependants are to be identified as those persons fitting the definition at the time of the member's death and that such persons thereafter remain as dependants irrespective of subsequent events.
- [15] Once again counsel submitted that the language of this provision needed adjustment, albeit to a lesser extent. Consistent with the approach that the member ceased to be a member he sought to recast the opening portion in the past tense. That was unnecessary for the same reasons as applied in relation to paragraph (a) of the definition. The balance of the subsection is expressed in language that draws a careful distinction between present tense and past tense. Counsel did not suggest that it required adjustment, no doubt because it was already expressed in terms that referred back to the position when the member died. From an interpretational perspective the important point is that where the legislation referred to the factual situation when the member died it said so expressly.
- [16] Paragraphs (b)(ii) and (iii) are of little assistance because they point in opposite directions. The first identifies as a dependant someone who is the spouse of the member. Counsel rightly pointed out that a person could only be the spouse of the member up to the moment of the latter's death. Logically, therefore, this could only refer to a person who was the spouse of the member at the time of their death. In this way all spouses, irrespective of whether they were being supported at the time of the member's death, qualify as dependants.

- [17] On the other hand, paragraph (b)(iii) points in the opposite direction by referring to someone who is a child of the member and reinforces that, as encompassing all children of the member, by including a posthumous child as a dependant. After their parent's death people are still the child of the deceased parent. A posthumously born child can only be spoken of as a child of the parent once they have been born, so that cannot refer back to the date of the member's death. Someone, not yet born, but who is born alive after the death of the deceased member, is included in the ranks of dependants. That is a strong pointer in favour of construing this provision as speaking in the present tense to a current situation, rather than to the situation at a point in time in the past.
- [18] Paragraph (c) of the definition is also couched in terms of futurity. It identifies as dependants persons who 'would have' become dependants – language of futurity – 'had the member not died' – language that points to past events. Again the choice of tense is careful and deliberate. Overall the definition identifies the different categories of dependant in language that is careful to respect the tenses being used. With the one exception of the use of the present tense in relation to spouses, there is no warrant for altering that language and rewriting the definition in the manner submitted by counsel.
- [19] There is no justification, therefore, for reading into the definition of 'dependant' the qualification 'at the date of death of the member', so that it means persons falling within the different specified categories as determined at the date of the member's death. That contention was inconsistent with the language of the section and its generally careful use of tense to indicate where it was concerned with the factual situation at a past or future time and where it was dealing with the present. It was also inconsistent with the purpose for which the different categories of dependant were designed.
- [20] Turning then to s 37C(1)(a), it provides that a fund has twelve months in which to trace dependants. If it is satisfied that it has completed that task during

the course of the twelve months it may proceed to make the distribution immediately, without waiting for the expiry of the twelve months. After that it must take a decision on how the death benefit of the member is to be distributed. Where there is doubt about the identity of the dependants who are to receive a distribution, or as to the correct distribution among those dependants, the board is not bound by the twelve months period, but may delay for a time necessary to resolve the issue.[9] The length of the twelve month period inevitably means that, in the course of the period of investigation, factual circumstances may change. A dependent child may attain their majority, graduate from university or obtain gainful employment, all of which may extinguish the need for financial support from the parent. A spouse may remarry; an inheritance may be received; there may be a windfall gain on the national lottery. In a less favourable direction a person may be taken seriously ill or injured in an accident and forced to relinquish gainful employment. Less dramatically, but with a similar impact, they may lose their job or be sequestered. And, as occurred here, an elderly and ill relative who would otherwise have needed to be maintained may die.

