IN THE HIGH COURT OF SOUTH AFRICA

(HELD AT THE EASTERN CAPE HIGH COURT, PORT ELIZABETH)

Case No: 1722/2020

In the matter between:

DEMOCRATIC ALLIANCE	**FIRST APPLICANT**
MORNE GERHARD STEYN	**SECOND APPLICANT**

And

SPEAKER FOR THE NELSON MANEDELA BAY MUNICIPALITY	**FIRST RESPONDENT**
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE	**SECOND RESPONDENT**
TSHONONO BUYEYE	**THIRD RESPONDENT**
THE EXECUTIVE COUNCIL FOR THE PROVINCE OF THE EASTERN CAPE	**FOURTH RESPONDENT**
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	**FIFTH RESPONDENT**
AFRICAN NATIONAL CONGRESS	**SIXTH RESPONDENT**
UNITED DEMOCRATIC MOVEMENT	**SEVENTH RESPONDENT**
CONGRESS OF THE PEOPLE	**EIGHTH RESPONDENT**

ECONOMIC FREEDOM FIGHTERS	**NINTH RESPONDENT**
PATRIOTIC ALLIANCE	**TENTH RESPONDENT**
AFRICA INDEPENDENT CONGRESS	**ELEVENTH RESPONDENT**
AFRICAN CHRISTIAN DEMOCRATIC PARTY	**TWELFTH RESPONDENT**
UNITED FRONT	**THIRTEENTH RESPONDENT**
MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**FOURTEENTH RESPONDENT**

JUDGMENT

SCHOEMAN J.

[1] This is a judgment on an application to compel the Speaker for the council of the Nelson Mandela Bay Municipality (NMBM) to convene a meeting to elect a new executive mayor. The first applicant is the Democratic Alliance (the DA), a political party, registered with the Independent Electoral Commission in terms of s 15A of the Electoral Commission Act, 51 of 1996, which has elected

councillors in the NMBM. The second applicant is a councillor of the Nelson Mandela Bay Municipal Council (the Council). The first respondent is the Speaker for the Council (the Speaker), the second respondent is the Member of the Executive Council for Co-operative Governance and Traditional Affairs, Eastern Cape (the MEC), and the fifth respondent is the Nelson Mandela Bay Metropolitan Municipality (the municipality). The other respondents are various political parties represented in the Council while the third respondent is the acting executive mayor of the NMBM.

[2] The applicants launched an urgent application against the respondents for:

(a) an order directing the Speaker to convene a meeting of the Council within seven days of the order and that the agenda for the meeting must include:

(i) The election of an executive mayor for the Nelson Mandela Bay Municipality; and

(ii) The Council's response to the MEC's threat to dissolve the Council.

(b) The MEC be interdicted from dissolving the Council until seven days after the meeting contemplated in (a)(i) has been held.

(c) Costs to be paid by first and second respondents and those respondents that oppose the application.

[3] The application was opposed by the Speaker, the MEC and the NMBM. After the MEC filed an answering affidavit it became obvious that there was no intention by the MEC to dissolve the Council, and, according to his affidavit, the relief sought against him was incompetent as he does not have the authority to

dissolve a municipal council. The applicants argued that the relief against the MEC became moot and that each party should pay its own costs. Therefore, in respect of the MEC it was only the issue of costs that was argued.

The issues.

[4] The respondents raised the following issues:

(a) The matter was not urgent as the relief claimed against the MEC was without merit and against the other respondents it was not urgent;

(b) Neither of the applicants had the necessary locus standi to bring the application;

(c) The Speaker did not have to call a meeting after the petition, signed by the majority of councillors requested a meeting. The reason being that two of the councillors withdrew their support and therefore there was no majority calling for a meeting. This argument pertains to the interpretation of s 29 (1) of the Local Government Municipal Structures Act, 117 of 1998 (the Structures Act);

(d) There was no necessity to call a meeting for the election of an executive mayor as there was an acting executive mayor. This issue hinges on the interpretation of s 55 (1) of the Structures Act; and

(e) Whether the applicants should pay the costs of the MEC or each party to pay its own costs.

Background and chronology.

