

SOUTH AFRICA / JUDGMENT

Ultimate Sports Nutrition (Pty) Ltd v Bezuidenhout (62515/20) [2020] ZAGPPHC 694 (8 December 2020) [2020] ZAGPPHC 694

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

62515/20

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IN THE HIGH

COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 62515/20

DATE:

8 December 2020

In

the matter between:

ULTIMATE

SPORTS NUTRITION (PTY)

LTD

Applicant

and

JURIE

BEZUIDENHOUT

Respondent

JUDGMENT

MABUSE J

[1] On 27 November 2020 the Court granted the following ex parte order in favour of the Applicant against the Respondent, Jurie Bezuidenhout:

“1. That the matter be dealt with as one of urgency and ex parte, and that the non-compliance with the rules of Court and the relevant practice directives be condoned in so far as it may be necessary.

2. That a rule nisi be issued, with a return date on 6 July 2021, calling upon the Respondent to show cause why the following order should not be made final:

2.1 That the sheriff for the district of Sandton and/or such other district where the following motor vehicles may be found, be authorised and directed to attach and remove the said motor vehicles and to retain such motor vehicles in safe custody pending the finalisation of the legal proceedings to be instituted by the Applicant as set out below:

2.1.1 The Porsche GT3 motor vehicle with engine number DGG010670 and registration number [....].

2.1.2 The Porsche GT3 RS motor vehicle with engine number DGG014949 and registration number [....].

2.1.3 The BMW X5M50i motor vehicle with engine number 20633579 and registration number [....].

2.1.4 The BMW X3M Competition motor vehicle with engine number J0473419 and registration number [....].

2.1.5 The Mercedes Benz AMG GTR motor vehicle with engine number 17898060014458 and registration number [....].

2.2 That each of the sheriffs who attaches and removes each of the motor vehicles concerned be authorised to make such arrangements as are reasonably necessary to ensure the secure custody of the motor vehicles pending the finalisation of the legal proceedings referred to below, taking into account the value of the motor vehicles.

2.3 That the Applicant be directed to institute the legal proceedings regarding its claims to the motor vehicles concerned within 30 days of this order being finally granted, failing which this order shall lapse and the Applicant be obliged to pay the costs thereof on a scale as between attorney and client.

2.4 That the Respondent be directed to pay the costs of the application, alternatively that the costs of the application be costs in the legal proceedings referred to above.

3. That the provisions of paragraphs 2.1 and 2.2 hereof shall serve as an interim order with immediate effect, pending the return date of the rule nisi.
 4. That each of the sheriffs who attaches and removes each of the vehicles concerned be directed to serve a copy of the application of this order on the Respondent in accordance with the provisions of rule 4 of the Uniform Rules of Court.
 5. That each of the sheriffs who serves a copy of this application and of this order on the Respondent expressly inform the Respondent that he is entitled to anticipate the return date of the rule nisi on notice to the Applicant and to place the application on the roll for a reconsideration of the order as provided for in rule 6(12)(c) of the Uniform Rules of Court.”
- [2] On 4 December 2020 the Respondent set the matter down for redetermination of the ex parte order in terms of Rule 6(12)(c) of the Uniform Rules of Court. The Respondent sought the following order:
- “1. That the forms, time periods and service prescribed by the Uniform Rules of Court be dispensed with and that this application be heard as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court;*
2. Condoning non-compliance with the practice directives regarding the set down of urgent applications;
 3. The reconsideration of the ex parte order of 27 November 2020 in Case number 62515/20 in terms of Rule 6(12)(c):
 4. Pursuant to reconsideration:
 - 4.1 Setting aside the Court Order granted by the above Honourable Court on an ex parte basis in Case Number 62515/2020;
 - 4.2 Directing the sheriffs concerned to return of the vehicles that were attached and removed to the premises where they were attached.
 5. Alternatively, to par 3 and 4 above, directing that the execution of the Court Order granted by the above Honourable Court on an ex parte basis in Case Number 62515/2020 is suspended in terms of Rule 45A, pending finalisation of:
 - 5.1 an application for reconsideration of the ex parte order in terms of Rule 6(12)(c), alternatively
 - 5.2 the finalisation of the application in case number 62515/20.
 6. Costs of the application in the event of opposition; alternatively, and in the event of relief being granted in terms of para 3 and 4 supra, costs on a punitive scale as between attorney and own client”
- [3] The order of 27 November 2020 was granted in the absence of the Respondent. In terms of Rule 6(12)(c) of the Uniform Rules of Court, a party against whom an order was granted in its absence in an urgent application may by notice set the matter down for the reconsideration

