

SOUTH AFRICA / JUDGMENT

Trudon (Pty) Ltd v Joburg Water SOC Limited (24440/2019) [2021] ZAGPJHC 547 (1 February 2021) [2021] ZAGPJHC 547

COURT

South Gauteng High Court, Johannesburg

BEFORE

C I Moosa

CASE / FILE NUMBER

24440/2019

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 24440/2019

REPORTABLE:	NO OF INTEREST TO OTHER JUDGES: NO REVISED. In
the matter between:	TRUDON (PTY) LTD PLAINTIFF/ EXCIPIENT and JOBURG WATER SOC LIMITED DEFENDANT/RESPONDENT

JUDGMENT

MOOSA AJ

INTRODUCTION:

- [1] This is an exception by the plaintiff/excipient against the defendant's defence and counterclaim, on the basis that they lack averments necessary to sustain a defence and action respectively.
- [2] In this action, the plaintiff is suing the defendant for allegedly breaching a written agreement entered into between the parties on 08 February 2017, for placement of advertising services ("agreement").
- [3] On or about 03 September 2019, the defendant denied liability and filed a plea and counterclaim to the plaintiff's particulars of claim wherein it, inter alia, alleged in its plea that the contract sued upon dated 08 February 2017 is unlawful and unenforceable, alternatively was null, void and unenforceable for the reasons stated therein and sought a declarator to this effect in its counterclaim.
- [4] The excipient filed an exception to the plea and contended that the aforesaid plea lacked averments necessary to sustain a defence and excepted to the counterclaim wherein the defendant asked the Court to declare the agreement unlawful and unenforceable, alternatively null and void and unenforceable, and the excipient furthermore asked that certain averments in the plea and counterclaim be struck out.

Put differently, the plaintiff's exception is that it is not legally permissible for the defendant to raise the unconstitutionality and/or validity of the agreement in the manner the defendant does, by way of a collateral challenge in a plea, in the absence of an application to review and set aside the agreement.

- [5] The plaintiff has excepted to the defendant's defence and counterclaim on the basis that they lack averments necessary to sustain a defence and action respectively. This is because:
- a). Absent the institution of a formal, direct review application, the agreement stands unless or until it is reviewed and set aside by a Court in accordance with the well-established Oudekraal principle.[1]
- b). The defendant cannot avail itself of a collateral challenge in the circumstances of this case. The application of this principle is confined to instances in which a subject is sought to be coerced by a public authority into compliance with an unlawful administrative act.[2]

APPLICABLE LAW

- [6] An exception is a legal objection to the opponent's pleading. It complains of a defect inherent in the pleading: admitting for the moment that all allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be.[3]
- [7] In deciding an exception a court must accept all the allegations of fact made in the particulars of claim as true, may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.
- [8] The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment, which is so serious as to merit, the costs of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.[4]
- [9] The Constitutional Court has affirmed that: "exceptions provide a useful mechanism "to weed out cases without legal merit".[5]
- [10] It is settled law that:
- "The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts".[6]*
- [11] The excipient has argued that as a matter of approach to exceptions:
- a). First, the allegations of fact in the defendant's plea and counterclaim must be accepted as true and correct.[7] It must be accepted true and correct that "the accounting officer and/or the adjudication committee of the defendant did not act [as required by the defendant's SXM policy and the relevant procurement prescripts]" when the decision to enter into the agreement was taken.[8]
- b). Second, the Court may not at this stage consider anything outside the pleaded facts. Rather the Court must accept that the defendant has no at any stage applied to court for the judicial review and setting aside of it decision to enter into the agreement.[9]

THE RELEVANT PLEADED ISSUES

- [12] In its particulars of claim the plaintiff alleges conclusion of the agreement, its terms and that, despite the plaintiff complying with its obligations in terms of the agreement, the defendant has breached same and has failed to remedy the breach.