[5] On 5 December 2019 the executive mayor was removed after a vote of no confidence. The deputy executive mayor has been acting as the executive mayor since that day. On 21 February 2020 the DA delivered a petition, supported by a majority of councillors, calling for a special meeting to be convened on 12 March 2020. The agenda included the election of an executive mayor. On the day of the meeting the Speaker terminated the meeting on the grounds that subsequent to the petition one councillor had left office and another had withdrawn his support for the petition. Again, on 12 March 2020 the DA delivered a petition supported by a majority of councillors, where the agenda included the appointment of an executive mayor, for the meeting to be held on 27 March 2020. It can be assumed that the meeting was in fact called for as the Speaker stated in her answering affidavit that due to the National State of Disaster, the meeting could not be held on 27 March 2020.

[6] After the lockdown restrictions were eased, the DA again submitted a petition signed by the majority of councillors (61) for a meeting to be held on 25 June 2020. This meeting was again not held as two of the original signatories withdrew their support for the meeting. The papers were not clear whether this meeting was in fact called. The second applicant in his founding affidavit stated that the Speaker failed to call a meeting; the Speaker in one paragraph of her answering affidavit stated that she did not call a meeting, as two UDM councillors informed her in writing that they withdrew their support for the meeting and

attached the said letter to her affidavit. This letter was dated 24 June 2020 and it follows that the Speaker was correct where she stated in another paragraph in her affidavit that she cancelled the meeting that had been scheduled for 25 June 2020. From the timing of the correspondence it is clear that a meeting had been scheduled and thereafter cancelled.

[7] On 21 July 2020 the MEC wrote a letter to the acting executive mayor headed: 'Notice to invoke s 139 (1) of the Constitution'. The first paragraph of the letter reads:

> "I write to you in your capacity as the Acting Executive Mayor to advise you that, due to the state of affairs that is currently prevailing at Nelson Mandela Bay Metropolitan Municipality, I am considering making a recommendation to the Provincial Executive to take any appropriate step by invoking the relevant provisions of section 139(1) of the Constitution. The purpose of this letter is therefore to give the Municipal Council of Nelson Mandela Bay Metropolitan Municipality prior notification of this impending step and further afford it an opportunity to advance its representations either in support or in opposition of this step, or as the council may deem fit.
>
> My decision is motivated by persistent failure of the municipality to fulfil the following executive obligations."

[8] The three obligations mentioned are: (a) the failure to fill the vacancy for the position of the executive mayor; (b) the appointment of an unqualified official to act as municipal manager; and (c) the issues raised by the National Treasury and the impending invocation of s 216 of the Constitution.

[9] The letter concludes with this:

"The municipality is therefore requested to make representations, if any, stating reasons why I may not make a recommendation to the Provincial Executive Council, to intervene in the affairs of Nelson Mandela Metropolitan Municipality in terms of s 139 (1) of the Constitution. The representations must be submitted to my office within 7 days from the date of receipt of this letter."

[10] On 24 July 2020 Mr Bhanga, a DA councillor, wrote to the Speaker and informed the Speaker that the executive mayor does not have the authority to act in response to the letter, but only the Council has. He requested an urgent meeting for 28 July 2020. It does not seem as if this meeting materialised.

[11] On 24 July 2020 an article appeared in the Business Day wherein it was stated that the MEC had said he had the go-ahead to put Nelson Mandela Bay Metro under administration.

[12] On 27 July 2020 the legal representatives of the DA wrote a letter to the MEC stating that his letter dated 21 July 2020, addressed to the acting executive mayor, threatened to intervene in the NMBM in terms of s 139 (1) of the Constitution. The letter addressed to the MEC concludes by stating "Please urgently confirm that you will not intervene without first indicating the steps under consideration and allowing the Council to meet to consider a response" and setting a deadline of 30 July 2020. The MEC did not reply to this letter.

[13] The MEC attached a letter to his answering affidavit written by the acting executive mayor dated 28 July 2020 in answer to the MEC 's letter of 21 July. In this letter the acting executive mayor re-iterates the stance of the Speaker that there is no necessity to fill the position of mayor.

[14] Failing a response by the MEC to the letter by the DA's legal representative requesting confirmation that he would not place the municipality under administration, the applicants launched this application on 31 July 2020 with the date of the hearing to be 11 August 2020.

[15] On 4 August 2020 the first and fifth respondents gave notice of opposition while the MEC gave notice on 7 August 2020. In the answering affidavit, filed on the same day, the MEC stated that he never said that he intended to dissolve the municipality, nor did he have the authority to do so, as it is the sole prerogative of the Provincial Executive Council. It was clear from this affidavit that there was no intention by him to place the municipality under administration.

[16] In a supplementary replying affidavit, the second applicant stated that if the MEC had replied to the letter of the legal representative of the DA, when it was written prior to the launching of the application, they would not have brought the application against him.