of the order. This Rule envisages a determination of the matter. This is so because the Court that entertains the ex parte application in the absence of the Respondent does not enjoy the benefit of the argument from the Respondent. Therefore, when the application is re-enrolled for reconsideration, it is reconsideration with the benefit of argument from the Respondent.

- [4] Before dealing any further with this matter, it is, in my view, imperative to examine the Respondent's papers; determine whether they constitute a reconsideration application or a separate independent application that precedes a reconsideration application. Adv SD Wagener SC, counsel for the Applicant, right at the beginning of his argument, complained to the skies about the Respondent's papers. He called it a reconsideration application. Of utmost importance, he pointed out that the reconsideration application of the Respondent did not answer to the allegations contained in the ex parte application. It did not plead paragraph per paragraph to the allegations contained in the founding affidavit of the ex parte application. That is true. It must be recalled that the Applicant's notice of motion required the Respondent to deliver and file its answering affidavit. The Respondent did not do so. Although the Respondent generally denied some of the allegations contained in the founding affidavit, he did not, as usual, confine himself to the paragraphs of the founding affidavit.
- [5] During his argument, Adv EC Labuschagne SC, counsel for the Respondent, placed a high premium on the following passage in the judgment of Madondo DJP in the case of *Competition Commission v Wilmar* 2020 (4) SA 527 paragraph [12], there the judge stated, inter alia, that:
- "The affidavits filed in support of the reconsideration application by the first and third respondents are the answering affidavits in the reconsideration proceedings, and are to be taken as the replying affidavits."*
- [6] Having stated that, in the answering affidavit, the Respondent is required to set out which of the allegations in the Applicant's founding affidavit he admits and which he denies and to set out his version. Has the Respondent admitted some of the allegations in the founding affidavit? The answer is yes. Has he denied some of the allegations in the founding affidavit? The answer is yes. Has he put his version of the relevant facts in his affidavit? The answer is yes. The next question is: Has he followed the conventional practice of pleading his evidence paragraph by paragraph? The answer is no; he has not done so. He does not even call his affidavit an answering affidavit. He calls it a founding affidavit. So, the practice set out by Madondo DJP in paragraph [12] of the Wilmar judgment finds no application in this matter. The first reason why it does not apply in this case is the Respondent has not filed any answering

affidavit in reconsideration of the ex parte order. His affidavit is called “a founding affidavit”. Secondly, he has not treated the allegations in the founding affidavit as they are supposed to be treated in an answering affidavit. Thirdly, he calls his papers an urgent application. He has therefore divorced his papers from the ordinary application for reconsideration as envisaged by Rule 6(12)(c) of the Uniform Rules of Court.

- [7] I now wish to determine whether the Respondent’s application, for lack of a better word, can be called a reconsideration application. Rule 6(12)(c) of the Uniform Rules of Court deals with the manner in which an ex parte order should be approached. It is only proper if I repeat it here. It states that:

“A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.”

It is of paramount importance to point out that the rule does not provide that the set down should or must be accompanied by any

affidavit. A simple notice of set down shall, in the circumstances, suffice. But with particular reference to the instant matter, Rule 6(12)(c) does not provide for an application consisting of a notice of motion accompanied by a founding affidavit. This procedure followed by the Respondent is not sanctioned by the Rules of this Court. The Court does not regard it as an application for reconsideration but as a separate and independent application. To the extent that the Respondent sought an order in terms of Rule 45A, that portion quite clearly showed that the Respondent launched an independent application.