- [21] The section does not deal expressly with how the board is to deal with vicissitudes like this. If the class of beneficiaries is to be determined at the date of death of the member, then those vicissitudes would make no difference to the board's decision. It would make the decision and determine the distribution of the death benefits among dependants at the date of death, disregarding the changes that had occurred in the interim. The result might be that some beneficiaries would have ceased to be dependants at the time of distribution, while others, who would be dependants if considered at the time of the distribution, would be excluded. In effect this was the stance of the board in this case. It said that Mrs Guarnieri Snr was a dependant when her son died and that she remained a dependant thereafter, notwithstanding her death.
- [22] The board added that it had been unaware that she had died four days before it made its original decision in July 2014 and that it made the decision bona fide and in ignorance of the true situation.[10] A half-hearted effort to lay the blame for this at the door of Mrs Guarnieri was not pressed and was plainly unjustified. It was not her responsibility to keep the Fund informed of the situation with her mother-in-law's health. It was the Fund's obligation to keep itself abreast of the situation, especially as it was well aware that she was elderly, suffering from a life-threatening condition and in frail care. The possibility of her imminent death should have been apparent. Also, the contention raised an obvious problem. Had the board been aware of the death of Mrs Guarnieri Snr would they still have been entitled to award her 42 percent of her son's death benefit? The question was posed by the bench but counsel gave no answer. An answer in the negative would reinforce the proposition that this would be because she had ceased to be a dependant. An affirmative answer would fly in the face of the established purpose of the section, namely, to provide maintenance to those who have need of it.
- [23] The approach of the board is not sensible. In judicial proceedings facts are preferred to prophecies.[11] I can see no reason why the same principle should not apply when boards of pension funds come to make important decisions regarding the determination of which of a member's dependants, as broadly defined in the statute, should benefit from the member's death benefit. The purpose of s 37C is to provide some protection for dependants, both existing and potential. The obvious time at which decisions should be taken in that regard is when the determination is made. At that stage the board should have completed its enquiries and be in a position to assess the relative present and future needs of the members of the class of dependants it has identified. Those such as the posthumously born child, or the person who has fallen on hard times, can then be assisted and those whose fortunes have improved, so that they no longer need to be maintained, can drop out of the picture.
- [24] This does not impose too great a practical burden on the board. It will continue to make its determinations on the evidence to hand when it comes to take the decision. It imposes upon a board an obligation to check carefully that the information it has is accurate and to ensure that when it makes distributions the intended beneficiaries will be the persons who benefit from them.[12] As is apparent from the record in this case, the board was too inclined to

accept the correctness of one-sided information, such as that Mr Guarnieri had maintained his mother, without requiring proof, for example by checking who was paying her bills at the residential home where she was residing. In its original submissions to the Adjudicator it erroneously said that she lived with her son, when he lived in Secunda and she in Durbanville. It also did not appear to have obtained an informed assessment of Mrs Guarnieri Snr's life expectancy. In circumstances where the effect of its decision would be to deprive the member's wife and children of a substantial portion of his death benefit, while favouring his mother, whose health was poor, it should have had regard to what would happen to those funds if Mrs Guarnieri Snr died. Had it done so it would have realised that, as a result of the arrangements made shortly before her death, the principal beneficiary of Mr Guarnieri's death would be Ms Swart who was not a dependant of his.

- [25] Given all these considerations of language, purpose and practicality, in my view, the proper construction of s 37C(1)(a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the

only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.

- [26] When the board took its original decision it made an allocation in favour of someone who was no longer a dependant because she had died. Its decision in regard to the distribution of Mr Guarnieri's death benefit was therefore contrary to the provisions of s 37C(1)(a). The Adjudicator's decision did not go that far, but the grounds upon which the original determination was set aside and referred back, namely that the board had not properly considered her medical condition and that this resulted in overproviding for her maintenance, arose from similar considerations.

- [27] In its reconsideration the board paid little heed to any of this. That is apparent from its statement of the factors taken into account in determining the allocation to Mrs Guarnieri Snr. These were limited to the fact that she was the deceased's mother; a statement that she was dependent on the deceased; her limited income and the estimated costs of moving her to a frail care facility. The statement contained no reference to her state of health or her likely future needs in relation to maintenance. All this was at a time when the board knew full well that, as a result of her death, she had no such needs and, indeed, had not had any needs when it took its earlier decision. The second determination, being the one challenged in this case, was thus also contrary to the provisions of s 37C(1)(a) of the PFA and invalid. The judge made an order setting it aside. It is unnecessary to decide whether it would have been preferable for him to have made a simple declaratory order to that effect, as the Fund did not take issue with that portion of the order and there was no cross-appeal.

[28] The Fund submitted that these were properly proceedings by way of judicial review and that the portion of the order in which the board of the Fund was ordered to reconsider the distribution of the amount awarded to Mrs Guarnieri Snr and apportion it between Mrs Guarnieri and her two children was inappropriate. It submitted that this was not just and equitable relief in the light of the fact that the Fund had acted in good faith and in ignorance of the true facts when it made its original decision to allocate 42 percent of the death benefit to Mrs Guarnieri Snr.

