THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 356/2023

In the matter between:

KSL **APPELLANT**

and

AL **RESPONDENT**

Neutral citation: *KSL v AL* (Case no 356/2023) [2024] ZASCA 96 (13 June 2024)

Coram: ZONDI, MOKGOHLOA, and MABINDLA-BOQWANA JJA

Heard: 27 February 2024

Delivered: The judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 13 June 2024 at 11h00.

Summary: Civil procedure – anti-dissipation interdict – whether requirements for an interim anti-dissipation interdict are satisfied – whether intention is a requirement or a lesser threshold is applicable – an interim interdict appealable in the interest of justice.

ORDER

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

1. The application to submit further evidence is dismissed with costs.
2. The appeal is upheld with costs, such costs limited to the costs of one counsel.
3. Paragraphs 5 and 6 of the order of the high court are set aside and replaced with the following:

'The anti-dissipation application is dismissed with costs.'

JUDGMENT

Mokgohloa JA (Zondi and Mabindla-Boqwana JJA concurring):

Introduction

[1] The issues for determination in this appeal are threefold. First, whether the respondent succeeded in establishing the requirements of an interim interdict in her application for an anti-dissipation order. Second, whether the high court applied the correct legal principles pertaining to the order granted. Third, whether an interim interdict order is appealable.

The facts

[2] The facts giving rise to this appeal are briefly the following. The appellant, KSL (the husband) and the respondent, AL (the wife), were married to each other on 3 April 1992 out of community of property with the inclusion of the accrual system as envisaged in Chapter 1 of the Matrimonial Property Act 88 of 1984.

They have two major children. Their marriage did not survive and, in May 2009, the appellant instituted divorce proceedings against the respondent. The parties attempted to reconcile but were unsuccessful. Ultimately, the marriage was dissolved on 14 March 2019. The divorce court granted the decree of divorce and the issue of their proprietary rights (the accrual) was postponed to be determined at a later stage.

[3] Whilst the divorce was still pending, on 19 July 2018 the appellant founded a trust named the Lovell Children Educational Trust and donated an amount of R1 800 000 to the trust with the objective of providing financial support for the parties' children. According to the respondent, she only learnt about this in December 2018. During October 2018, the appellant caused an amount of R5 114 740.75 to be invested in a living annuity held with Investec Assets Management Services (Pty) Ltd.

[4] On 12 December 2018, the appellant presented to the respondent a 'with prejudice tender' in terms of rule 34 of the Uniform Rules of Court. The appellant proposed in the tender that an amount of R550 000 be paid by the appellant to the respondent in full and final settlement of her accrual claim. He further proposed that in order for the respondent to properly consider the settlement offer, a power of attorney be prepared by the respondent's attorneys to be signed by the appellant to enable the respondent to investigate the appellant's financial position. If the respondent was not satisfied with the settlement offer, the appellant proposed that a referee be appointed. The respondent rejected this tender.

[5] During May 2021, two years after the parties' divorce, the appellant sold his immovable property, 6 Coombe Close, Northwold, Extension 11, Johannesburg (the property). The respondent became aware of the sale in June

2021. As a result, she instituted an anti-dissipation application in the Gauteng Division of the High Court, Pretoria (the high court) on 1 July 2021. In the application, she sought an order directing the appellant's attorneys as conveyancers mandated to give effect to the transfer of the property:

'1. . . .to retain the total net proceeds of the sale of the Immovable Property being an amount equivalent to the purchase consideration less the cost of bond cancellation, estate agents commission, taxes and necessary disbursements and imposts ("the Net Proceeds") in an interest-bearing trust account as envisaged by section 86(3) of the Legal Practice Act 2014, (No. 28 of 2014) pending the determination of the [respondent's] accrual claim in the divorce action.

2[I]n the event that the Net Proceeds of the sale of Immovable Property have been paid to the [appellant], or his nominee, at the time of the hearing of this application:-

2.1. the [appellant's attorneys] be directed to furnish the [respondent], care of her attorneys, within 5 (five) days, with a statement of account reflecting the purchase consideration achieved for the Immovable Property and detailing the disbursement of expenses including but not restricted to bond cancellation, estate agents commission, taxes and necessary disbursements and imposts;

2.2. the [appellant] be directed to, within 5 (five) days, pay an amount equivalent to the Net Proceeds to the [appellant's attorneys] to be retained in an interest-bearing trust account as envisaged by section 86(3) of the Legal Practice Act 2014, (No. 28 of 2014) pending the determination of the [respondent's] accrual claim in the divorce action.'