- [8] If in order to reconsider an ex parte order granted in his absence in an urgent application a Respondent merely has to file a set down, unaccompanied by any affidavit, I find it difficult to understand the following paragraph from Civil Procedure in the Superior Court by Harmse at B6.67 page B.70:

“The consideration of a matter can be performed on the basis of a set of circumstances quite different from that under which the original order was obtained.”

Even more difficult to comprehend is the following approach espoused in Rhino Hotels Resort (Pty) Ltd v Forbes and Others 2000 (1) SA 1185 WLD, at 1182 B, where it is stated that:

“Where Rule 6(2)(c) is utilised, the original application is reconsidered on its own without reference to anything else.”

- [9] Despite the fact that Rule 6(12)(c) refers to a setting down of a matter for reconsideration, Harmse states that:

“The reconsideration of a matter can be performed on the basis of circumstances quite different from that under which the original

order was obtained.”

These circumstances can only be placed before a Court by way of an affidavit. So, a notice of set down may be accompanied by an affidavit in which the circumstances are explained. According to Wilmar the affidavit accompanying the set down must be an answering affidavit.

- [10] According to Rhino Hotel and Resort (Pty) Ltd, the original application is reconsidered on its own without reference to anything else, i.e. this means no reference to other affidavits. Only this affidavit referred to in Wilmar may be used.
- [11] I now turn to reconsider the application that culminated in the impugned ex parte order of 27 November 2020. According to *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 267, the purpose of Rule 6(12)(c) of the Uniform Rules of Court is to afford an aggrieved party mechanism to revisit and redress imbalances and the injustices flowing from an urgent application that was granted in his absence. A reconsideration may involve a dismissal of the order granted ex parte or an amendment of it.
- [12] In a reconsideration application, the whole matter that led to the making of the ex parte order is considered anew. The only document that the Court in the reconsideration had regard to are the ex parte application and the reconsideration application. The Applicant is therefore not free to bring in new facts. In this matter, the Applicant delivered what it called the “answering affidavit”. This is the document that Adv Labuschagne SC argued that it should be ignored. The problem with this argument is that it ignores the fact that the Respondent did not call his papers an application for reconsideration but a notice of motion with a founding affidavit. Included in the said papers was an application by the Respondent in terms of Rule 45A of the Uniform Rules of Court. If the Court were, in dealing with the application for reconsideration to confine itself to the ex parte application and the notice of motion and founding affidavit of the Respondent, the proceedings would have been unfair and prejudicial to the Applicant because the Applicant would have been deprived of the opportunity to deal with the Respondent’s application in terms of Rule 45A. The Respondent did not ask that part of the Applicant’s answering affidavit, that related to the ex parte application, should be disallowed. This would have been a reasonable proposition. Instead, the point by Adv Labuschagne SC, was that the whole answering affidavit, even the part that dealt with the Rule 45A application, should be ignored.
- [13] I will rather follow the law. The law requires that in a reconsideration application the Court must only have regard to the application that led to the ex parte order and the affidavit filed by the Respondent, in other words, I will ignore the part of the answering affidavit that relates to the ex parte application but will take into account that part of the answering affidavit deals specifically with the Respondent’s Rule 45A application. That portion will not be ignored.
- [14] The test in reconsideration proceedings is whether the Applicant has made out a good case for the interdict that it obtained in the ex parte application. It is of utmost importance to point out that a Court has powers to grant orders for the attachment of things

pendente lite, sometimes even before any action has commenced. There are four requisites necessary to secure the granting of the temporary interdict. A temporary interdict, like the one obtained by the Applicant in casu, is a provisional order pending the result of an action which will take place on the return date which is the date set down for the further hearing of the matter. All these four requirements must be present before the interdict can be granted. These requisites for the granting of an interim interdict pending the determination of the main action are usually framed with somewhat greater elaboration. In *Webster v Mitchell* 1948 (1) SA 1186 W the Court stated that:

“In an application for a temporary interdict, Applicant’s rights need not be shown by a balance of probability; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the Applicant could on those facts obtain final relief at a trial. The facts set out in contradiction by the Respondent should then be considered, and if serious doubt is thrown upon the case of the Applicant he could not succeed.”