[13] The defendant in response has, inter alia, pleaded as set out hereunder. I pause to mention that I do not deem it necessary to regurgitate the entire plea which deals mainly with the defendant's legal status and the public procurement laws, rooted in section 217 of the Constitution of the Republic of South Africa, to which it is subject. I have accordingly distilled the plea for the purposes of capturing the salient aspects hereunder:

a). Section 217 of the Constitution states: "(1) when an organ of state in the national, provincial or local sphere of government, or any institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

b). The Municipal Finance Management Act, 56 of 2003 ("MFMA") requires each municipal entity, such as the defendant to have and to implement a supply chain management policy which gives effect to inter alia the provisions of section 217 of the Constitution and to Chapter 11 of the MFMA.

c). The defendant, a municipal entity, adopted the Supply Chain Management Policy ("SCMP") which in terms of clause 2(1) thereof applies to inter alia eligible procurement undertaken by the defendant including the disposal of immovable and movable assets.

d). In terms of clause 11.1 of the SCMP, the board of directors of the defendant must delegate additional powers and duties to the accounting officer as are necessary to enable the accounting officer to discharge the supply chain management responsibilities conferred on accounting officers of the MFMA.

e). In terms of clause 37.1(a) of the SCMP, the defendant's accounting officer may dispense with the official procurement processes established by the SCMP and procure any required goods or services through any convenient process in circumstances laid down in clause 37.1.1 thereof.

f). Section 106 of the MFMA states:

"(1) The accounting officer of a municipal entity-

(a) may delegate to an official of that entity-

(i) any of the powers or duties assigned to or delegated to the accounting officer in terms of this Act; or

(ii) any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting officer to take reasonable and appropriate steps to ensure the achievement of the aims of a specific provision of the Act; and

(b) must regularly review delegations issued in terms of paragraph (a) and if necessary, amend or withdraw any of these delegations.

(2) A delegation in terms of subsection (1) –

(a) must be in writing;

- (b) is subject to any limitation and condition the accounting officer may impose;
 - (c) may be either to a specific individual or to a holder of a specific post in the municipal entity; and
 - (d) does not divest the accounting officer of the responsibilities concerning the exercise of the delegated power or the performance of the delegated duty.
- (3) An accounting officer may confirm, vary or revoke any decision taken by an official in consequence of delegation in terms of subsection
- (1) but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision”.
- (g) When concluding the purported agreement in casu with the plaintiff on 08 February 2017, the defendant was represented by Ms T Choane, in her capacity as Manager: Marketing and Communications of the defendant.
- (h). Ms Choane did not possess and have the authority to conclude the aforesaid purported contract and such contract could only be performed by the accounting officer and/or adjudication bid committee and/or the evaluation committee of the defendant, and, such accounting officer must, in terms of clause 37.3 record the reasons for any deviation in terms of clause 37(2)(a) and report them at the next meeting of the board of directors.
- (i) The accounting officer and/or the adjudication committee and/or evaluation committee of the defendant did not act as aforesaid and accordingly the contract sued upon is unlawful and unenforceable, alternatively null and void and unenforceable.
- (j) The defendant further filed a counterclaim for an order declaring the agreement unlawful and unenforceable, alternatively null and void and unenforceable for the reasons set out in its plea.

THE BASIS OF THE DEFENDANT’S DEFENCE AND COUNTERCLAIM

- [14] The defendant alleges that in terms of its procurement policy, only the accounting officer and/or the adjudication bid committee and/or the evaluation committee of the defendant could conclude the agreement, and “...such accounting officer must, in terms of clause 37.3 of the SCMP record any reasons for any deviation...and report them at the next meeting of the board of directors”.
- [15] The defendant further alleges that: “the accounting officer and/or the adjudication committee and/or evaluation committee of the defendant did not act as aforesaid”. Accordingly, it is submitted that such failure to act in terms of the applicable public procurement prescripts when the defendant entered into the agreement, that “the contract sued upon is unlawful and unenforceable, alternatively null and void and unenforceable”.

[16] The conclusion to be reached in the aforementioned circumstances is that the defendant's defence and counterclaim alleges that the agreement was entered into in contravention of the public procurement prescripts to which the defendant is subject, including its own SCMP. Put differently, the defendant alleges that its administrative act; in deciding to enter into the agreement, was unconstitutional and unlawful as it flouted public procurement laws.