The high court granted the relief sought. Thereafter the appellant applied for leave to appeal. The high court dismissed the application. The appeal is with leave of this Court.

In the high court

[6] In her founding affidavit, the respondent averred that as at a date of divorce, the estate of the appellant had shown an accrual in excess of the accrual in her estate. This, according to her, was evident from the tender that the appellant made to her on 12 December 2018 which 'constitutes clear evidence of the fact that [the

appellant] accepts that his estate had shown greater accrual to [her estate]'. Consequently, she contended that she had a vested interest in the assets sought to be preserved being the net proceeds of the sale of the appellant's immovable property. She contended further that the appellant's conduct prior to the dissolution of the marriage relating to the money donated to the trust and invested in the annuity, gave her concern that the appellant would dissipate and diminish his assets with the objective of frustrating her claim.

[7] The appellant opposed the application contending that the respondent had not made out a case for the relief sought. First, that the trust was created for the benefit of the parties' children. Second, the funds invested in the annuity (which amounted to R5 million at the time of the application) had not been dissipated and he retained his right to the proceeds thereof. Third, the appellant made a calculation in his opposing affidavit to show that his estate had shown a lesser accrual to that of the respondent as at the date of divorce. He denied that he sold the property with the intention of dissipating his estate. He contended that he had debts to pay and had to sell his property to settle them.

[8] As to whether a *prima facie* right to the accrual claim had been established, in granting the anti-dissipation relief, the high court made the following findings:

'[46] . . . The defendant [respondent] states that she has an accrual claim against the plaintiff [appellant] because her estate has shown no accrual and the plaintiff's estate has shown an accrual. She does not substantiate this submission with any primary facts, e.g. referring to the assumed values of the two estates. This blank statement needs, however, to be considered against the context created in the Rule 34 "with- prejudice" offer made by the plaintiff. . .

[47] The plaintiff's with-prejudice tender is substantiating a view that the defendant has succeeded in proving, albeit *prima facie*, that the accrual of the plaintiff's estate exceeds the accrual of her estate.'

[9] The court based this on these two paragraphs appearing in the rule 34 'with prejudice' offer:

'In full and final settlement of the accrual claim of the Defendant against the Plaintiff, the Plaintiff tenders to the Defendant a sum in the amount of R550 000.00 (five hundred and fifty thousand rand) ('the accrual tender')'

'if the Defendant believes that the accrual tender is lower than what the Defendant is entitled to in terms of her accrual claim against the Plaintiff, the defendant may refer the matter to referee for the referee to establish the quantum of the Defendant's accrual claim against the Plaintiff. . . '

[10] On the question of whether there was a well-grounded irreparable apprehension of harm, the court said the following:

'If the defendant succeeds in her counterclaim, and the plaintiff is allowed to sell the house without the proceeds being kept in trust, it will significantly frustrate the enforcement of her claim. The plaintiff, who had several assets at his disposal just before the divorce order was granted, *managed his estate in such a way that although he still benefits, directly or indirectly, from the value of the assets, the assets are removed from his direct control.* The prejudice that will be suffered by the defendant if she is successful in her counterclaim and the order is not granted, meets the requirement of a well-grounded apprehension of irreparable harm.' (Emphasis added.)

The court ultimately found that the balance of convenience favoured the respondent, and she had no other remedy.

In this Court

[11] The appellant contended that (a) the respondent failed to establish the *prima facie* right for the granting of an anti-dissipation order; and (b) the high court applied the wrong legal principles in granting the relief sought. He also applied for leave to submit further evidence on appeal and submitted that he would be prejudiced if the high court's order was not upset on appeal. The respondent on the other hand, submitted that the appellant's conduct prior to the

dissolution of the marriage relating to money donated to the trust and invested into the annuity, reasonably considered, amounted to the conduct required for the anti-dissipation interim relief.

Application to introduce further evidence on appeal

[12] Before I discuss the parties' contentions on the merits, I deal with the appellant's application to submit further evidence on appeal. The evidence which the appellant seeks to introduce is that the property was transferred to the new owners on 3 March 2022. His attorneys received an amount of R1 680 000 on the same day. Various deductions were made from this gross amount totalling R614 258.76. He received additional money following the cancellation of the mortgage bond over the property which brought the net sale of the property to R1 165 848.36. The appellant used part of this money to pay off his creditors and his attorneys. As to why this evidence was not introduced during the trial, the appellant explains that he could not submit this evidence in the high court as his answering affidavit was delivered months before this evidence arose.