[15] The Applicant for such a temporary interdict must show:

15.1 that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, prima facie established though open to some doubt.

15.2 that, the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and ultimately succeeds in establishing his rights;

15.3 that the balance of convenience favours the granting of the interim relief;

15.4 that the Applicant has no other satisfactory remedy.

[16]

16.1 A CLEAR RIGHT

16.1.1 As pointed out earlier the approach in deciding whether an Applicant in an interlocutory interdict has prima facie established his right is to look at the Respondent’s affidavits as well. In

Gool v Minister of Justice 1955 (2) SA 682 (C) at 688, Ogilvie Thomson J, as he then was, commented as follows on the passage cited above from *Webster v Mitchell*:

“With the greatest respect, I am of the opinion that the criterion prescribed in this statement for the first branch of the enquiry thus outlined is somewhat too favourably expressed towards the Applicant for an interdict. In my view, the criterion on an Applicant’s own averred or admitted facts is: should (not could) the Applicant on those facts obtain final relief at the trial? Subsequent to that qualification I respectfully agree that the approach outlined in Webster v Mitchell ... is the correct approach for ordinary interdict applications.”

In proceedings for an interdict pendente lite, the dispute is one of fact.

16.1.2 When the words “clear right” are used in an interlocutory application, it does not mean that the Applicant must show an absolutely incontrovertible right nor that he must show a clear right to the relief when applying for an interdict than when applying for any other form of relief.

16.1.3 I now turn to examine the evidence of the parties. It is the Applicant’s case that the motor vehicles that are the subject of this application, were fraudulently obtained by the Respondent with the Applicant’s monies. By reason of the fact that these motor vehicles were obtained with the Applicant’s money, the motor vehicles therefore belong to the Applicant. It is not the duty of this Court at this stage to decide ownership of the motor vehicles. That dispute will be ventilated and decided on the return date. In support of its case, the Applicant has attached to the founding papers a forensic report marked appendix ‘FA1’. This forensic report, which is supported by invoices, shows how the said motor vehicles were acquired. Quite correctly, despite the Respondent’s allegations, this document shows that the invoices relating to the motor vehicles, at least four of them, were issued to the Applicant. The prima facie conclusion is that therefore that the Applicant has a right to claim restoration of these motor vehicles to its possession.

16.1.4 Counsel for the Respondent argued that the Respondent is not a flight risk, that he is a shareholder of the Applicant, that he is still paying for his shares. More importantly, he contended that the

motor vehicles were bought for the Respondent as incentives. This was disputed by the Applicant. The dispute will obviously

be resolved on the return day. Having been referred to the forensic report that shows how the motor vehicles were acquired; that the Applicant’s money was used to purchase the various motor vehicles and the Applicant’s interest in the said motor vehicles, I am satisfied that the Applicant has shown a clear, alternatively a prima facie right that the motor vehicles concerned be retrieved from wherever they are and be kept in a secure place pending the finalisation of the Applicant’s claim to the motor vehicles.

16.2 WELL-GROUNDED APPREHENSION OF IRREPERABLE HARM

16.2.1 A reasonable apprehension of injury is the one which a reasonable man might entertain on being faced with certain facts. See in this regard *Free State Gold Areas Ltd v Merriesspruit* (Orange Free State) Gold Mining Co Ltd 1961 (2) SA 505 (W) at 518. See also *National Treasury v Opposition to Urban Tolling Alliance* 2012(6) SA 223 (CC) at 231 D; and *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at 300 B. An Applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow. All that he has to show is that it is reasonable to apprehend that injury will result. The test for apprehension is an objective one. In *Free State Gold Areas Limited v Merriesspruit* (Orange Free State) Gold Mining Co Ltd supra Williamson J, as he then was, dealt extensively with reasonable apprehension and stated as follows:

“As I said above, it seems to me that if Innes, CJ; meant to rule that the onus on an Applicant was to establish facts on which the Court could find on a balance of probabilities that injury would result, he would have said so. He found that the Applicant only had to presume that it was reasonable to comprehend that injury would result.”