[17] I will first deal with the question of urgency and the legal standing of the applicants. As the issues raised regarding sections 29 and 55 of the Structures Act deals with the interpretation of those sections they will be dealt with together.

Urgency

[18] Prior to the commencement of argument counsel for the applicants informed me that due to the fact that there was no further *lis* between the applicants and the MEC, barring the question of costs, there was no further reason to proceed at that stage as the matter was no longer urgent. I was of the view that

as all the parties were before court, that all the issues had been properly ventilated, the matter should be argued and disposed of. That was the view shared by all counsel involved in the matter.

[19] However, the Speaker and the municipality argued that the matter should be struck off the roll with costs and can be placed on the roll at a more opportune time. Considering the costs involved, with three counsel from outside Port Elizabeth, there was a court available and all the issues had been properly ventilated, it would not have been in the interests of justice to remove the matter from the roll, just to be set down at a future date.

Locus standi

[20] The Speaker addressed this issue as follows with regard to the DA: "As regards the First Applicant's legal standing, the Second Applicant hinges his authority to act herein as the duly authorised representative of the First Applicant on a letter of authority attached to the founding papers."

[21] The letter referred to is on a letterhead of the DA written by Helen Zille, in her capacity as the Chairperson : Federal Council, and signed by her. This letter reads:

> "DEMOCRATIC ALLIANCE & ANOTHER / SPEAKER FOR THE NELSON MANDELA BAY MUNICIPAL COUNCIL & 11 OTHERS.
> As the Chairperson of the Democratic Alliance Federal Council, I am duly authorised to act on behalf of and legally bind the Party. I hereby authorise Cllr Morne Steyn to sign all affidavits in the above proceedings."

[22] The objection raises a conflation with legal standing and authority. If a party does not have legal standing it means that it has no direct and substantial interest in the right that is the subject matter of the application and the outcome thereof.[1] The Speaker did not deny that the DA is a political party with a number of representatives in the council. I am of the view that this clothes the DA with legal standing in this application as it has a direct and substantial interest in whether the Speaker complies with her legally imposed obligations in the council, or not.

[23] The letter by the chairperson of the federal council authorises Mr Steyn to depose to the affidavit. In *Ganes and Another v Telecom Namibia Ltd*[2] it was clearly stated that it is irrelevant whether he was authorised to depose to the affidavit, or not. The question is rather whether he has the authority to bring the application for and on behalf of the DA. As to the authority to bring an application it was stated by Flemming DJP in *Eskom v Soweto City Council*[3]

> "The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney ... The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no

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[1] *Jacobs en 'n ander v Waks en andere* 1992(1) 521 (A) at 533J-534C.
[2] 2004(3) SA 615 (SCA) at 624 F-H.
[3] *Eskom v Soweto City Council* 1992(2) SA 703 (W) at 705 D -H.

need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority (see Rule 7(1))"

[24] This dictum was approved in *Unlawful Occupiers, School Site v City of Johannesburg*[4] where the following was said:

"However, as Flemming DJP has said, now that the new rule 7(1) remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, only be answered in the negative."

The Speaker and the municipality did not avail themselves of the procedure set out in Rule 7(1). This denial of authority, I am convinced, would also ". .

[4] *Unlawful Occupiers, School Site v City of Johannesburg* 2005(4) SA 199 (SCA) at para 16.

invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised."

[25] The argument regarding the second applicant was that he averred that he is a councillor and that he brings the application in his private capacity. Thus, it was argued, he did not bring the application in his capacity as a councillor, but in his private capacity, and therefore does not have locus standi.

[26] In my view it is clear from both the founding affidavit and the replying affidavit that Mr Steyn brings the application as a councillor of the municipality and he has a direct and substantial interest in the litigation. The argument that he does not have locus standi accordingly has no merit.

[27] Therefore, I am of the view that both applicants have legal standing and the attack on the authority of Mr Steyn to act on behalf of the DA is without foundation.

The interpretation of sections 29(1) and 55(2) of the Structures Act

[28] In interpreting the provisions of the Structures Act the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[6] find application. In *Endumeni* the following was said at para 18:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[6] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27.

context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

[29] The long title of the Structures Act provides that it is to ". . regulate the internal systems, structures and office-bearers of municipalities . . ." while the preamble to the said Act states that:

"Whereas there is agreement on the fundamental importance of local government for democracy, development and nation building in our country;

. . .

Whereas there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, . ."