THE PLAINTIFF'S EXCEPTION

[17] The plaintiff has excepted to the defendant's allegation in support of its defence and counterclaim on the basis that they lack averments necessary to sustain a defence and action respectively. The plaintiff's exception specifically records that this is because: "It is not legally permissible for the defendant to raise the unconstitutionality and/or invalidity of the agreement in the manner

in which the defendant does, by way of a collateral challenge in a plea, in the absence of an application to review and set aside the agreement".[10]

[18] The plaintiff further argues that it has successfully raised this point in a separate matter in *Trudon v The National Director of Public Prosecutions and Another* (43247/2014) [2018] ZAGPPHC 872 ("Trudon 1"). In *Trudon 1*, which involved substantively analogous factual claims, the parties agreed to a separation of issues in terms of Rule 33 (4) of the Uniform Rules of Court. The Court was then asked to determine whether the defendants are entitled to –

(a). "ignore their own decision to conclude the agreements on the basis that, in their view, the agreements are unlawful, in circumstances in which they failed to take proper steps to have a court confirm their view through a 'direct review',[11] and

(b). "in the absence of a direct review, wait until the plaintiff sought to enforce its rights under the agreement before raising their constitutional argument as a defence to the plaintiff's claims through a "collateral challenge".[12]

The plaintiff points out that the Gauteng Division, per Bhoola AJ answered both questions with a resounding no[13].

[19] The plaintiff accordingly submits that *Trudon 1* is binding on this court, relying on the provisions of the Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Act 10 of 2013, as canvassed in the article written by Wallis J of the Supreme Court of Appeal, writing in an extra curial capacity.[14] Wallis J points out that before coming into force the Superior Courts Act in 2013 "one could with relative certainty state the rules governing courts below the two apex courts... a single judge was bound by the decision of another single judge in the same division, unless he or thought it clearly wrong."

- [20] Notwithstanding the aforementioned submission by the plaintiff regarding the binding decision of *Trudon 1*, I deem it appropriate to deal with certain aspects of the administrative law that are relevant to this application, as I do hereunder; and on the basis that each matter must be dealt with on its merits and facts.

THE GENERAL PRINCIPLES OF ADMINISTRATIVE LAW

- [21] Generally, unlawful administrative acts are void, but our law requires that a court consider and declare an unlawful administrative act to be invalid and, thereafter, the court has a discretion as to whether or not to set it aside.[15] The Constitutional Court has reiterated that: “Logic, general legal principle, the Constitution and the binding authority of this Court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality”.
- [22] The Supreme Court of Appeal has also recognised that organs of state in fact generally have a duty to apply to a court to have their unlawful decisions set aside,[16] a duty which has subsequently been endorsed and confirmed by the Constitutional Court in *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at paragraphs 35-36.
- [23] The corollary of this, however, which is an equally fundamental part of the rule of law and a necessity of the principle of legality, is the fact that there are also instances in which the rule of law may require an otherwise unlawful decision to remain in principle, which is the origin of the *Oudekraal* principle.

The *Oudekraal* principle can be summarised as follows: “the State cannot simply ignore its own decisions.” Thus, even unlawful administrative acts continue to have consequences both in law and in fact, unless or until they are set aside by a Court on review.[17]

- [24] In *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) (“*Merafong*”) at para 41, Cameron J stated categorically once again that: “government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts...It remains legally effective until properly set aside.”
- [25] In *Oudekraal* at para 1, the Supreme Court of Appeal framed the question starkly: “This appeal raises important questions for the rule of law. It raises the question whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts.”

It emphasised that “The proper functioning of the modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside”.

Further emphasising: “And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating act: it is required to take action to have it set aside and not simply to ignore it.”

- [26] This principle was endorsed by the Constitutional Court in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) (“Kirland”) wherein the Court asked the following at paragraph 64: “Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials’ decisions?”
- [27] It then immediately answers this question in the negative: “Even where the decision is defective... government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally to a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it”.
- [28] In rejecting the government’s argument in *Kirland* that Oudekraal ought to be reconsidered, the Court at paragraph 89 reaffirmed the principle and pointed out that anything to the contrary would amount to – “a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct that they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the court’s supervision of the administration.”