Accordingly, the Applicant must show objectively that his apprehensions are well-grounded. See *Yamamoto v Rand Canvas Co* 1919 WLD 100.

16.2.2 According to the Applicant the Respondent had already started with the act of selling the motor vehicles. A classic example of these was the fact that a Cayman Porsche motor vehicle was sold during September 2020 and another motor vehicle, an AMG GTR Mercedes Benz had been placed on the sales floor of Platinum Wheels (Pty) Ltd, a motor dealer.

16.2.3 It is furthermore the Applicant's case that the motor vehicles can be sold easily because they are high value items that fall within a niche market. The motor vehicles are immensely sought after and immediately saleable, especially if sold at a discount.

16.2.4 The Applicant has expressed a fear that if the motor vehicles or any of them are sold by the Respondent, the monies so obtained by him can easily be dissipated. This belief is based on three factors:

Firstly, the Respondent has a bank account in Cyprus; secondly, the Respondent has bought himself a second home at Val de Vie Estate in Paarl, Western Cape, over which a bond of R7.7 million was registered recently on 19 October 2020; thirdly, the Respondent has to service, over and above, the R4 million bond over his Midstream Home.

16.2.5 The Court is satisfied that the Applicant will accordingly suffer irreparable harm if the relief that it seeks is not granted. The Applicant has set out the facts upon which its apprehension is grounded to enable this Court to assess for itself whether it is indeed well-grounded. According to the old authority of *Setlogelo v Setlogelo* 1914 A.D. 221 if the Applicant manages to show a clear right, his apprehension of irreparable harm need not be established.

16.3 NO OTHER REMEDY

16.3.1 The third requirement for the granting of an interdict is proof that there is no other satisfactory remedy available for the Applicant. The Court will be loath to grant the interdict where the Applicant

can obtain adequate redress in damages or some other relief. Under certain circumstances an interdict may in fact be less drastic than some other remedy available to the Applicant. In such circumstances where there are other remedies available to the Applicant, it will not be a bar to the grant of an interdict. See in this regard *Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd* 1965 (1) SA 683 (T).

16.3.2 An Applicant for a temporary interdict must show that no adequate ordinary remedy is available. See in this regard Olympic Passengers Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D); Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T) at 54,

57. In respect of temporary interdict this requirement is explicably linked to “irreparable harm” or “injury”

or “loss”. The original statement of the principle as set out in Setlogelo v Setlogelo should be remembered. It states the following:

“But he does not say that where the right is clear the injury feared must be irreparable. The element is only introduced by him in cases where the right asserted by the Applicant, though prima facie established, is open to some doubt.”

In such cases the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable

injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party....”

“Irreparable loss” may be defined as loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable, and in the case of property includes those instances where the owner was lawful possessor is obliged to take merely its value. But the loss need not necessarily be any financial loss; “irreparable loss” may consist of irremediable breach of the Applicant’s rights (Braham v Hood 1956 (1) SA 651 (D) at 655). “Irreparable loss” has been equated to “an actual or well-grounded apprehension of injury.” (Ncongwane v Molorane 941 OPD 125 at 130; in Stern and Ruskin N.O. v Appleson 1951 (3) SA 800 W at 813 Millin J speaks of: “an actual and well-grounded apprehension of irreparable loss). Irreparable loss will occur when a person is forced to give up a right in return for damages assessed upon an incomplete investigation. (Transvaal Property & Investment Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corporation Ltd and the Administrator 1938 TPD 512 at 521, a case dealing with a final interdict); or when entitled to a particular thing, is forced to take merely its value (Cowen & Hammond v Campbell 1906 TH 191 at 194); or is obliged to expend money which he cannot possibly recover (Randles Brothers & Hudson and Trustee of Berkowitz v Brewer 1908 TS 673).”