Section 29 (1)

[30] Section 29(1) of the Local Government Municipal Structures Act, 117 of 1998 (the Structures Act) determines:

"29 Meetings of municipal councils

(1) The speaker of a municipal council decides when and where the council meets subject to section 18 (2), but if a majority of the councillors requests the speaker in writing to convene a council meeting. The speaker must convene a meeting set out in the request."

[31] It is the Speaker's contention that this must be interpreted to have the effect that in the event that some of the councillors withdraw their support, or if a councillor is no longer available and the support for the meeting does not comprise a majority, the Speaker is not obliged to hold a meeting.

[32] There is nothing in the section to indicate that the interpretation by the Speaker is correct. The words of the section are clear: once a majority of councillors request a meeting, the Speaker 'must convene a meeting at a time set out in the request.' The word 'must' denotes that it is peremptory, and the Speaker does not have a discretion whether to do so or not. Initially, in argument, counsel for the Speaker and the municipality argued that at any time before the start of the meeting, if councillors withdraw their support and there is not a majority requesting the meeting, the meeting could be cancelled. However, as the proposed interpretation and scenario is not covered by the clear wording of the section, counsel was constrained to argue that in the event the support is withdrawn prior to the calling of the meeting by the Speaker, the latter is not compelled to convene a meeting, but once a meeting has been convened, the meeting may not be cancelled.

[33] It was argued that in the instant matter a meeting had not yet been convened at the time the support had been withdrawn. This, however, cannot be the position

as the letter withdrawing the support was dated 24 June 2020, only one day before the meeting scheduled for 25 June 2020 which the Speaker averred was then cancelled. It is clear that the meeting had been called and then cancelled.

[34] I am of the view that in any event, reading the section 'in the light of the ordinary rules of grammar and syntax' it is clear that once a meeting is requested by a majority of councillors, the Speaker is compelled to convene a meeting at the time set out in the request despite some of the councillors afterwards withdrawing their request. Once a meeting is held, the meeting will proceed in terms of the Rules of Order. It is logical that the councillor, who withdrew his or her support for the holding of the meeting, can vote as he or she pleases at the meeting and is not obliged to vote with any majority that he/she supported requesting the meeting.

Section 55 (2)

[35] The Speaker argued that it was not necessary to elect an executive mayor, as the deputy executive mayor has been fulfilling the role as executive mayor in an acting capacity from 5 December 2019. As proof of the lack of necessity, the fact that a council meeting had been held on 30 January 2020 and the DA did not object to the acting executive mayor continuing in his role, was held up as an example.

[36] This stance of the Speaker is based on s 55 (2) of the Structures Act which reads:

"(2) A vacancy in the office of executive mayor or executive deputy mayor must be filled when necessary."

The argument is that it is not necessary to fill the position as the deputy mayor is acting in that capacity and is fulfilling all the duties of an executive mayor.

[37] Rule 10.1 of the Rules of Order of the municipality reads:

"At its first meeting after its election, or after the vacation of the Office of the Executive Mayor, the Council must elect the Executive Mayor."

It is argued by the respondents that the wording of the Structures Act takes precedence over the Rules of Order, and it is only when it is necessary to do so that a new executive mayor needs to be elected.

[38] Section 55 (2) determines that the position of executive mayor must be filled when necessary. As the purpose of Structures Act is *inter alia* to regulate the structures and office-bearers of the municipality if follows, when a position is vacant, it has to be filled and not continue with an acting position. No provision is made in the Structures Act for an acting executive mayor. The argument of the Speaker has the effect that, if correct, it might never be necessary to have an executive mayor and that an acting executive mayor might hold the position for the whole period that the Council has been elected. This interpretation negates the important function of an executive mayor whose functions and powers are set out in s 56 of the Structures Act. This includes, but is not limited to, identifying the needs of the municipality, to review and evaluate those needs in order of priority, recommend strategies, programmes and services to address priority needs and

recommend or determine the best way to deliver those services to the maximum benefit of the community.

[39] I am of the view that it is not the correct position that the municipality could have an acting executive mayor for an indeterminate time period. The reference to "when necessary" refers to when the position of executive mayor has been vacated, for whatever reason. This is also clear from the Rules of Order.

[40] It is also the view of the MEC who wrote a letter to the acting executive mayor on 21 June 2020 stating that he is considering recommending to the Provincial Executive to invoke the provisions of s 139(1) of the Constitution. One of the motivational factors mentioned is the 'persistent failure of the municipality' to fill the vacancy for the position of the executive mayor. Section 139 of the Constitution authorises the intervention in local government by the Provincial Executive, either stating what steps need to be taken to meet its obligations (s139 (1)(a)); assuming responsibility for the relevant obligation (s139(1)(b); or dissolving the municipality and appointing an administrator (s 139(1)(c)).