[29] The submission was misconceived. The effect of this judgment is that, in making both determinations in regard to the distribution of Mr Guarnieri's death benefit, the Fund made an allocation in favour of someone who was not a dependant at the time and therefore not qualified to participate in the distribution of the death benefit. It makes no difference that in different circumstances that person might have been a dependant and entitled to receive some part of the death benefit. Her position was no different from that which would have prevailed had she been a complete stranger. She was not entitled to participate in the distribution and the decision to include her was contrary to the statutory scheme and invalid. To the extent of the benefit awarded to her there was no valid distribution. The board was obliged to make a proper distribution of that portion of the benefit among the persons who

were dependants.

[30] That the board made a payment pursuant to this decision did not alter the position. That payment was made without any lawful obligation to do so and the Fund was entitled to invoke whichever of the condictiones would be applicable to recover that payment. As against the other dependants its position was that it had made a lawful allocation of 58 percent of the death benefit and was obliged to make a distribution of the balance. The argument proceeded as if Mr

Guarnieri's death benefit existed as a pot of money distinct from the assets of the Fund, all of which had been disbursed and none of which remained. That was incorrect. The death benefit was not a distinct and separate sum of money, but a claim against the assets of the Fund. Distributions made to lawful beneficiaries resulted in that claim being pro tanto discharged by payment to those beneficiaries. When an amount was distributed in favour of Mrs Guarnieri Snr that did not discharge any portion of the claim constituted by the death benefit. The balance of the benefit remaining after the distribution to the widow and children remained as a lawful claim against the Fund.

[31] The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: S Khumalo

Instructed by: Shepstone and Wylie, Cape Town

McIntyre Van der Post, Bloemfontein

For respondent: T P Krüger SC (with him C D'Alton)

Instructed by: Rothmann Phahlamohlaka Attorneys Inc, Pretoria

Honey Attorneys, Bloemfontein.

- [1] This was an advance payment in respect of the costs of Mrs Guarnieri Snr's accommodation in the frail care facility into which she was moved in May 2014, no more than two to three months before her death. The costs of the facility were R13 000 per month.
- [2] The applicants were not obliged in terms of Chapter VA of the PFA first to approach the Adjudicator with their complaint.
- [3] Mashazi v African Products Retirement Benefit Provident Fund 2003
- [1] SA 629 (W) at 632H-J. See also C Marumoagae 'The weight accorded to the wishes of deceased retirement fund members when distributing death benefits in South Africa: Do such members have freedom of testation?' (2018) 30 SA Merc LJ 115 at 129-130.
- [4] Had there been a nominated beneficiary the death benefit would have been distributed in terms of one of ss 37C(1)(b) and (bA). Absent a nominated beneficiary or any dependants, the benefit would have been paid to the estate of the member to be distributed in accordance with any will or on intestacy.
- [5] Kaplan and Another NO v The Professional and Executive Retirement Fund and Others 1999 (3) SA 798 (SCA) at 803A-C.
- [6] Rosemary Hunter et al, The Pension Funds Act: A Commentary (2010) at 684.
- [7] Boezaart (ed) Child Law in South Africa, 2ed (2017), para 2.7, pp 52-54.
- [8] Boezaart ibid para 2.18.1, p 74.
- [9] Dobie NO v National Technikon Retirement Pension Fund [1999] 9 BPLR 29 (PFA) at 38C-39B.
- [10] In complaints to the Adjudicator ignorance of a relevant factor, whether justifiable or due to a failure to conduct a proper investigation, has never served to sustain a distribution. See Williams v FFE Minerals South Africa Pension Fund and Another [2001] 2 BPLR 1678 (PFA); Calitz v Central Retirement Annuity Fund and Another [2005] 4 BPLR 302 (PFA).

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- [11] Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Company [1903] AC 426 (HL) at 431 cited with approval by the Constitutional Court in Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others [2005] ZACC 14; 2006 (2) SA 311 (CC) para 19, fn 37.
- [12] In Dobie NO supra, fn 12, the Adjudicator said that: ‘The section imposes an onerous duty on the board of management of a fund to determine need and to effect an equitable distribution among the deceased’s dependants and nominees.’
- [12] In Dobie NO supra, fn 12, the Adjudicator said that:
- ‘The section imposes an onerous duty on the board of management of a fund to determine need and to effect an equitable distribution among the deceased’s dependants and nominees.’
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