If the injury envisaged will be irreparable if left to continue an interdict would be the only remedy.

16.3.3 The Applicant has stated that it has no suitable alternative remedy save the relief sought in the notice of motion. This has not been denied by the Respondent. The Respondent has not proposed

any alternative remedy available in the place of an interim interdict.

16.4 THE BALANCE OF CONVENIENCE

16.4.1 The Respondent will not be inconvenienced by temporary deprivation or safekeeping of the motor vehicles. During argument it was pointed out that whenever he flew down to Cape Province the Respondent normally hired a motor vehicle to drive around. On the other hand, the Applicant will suffer immeasurable damage if the motor vehicles are dissipated. In the circumstances, I agree that the balance of convenience favours the granting of the interdict.

[17]

17.1 Mr Labuschagne SC raised two grounds against the application and on the basis of which he argued that the rule nisi should be discharged. The first of these two grounds was that there were certain material facts that the Applicant did not disclose in the founding affidavit. According to him, Mr Albé Geldenhuys (“Mr Geldenhuys”), the deponent to the founding affidavit, did not disclose the fight between him and the Respondent. Secondly, it is alleged by the Respondent that Mr Geldenhuys failed to disclose to the Court that the Applicant gave him some of the motor vehicles as part of his benefits. I can only assume that the reason why Mr Geldenhuys has not disclosed this is because it is farfetched. His case is that all the motor vehicles were bought by his company’s money and that they belong to the company. At any rate I have already stated somewhere supra that the issue regarding ownership will be ironed out on the return date.

17.2 Mr Geldenhuys has failed to disclose that there was a fight between him and the Respondent. It was the other ground upon which the Respondent wanted to derail the ex parte order. In my view, these allegations lack merit. There could not be a fight between them if the Respondent resigned suddenly from the Applicant. He and Mr Geldenhuys had been working peacefully together. There was no evidence of bad blood between them. He could not have continued working, until his sudden and unexpected resignation, if any bad existed between the two of them. He fails to explain why he kept on working with Mr Geldenhuys while they were fighting. He also failed to show how the fight between them influenced the urgent application. At any rate the Court cannot fathom out what the fighting has to do with the forensic reports and the invoices. In the premises, the contention that Mr Geldenhuys failed to disclose some material evidence that would have made the Court to decide the ex parte application differently is flawed.

17.3 Another complaint that the Respondent raised was against the execution of the ex parte order. Adv Wagener SC explained to the Court why the motor vehicles were in the possession of the Applicant and not the sheriff’s. These reasons are in my view valid and the Respondent should not be overly concerned about the possession of the motor vehicles.

[18] Finally, I wish to turn my attention to the Respondent’s application in terms of Rule 45A. This rule provides that:

“The Court may suspend the execution of any order for such period as it may deem fit.”

The Court has the powers to suspend its own orders where real and substantial injustice requires a stay, in other words, where injustice would result from its execution. Adv Wagener SC argued that Adv Labuschagne SC's plea for the suspension of the ex parte order did not mean that the Respondent will get the motor vehicles back. They will remain under attachment until the return date. If that is the case, then the order of suspension as sought by the Respondent will serve no purpose.

[19] At any rate, the Respondent has not established any real and substantial injustice that he will suffer if the motor vehicles are not released.

[20] Finally, the issue of urgency was inextricably woven with the application for reconsideration. I see nothing wrong in it.

[21] In the result, the following order is made:

1. The Respondent's applications for reconsideration of the ex parte order obtained on 27 November 2020, and in terms of Rule 45A of the Uniform Rules of Court are hereby dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Adv. SD Wagener SC

Instructed by:

Weavind & Weavind Attorneys

Counsel for the Respondent:

Adv. EC Labuschagne SC

Instructed by:

Adams & Adams Attorneys

Dates heard:

4 December 2020

Date of

Judgment:

8 December 2020

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