[13] Section 19*(b)* of the Superior Courts Act 10 of 2013, empowers this Court to receive further evidence on appeal. The criteria as to whether evidence should be admitted are: the need for finality; the undesirability of permitting a litigant who has been remiss in bringing forth evidence and to produce it late in the day; and the need to avoid prejudice.[1] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,[2] the Constitutional Court, referring to s 22 of the repealed Supreme Court Act 59 of 1959 which is similar to s 19*(b)* of the Superior Courts Act, cautioned that the power to receive further evidence on

[1] *Colman v Dunbar* 1933 AD 141 (A) at 161-162.
[2] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) paras 41-43.

appeal should be exercised 'sparingly' and that such evidence should only be admitted in 'exceptional circumstances'. Furthermore, in *O'Shea NO v Van Zyl NO and Others*,[3] this Court held that one of the criteria for the late admission of the new evidence is that such evidence will be practically conclusive and final in its effect on the issue to which it is directed.

[14] Against this background I proceed to deal with the appellant's application to adduce new evidence. There is no merit in the appellant's application. I discern no 'exceptional circumstances' to move this Court to exercise its power, which, it must be borne in mind, should be exercised sparingly. The appellant's answering affidavit was served on 17 August 2021. According to him, the property was transferred to the new owners on 3 March 2022. His attorneys received the proceeds of the sale on the same day. He received further amounts from the bank when the bond was cancelled. He used these funds to pay his debts and his attorneys between March and April 2022. The application was heard on 23 August 2022 almost four months after this new evidence came to his knowledge. The evidence sought to be introduced should have been presented prior to hearing of the application in the high court or at the very least prior to the handing down of the judgment, as the evidence was known and available to the appellant long before then. There is no explanation why that was not done. In my view, the application to adduce further evidence on appeal must be dismissed.

Anti-dissipation interdict

[15] An anti-dissipation interdict may be granted where a respondent is believed to be deliberately arranging his affairs in such a way so as to ensure that by the time the applicant is in a position to execute judgment, he will be without assets

[3] *O'Shea NO v Van Zyl NO and Others* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) para 9.

or sufficient assets on which the applicant expects to execute. Its purpose is to preserve the asset which is in issue between the parties. The onus is on the applicant for such an interdict to establish the necessary requirements for the grant of the interdict.

Did the respondent satisfy the requirements for an anti-dissipation interdict?

[16] The requirements for an interim interdict are: (a) a *prima facie* right, even if it is open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) the absence of similar protection by any other remedy.[4] In *Knox D'Arcy Ltd and Others v Jamieson and Others*[5] (*Knox D'Arcy*) this Court went further and held that an anti-dissipation interdict provides a remedy where an applicant has shown on the established basis of an interim interdict; (a) a claim against a respondent and (b) that the respondent is [intentionally] secreting or dissipating assets, or is likely to do so with the intention of defeating the applicant's claim.[6] These jurisdictional facts to justify the granting of an anti-dissipatory relief were re-affirmed by this Court recently in *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others*.[7]

[17] Importantly, this Court in *Knox D'Arcy* asked and stated the following:

'The question which arises . . . is whether an applicant need show a particular state of mind on the part of the respondent, i e, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict the answer must be, I consider, yes, *except possibly in exceptional cases*. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where

[4] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1187.
[5] *Knox D'Arcy Ltd. and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (SCA); [1996] 3 All SA 669 (A) at 31.
[6] Ibid at 63.
[7] *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others* [2021] ZASCA 126 para 1.

the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency.'[8] (Emphasis added.)

[18] Against these principles, the first question to determine is whether a *prima facie* right to an accrual claim has been established in this case. The high court found that the respondent did not substantiate the averment in the founding affidavit that she has an accrual claim against the appellant by putting any evidence. Despite that finding, the high court found that the appellant's 'tender is substantiating a view that the defendant has succeeded in proving, albeit *prima facie*, that the accrual of the plaintiff's estate exceeds the accrual of her estate'.

[19] This finding cannot be correct because a tender in terms of rule 34 whether with or without prejudice, is an offer to settle and does not amount to an acknowledgment of liability.[9] Often offers to settle are made to avoid incurring further costs and to save time. Most importantly, the appellant stated that he made a 'with prejudice' offer in order to have this matter settled and to save costs. The high court's finding has the effect of defeating the whole purpose of rule 34.