ANALYSIS

- [29] The defendant argues that the conclusion of the agreement was in breach of the legislative regime in place to give effect to section 217 of the Constitution, and was thus unconstitutional and invalid. It seeks a declaratory to this effect. However it is cast, the fact that the defendant’s challenge is an administrative law challenge to the validity of a particular decision, which must therefore be brought before this Court properly, but also in accordance with the principle of legality, which is the foundational component of the rule of law.[18]

[30] However, the defendant has never challenged its own decision to conclude the agreement, by way of a direct review application. Its invocation of the constitutional and statutory regime does not assist it, even if there were some unconstitutionality, the agreement is not thereby rendered a nullity as it continues to exist in law and fact, although it may be liable to be set aside on review.[19]

[31] Further, Kirland makes it plain that organs of state, like the defendant, cannot simply ignore their own actions, which they believe to be unlawful. They are obliged “to do right, and do it properly.” To amplify the aforementioned, it means that the defendant was required to institute a formal, direct application to review and set aside the agreement.

To this end, I am reminded of the majority judgment’s explicit statements in Kirland which states that: “When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts.... Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set aside. That demands a proper process, in which all factors for and against are properly weighed.”

[32] I have considered the judgments in Merafong and Tasima and am in agreement with the plaintiff that there seems to have been some terminological confusion introduced by these judgments. I have duly noted that the exception that is raised herein by the defendant is referred to as a ‘collateral challenge’, or a ‘reactive’ or even a ‘defensive’ challenge. The key point is that it is raised as a defence in enforcement proceedings, which are not intended to consider the validity of the act in question. To this end, I am in agreement with the plaintiff that this is a critical distinction from what this court is called upon to determine in the present matter.

[33] I am further reminded of what was said at paragraph 32 in Oudekraal, wherein the Court emphasised that a collateral challenge is one “to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act”. However, in opening the door to collateral challenges, the Supreme Court of Appeal also expressly acknowledged that- “A collateral challenge to the validity of an administrative act will be available... only ‘if the right remedy is sought by the right person in the right proceedings’ Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of the principles of the rule of law.”[20]

[34] A collateral challenge may only be raised where a person is coerced by a public authority to do or refrain from doing something, in terms of unlawful administrative action. It is an exceptional remedy that must be justified by the facts and circumstances of the case. Accordingly, in my view this is not the case here.

[35] A “collateral review” enjoys a unique status in administrative law as set out in *Kouga Municipality v Mark Bellingan and Others* 2012 (2) SA 95 (SCA), para 12. I am in agreement with the submission of the plaintiff that the defendant has sought to take advantage of this special status in a deliberate attempt:

- a). First, to overcome the inordinate delay in bringing the review;
- b). Second, to circumvent the other procedural and substantive safeguards afforded to the plaintiff in a review application (including the right to the record, without which the Court cannot responsibly determine the validity or otherwise of the agreements, and the application of the Plascon-Evans rule that would inevitably inure to the benefit of the plaintiff);[21]
- c). Third, to close down the possibility of the Court’s determining that a just an equitable remedy would in fact entail an order crafted along the lines of the order in the Gijima case, which would mean that the defendant would still be required to make payment of the outstanding amounts under the agreement.

[36] In *Kwa Sani Municipality v Underberg/HIimeville Community Watch Association* 2015 (2) All SA 657 (SCA) it was confirmed that collateral review is not available where the public body which took the decision seeks to resist compliance with its own decision.

FINDING

[37] I accept the allegations of fact in the defendant’s plea and counterclaim as true and correct, to the extent that “the accounting officer and/or the adjudication committee of the defendant did not act [as required by the defendant’s SXM policy and the relevant procurement prescripts]” when the decision to enter into the agreement was taken.

[38] I accept that this Court may not at this stage consider anything outside the pleaded facts. Accordingly, this Court must accept that the defendant has at no stage applied to Court for the judicial review and setting aside of its decision to enter into the agreement with the plaintiff.

[39] In the circumstances, it is clear from the totality of the evidence that the defendant has failed to take proper steps to have a court confirm their view that the agreements are unlawful, through direct review; and in the absence of direct review, waited until the plaintiff sought to enforce its rights under the agreement before raising their constitutional argument as a defence to the plaintiff’s claims through a “collateral challenge”.