[41] I am of the view that it is clear that there was a valid request for a meeting to inter alia elect an executive mayor by a majority of councillors. The Speaker called this meeting, but she unlawfully cancelled it. Irrespective of the request in terms of s 29(1) of the Structures Act, the Council was obliged to hold a meeting to elect a new executive mayor in terms of the provisions of s 55 (2) of the Structures Act.

The interdict

[42] The requirements for a final interdict are trite: a clear right, an infringement of that right and the absence of an alternative remedy. If these requirements are measured against the finding of the facts discussed above the following emerge.

(a) The applicants have a clear right to have a meeting held after a majority of councillors requested the Speaker to convene a meeting;

(b) There was an infringement of that right when the meeting was not called or cancelled; and

(c) No other suitable or adequate remedy had been proposed and I am of the opinion that in the circumstances of this matter the path followed by the applicants was in fact the correct and appropriate path.

Costs

[43] The *lis* between the applicants and the MEC is moot. However, the issue of costs is not. The applicants argued that each party should pay its own costs, while it is the argument of the MEC that the applicants should pay his costs as the letter written by the MEC to the acting executive mayor dated 21 July 2020 was clear that he did not intend placing the municipality under administration, while the applicants misconstrued the letter.

[44] The subject matter of the letter by the MEC dated 21 July 2020 addressed to the acting executive mayor stated "Notice of intention to invoke section 139 (1) of the Constitution". In the letter it is set out that the MEC is considering making a ". . . a recommendation to the Provincial Executive to take any

appropriate step by invoking the relevant provisions of section 139 (1) of the Constitution." This was done to give the council "prior notification of the impending step and further afford it an opportunity to advance its representations either in support or in opposition of this step, or as the Council may deem fit". These representations had to be made within seven days of the date of the letter.

[45] As previously mentioned on 27 July 2020 the DA's legal representative wrote a letter to the MEC stating that it has not been set out in his letter to the acting executive mayor what subsection of s 139(1) of the Constitution he intends invoking and without such information the DA cannot make meaningful representations. The letter concluded by requesting an undertaking by the MEC that he would first indicate which steps he is considering and allow the Council to meet to consider a response. The MEC did not respond to this letter by the DA.

[46] I cannot determine when the application was served on the MEC as there is no return of service filed. However, it is clear he did receive the papers, as he noted an appearance to oppose after the applicants had filed their replying affidavit in respect of the Speaker and the municipality. Despite knowing that he had no intention of invoking s 139(1) of the Constitution, he did not inform the applicants of that fact after receiving this application.

[47] The MEC stated in his opposing affidavit that he did not have the authority to dissolve a municipal council, as that is the sole prerogative of the Provincial Executive Council in accordance with the provisions of s 139(1) of the Constitution and s 137 of the Local Government Finance Management Act, 56 of

2003. The latter mentioned Act does not apply in the instant matter, as that is limited to provincial intervention only in the event that it is related to financial problems in the municipality, as is set out in S137 (4) of the said Finance Management Act.

[48] The denial by the MEC that he does not have the authority to dissolve a municipality is not correct if regard is had to s 34 (4) of the Structures Act. The section determines that "The MEC for local government in a province may dissolve a municipal council in a province in accordance with the provisions of section s 139 of the Constitution. . ." The opposition to the application could have been circumvented by informing the applicants that there was no intention to invoke any of the provisions of s 139 (1). This could have been done at the time the DA requested confirmation that the MEC would not invoke s 139(1) or at the time the application was served on him. That would have prevented all the wasted costs occasioned by bringing the application and opposing it, while knowing that the MEC had no intention to act as feared.

[49] In the circumstances I am of the view that in respect of the applicants and the second respondent, each party should pay his or its own costs. There is no reason why the costs should not follow the result in respect of the other matters.

[50] The following order is made:

1 The first respondent, the Speaker of the Nelson Mandela Bay Municipal Council is directed to convene a meeting of the Municipal Council within seven days of this order and that the agenda for the meeting must include

the election of an executive mayor for the Nelson Mandela Bay Municipality.

2 The first and fifth respondents are to pay the costs of the application.

3 The second respondents and the applicant are each to pay their own costs in respect of the application against the second respondent.

Irma Schoeman

(Judge of the High Court)

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