[20] An assumption cannot be made that a claim has been admitted simply on the basis of the offer to settle. The appellant, in his answering affidavit, denied that the accrual in his estate exceeded that of the respondent. He put up detailed calculations to demonstrate that his accrual was lesser. The respondent did not attempt to contest this in her replying affidavit. The first hurdle of whether or not

[8] *Knox D'Arcy* fn 5 at 64.
[9] *Visser v Visser* [2012] ZAKZDHC 16; 2012 (4) SA 74 (KZN) para 32.

there was a *prima facie* right of an accrual claim, has not been overcome by the respondent. On this point alone, the application ought to have been refused.

[21] The second issue is whether there was any evidence of an intention to render the respondent's claim hollow. The only averments in this regard related to the establishment of the trust and the investment in the annuity. Apart from the fact that dispositions to the trust and the annuity occurred more than two years prior to the institution of the application, they were simply not proximate to the sale of the property. Further, the trust was expressly for the children's financial support. The money in the annuity remains invested in the appellant's name and he has the right to it. It did not disappear. The respondent was offered an opportunity to forensically examine the appellant's financial position in the rule 34 offer, but she declined to do so.

[22] Further, the reason to sell the property is sound. The appellant was 64 years old when the application was lodged. It is common cause that he was no longer employed. The averment that he needed to sell the property to settle his debts does not show intent to get rid of his funds in order to defeat the respondent's claim and render it hollow.

[23] Faced with the difficulty of establishing the jurisdictional requirements for the granting of the relief sought, the respondent sought to rely on the statement in *Knox D'Arcy* that there may be exceptional circumstances in which intention to render an applicant's claim hollow by secreting assets, is not required to be shown. Counsel for the respondent submitted that an anti-dissipation relief in matrimonial matters is such a situation. He further submitted that the Court in *Knox D'Arcy* left this issue open. He referred to several high court judgments,

which I discuss below, as support for the view that it is 'the likely effect' and not the intention, which is important.

[24] The respondent attempted to distinguish the facts in *Knox D'Arcy* from the present facts by contending that *Knox D'Arcy* dealt with commercial issues and not matrimonial issues as is in her matter. She argued that in her case, she had a vested right to claim against the appellant's estate because of the dissolution of the marriage, which was premised upon the ante-nuptial contract. She alleged that she has an accrual claim against the appellant's estate; that the appellant has acknowledged that claim by presenting the tender to her; and that according to her, fell squarely within the exceptional circumstances referred to in *Knox D'Arcy*.

[25] The respondent did not base her claim on exceptional circumstances in her founding affidavit. Neither did she allege that the appellant's conduct was not *bona fide*. In her founding affidavit she alleged that the appellant would dissipate his assets with the objective of frustrating her claim. These are the grounds on which the high court granted the relief she sought. She made her case in her founding affidavit and cannot, at this stage, change the basis of her claim. She must stand or fall by the allegations she made in her founding papers and cannot seek to make out a new case in argument and more so on appeal.

[26] Even so, to qualify as exceptional, the circumstances must be out of the ordinary and of an unusual nature, something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different.[10] I am not persuaded that enough material was submitted for the respondent's case to constitute exceptional circumstances, that would justify the application of a

[10] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 156H-I.

lesser threshold than the one stated in *Knox D'Arcy*. Something more than the allegation that the parties' marriage was out of community of property with accrual system may be required. This has however not been shown in this case. The findings above render it unnecessary to consider whether the other elements to satisfy an interim interdict had been met.

Did the high court apply the correct applicable legal principle?

[27] The high court did not deem it necessary to apply the requirements as stated in *Knox D'Arcy*. Instead, it preferred the dictum in *JLT v CHT and Another*[11] *(JLT)* which held that:

'. . . it is not essential to establish an intention on the part of the respondent to frustrate an anticipated judgment *if the conduct of the respondent is likely to have that effect*.'[12]

[28] The dictum in *JLT* does not reflect the correct legal position. This Court has made it clear in *Knox D'Arcy* that an applicant must show that the respondent possessed a particular state of mind in his conduct. *JLT* has, unfortunately, found favour with various divisions of the high court. In *Gernetsky* v *Gernetsky*[13]the high court held that it is not a requirement for the applicant to show a fraudulent intent for the relief, in a matter where a spouse sought anti-dissipatory relief relevant to an accrual claim. The court considered whether such relief between spouses was not an exceptional circumstance referred to in *Knox D'Arcy*. It however did not make a finding on this issue. *JLT* was recently followed and quoted wrongly in *SM v JM and Another* (*SM*)[14] as though it appears in *Knox-D'Arcy*.