[40] Having due regard to the facts of this matter as well as the case law, I find that it was essential for the defendant’s to have instituted a formal, direct review application, as required by the Constitutional Court in *Kirland*. This is not a mere formality nor does it place unnecessary procedural obstacles in the path of the state’s endeavours to uphold the rule of law and the principle of legality. The state, including the defendant, must do right, and must do it properly.

- [41] I find that the defendant's plea and counterclaim are not, nor are they capable of being "collateral challenges" and therefore enjoy none of the benefits afforded to that special category of reviews.
- [42] I find the agreement between the parties to be binding and enforceable, as it has not been set aside.
- [43] I now turn to deal with the plaintiff's submissions in respect of the judgment in Trudon 1. It is trite that a single judge is bound by the decision of another single judge in the same division. A recent finding by the full court, Gauteng Division in *Democratic Alliance v President of the Republic of South Africa* 921424/2020 [2020] ZAGPPHC 326 (29 July 2020) effectively confirms that the Pretoria and Johannesburg High Courts fall under the same division. The full court found that the decision of the full court in Pretoria is binding on "all courts in Gauteng". It was stated as follows: "Mr Cockrell noted that the ratio of this Court would bind all courts in Gauteng and may also bind all other divisions of the High Court subsequent to the enactment of the Superior Courts Act. In this connection he cited and article by Malcolm Wallis "Whose decisis must we stare""
- (2018) 135 SALJ 1. There is no need to engage in the interesting issues raised by Judge Wallis, writing in an extra curial capacity. There is a binding ratio in that, at the very least, the judgment of this court is binding on all courts in Gauteng."
- [44] In the circumstances, I am duly satisfied that the plaintiff has made out a proper case for the relief it seeks herein. I am satisfied that the decision in Trudon 1 is not wrong and accordingly conclude that this Court is bound thereto on the principle of stare decisis et non quieta movere. I pause to mention that I would have nonetheless found as I do, even in the absence of Trudon 1. However, I find that my view and conclusion are fortified by the findings and outcome therein.

ORDER

[45] In the result, I make the following order:

[a]. The plaintiff's exception is upheld.

[b]. Paragraphs 2.2 to 2.15 of the defendant's plea, and the entirety of the defendant's counterclaim dated 03 September 2019 are struck out.

[c]. The defendant is ordered to pay the plaintiff's costs of the exception, such costs to include the costs of two counsel.

C I MOOSA

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

01 FEBRUARY 2021

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Date of hearing:

20 October 2020

Date of Judgment:

01 February 2021

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- [1] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)
- [2] Oudekraal supra at para 35
- [3] Marney v Watson 1978 (4) SA 140 (C) at 144 F - G
- [4] Pretorius & Another v Transport Pension Fund & Other 2018 ZACC 10, para 15
- [5] H v Fetal Assessment Centre 2015 (2) SA 193 (CC) at para 10 [quoting Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at para 3]
- [6] Trustees for the Time Being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA) at para 36
- [7] Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (SA) Ltd 2018 (3) SA 405 (SCA) at para 9
- [8] See Defendant's plea, Caselines 005-9 - 005-10 (pages 26 -27), para 2.15
- [9] Pretorius and Another v Transport Pension Fund and Others 2019 (2) SA 37 (CC) at para 15
- [10] Plaintiff's exception, Caselines 006-2, para 4
- [11] Trudon 1, supra; para 8.1
- [12] Trudon 1, supra; para 8.2
- [13] Trudon 1, supra ; para's 19 and 28
- [14] M Wallis "Whose decisis must we stare?" (2018) 135 SALJ 1 ("Article")
- [15] AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others (No2) 2014
- (4) SA 179 (CC) para 30
- [16] Pepkor Retirement Fund and Another v Financial Services Board and Another 2003 (6) SA 38 (SCA); Ntshangase v MEC for Finance, KwaZulu-Natal and Another 2010 (3) SA 201 (SCA)
- [17] Oudekraal supra at para 26
- [18] Following the Constitutional Court's judgment in State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) at para 40, it is apparent that PAJA does not avail the State where the State seeks to review and set aside its own decisions
- [19] Kirland supra para 65
- [20] Oudekraal at para. 35, citing Wade Administrative Law 6th edition at 331
- [21] See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E – 635E

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