[11] *J.L.T v C.H.T* [2021] ZAECELLC 4.
[12] Ibid para 7.
[13] *Gernetzky v Gernetzky and Others* [2007] ZAECHC 17 para 9.
[14] *S.M v J.M and Another* [2023] ZAGPJHC 723 at para 39.

[29] As stated above, *JLT* and the cases that followed it, do not reflect the correct legal position. *Knox D'Arcy,* a decision of this Court, settled the matter on the requirement of intent in anti-dissipation applications. The high courts were bound to follow the decision of this Court, which is precedent. Following precedent is not simply a matter of respect for higher authority, '[i]t is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution'.[15]

[30] For these reasons, I find that the high court erred in granting the relief sought. The next issue is whether the relief granted, being an interim interdict, is appealable.

Appealability of an interim interdict

[31] The Constitutional Court has held that the interests of justice standard has subsumed the common law test on appealability of interim orders. In *City of Tshwane Metropolitan Municipality v Afriforum and Another*[16] it held:

'The common-law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA* by Moseneke DCJ in these terms:

[15] *Ayres and Another v Minister of Justice and Correctional Services and Another* [2022] ZACC 12; 2022 (5) BCLR 523 (CC); 2022 (2) SACR 123 (CC) para 16.
[16] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 40.

"This Court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the 'interests of justice'. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable".'

[32] This was reaffirmed in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*[17] in which the following was stated:

'[43] Whether an interim order has final effect or disposes of a substantial portion of the relief sought in a pending review is merely one consideration. Under the common law principle as laid down in *Zweni*, if none of the requirements set out therein were met, it was the end of the matter. But now the test of appealability is the interests of justice, and no longer the common law test as set out in *Zweni*. . . .

[45] What is to be considered and is decisive in deciding whether a judgment is appealable, even if the *Zweni* requirements are not fully met, is the interests of justice of a particular case and whether or not an order lacking one or more of the factors set out in *Zweni* constitutes a "decision" for the purposes of s 16(1)(a) of the Superior Courts Act. Over and above the common law test, it is well established that an interim order may be appealed against if the interests of justice so dictate. It is thus in the interests of justice that the impugned interim interdict is appealable on the allegation that the interdictory relief in question resulted in the infringement of the right to freedom of expression.'

[33] The interests of justice to have the high court's order appealed against, have been amply demonstrated in this matter. First, the high court was wrong to regard the tender in terms of rule 34 as substantiation that the respondent had *prima facie*

[17] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) paras 43 & 45.

demonstrated that she had an accrual claim against the appellant. The onus was on the respondent to show that her accrual was less than that of the appellant and she failed to do so. Second, the high court did not apply the correct legal principle as enunciated in *Knox D'Arcy* that the respondent has to show that the appellant was dissipating his assets with the intention of defeating her claim. Third, it was important for this Court to decide the matter, in view of the high court judgments that seem to suggest that intention did not need to be shown, in these kinds of cases. To allow the order of the high court to stand will, in these circumstances, results in an injustice.

Costs

[34] Counsel for the appellant asked for costs including costs consequent upon the employment of two counsel. Generally, costs of the appeal, including those of the application for leave to appeal must follow the result. The basic rule is that costs are in the discretion of the court. In exercising that discretion, this Court, must consider whether it was reasonable to employ two counsel. In doing so, it must consider the importance and the complexity of questions of law involved and the number of authorities referred to in the matter. In my view, the factual and legal issues argued were not complex so as to warrant the employment of two counsel. Accordingly, the appellant's costs should be limited to costs consequent to the employment of one counsel.

[35] In the result, the following is made:

1. The application to submit further evidence is dismissed with costs.

2. The appeal is upheld with costs, such costs limited to the costs of one counsel.

3. Paragraphs 5 and 6 of the order of the high court are set aside and replaced with the following:

‘The anti-dissipation application is dismissed with costs.’

F E MOKGOHLOA

JUDGE OF APPEAL

APPEARANCES

For the appellant:	A Bester SC and R Bossman
Instructed by:	Fairbridges Wertheim Becker Attorneys, Johannesburg
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