DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) ~~OF~~ INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

24/4/2012.

DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(~~NORTH GAUTENG HIGH COURT~~)

CASE NUMBER: 9611/07

In the matter between: 30/4/2012

COMMISSION ON RESTITUTION OF LAND RIGHTS **PLAINTIFF**

and

GERHARDUS THEODORUS KNOETZE FIRST DEFENDANT

RAVELE COMMUNAL PROPERTY ASSOCIATION SECOND DEFENDANT

CORAM: EBERSOHN AJ
DATE HEARD: 9 March 2012
DATE JUDGMENT HANDED DOWN: 30th April 2012

JUDGMENT

EBERSOHN AJ:

[1] The plaintiff is the Commissioner on Land Restitution of Land Rights

("the Commission"). There initially was a second plaintiff but an exception as to its *locus standi* succeeded and the second plaintiff did not figure in the matter any more.

[2] The defendant is a farmer ("Knoetze").

[3] In carrying out its obligation the Commission is to acquire land.

[4] Knoetze's farm described as

> "Certain portion 8 (a Portion of Portion 3) of the farm Appelfontein
> 35 Reg Div LT.
> In extent 158,8855"
> (the "farm")

was earmarked to be purchased by the Commission together with many other farms in the Levubu region. A notice in this regard was on 7th April 2000 published in the Government Gazette.

[5] Knoetze farmed on the farm with various fruit trees, but chiefly with macadamia trees. The macadamia nuts are enclosed in a particular hard shell (husk).

[6] After it became known to the farmers, who owned the various farms, that the particulars of their properties appeared in the Government Gazette of 7 April 2000, representatives of the Commission called for

and held meetings with them where the procedure the Commission would follow and what was required of the farmers, was disclosed to the farmers and discussed.

[7] The effects of the publication in the Government Gazette namely that no further improvements were to be effected to the properties and if such improvements were effected, the farmers would not be paid for it, was also clearly spelt out to the farmers including Knoetze.

[8] It was also made known to the farmers, including Knoetze, that a valuator would be appointed by the Commissioner and the farmers were implored not to hinder or to try and to influence the valuator and that the contents of the valuation was for the benefit of the Commission only and that the farmers would not be entitled to particulars of the contents of the valuation of their farms.

[9] The main issue in this matter is whether the various conveyor belts, bins, the two de-huskers and extractor fans etc. in a shed on the farm of Knoetze were fixtures and were included in the sale or not. In this judgment the plant will be referred to as the "plant" or the "de-husking" plant.

[10] Knoetze's evidence was that at the stage when the notice appeared in the Government Gazette the de-husking of the macadamia nuts by him was done by making use of a rubber wheel. It was a slow process and the trees on the farm matured and produced more and more nuts to be de-husked. He testified that he travelled extensively over the world where he visited macadamia farms and he noticed the improvements in the de-husking process, accordingly he commenced in 2001 to plan and design a feasible de-husking process to be put into operation at the farm, well-knowing that it had to be removed once he had to vacate the farm. In the mean time he also acquired two farms in the Western Cape where he intended to commence with the farming of macadamias and to utilize the de-husking plant which he erected on Appelfontein, which would be moved to the Western Cape.

[11] The Court held an inspection *in loco* on the 13th October 2009 and the minutes thereof read as follows:

"MINUTES OF INSPECTION IN LOCO

DATE HELD: 13/10/2009

PLACE HELD: FARM APPELFONTEIN 35.

PRESENT: COUNSEL AND ATTORNEYS OF BOTH PARTIES TOGETHER WITH WITNESSES.

INSPECTION DONE OF OUTSIDE AND ON UPPER AND LOWER FLOORS OF WESTERN PART OF A SHED BUILT WITH CEMENT BRICKS WITH IBR ROOFING OVER STEEL TRUSSES AS PER

ITEM 8 IN ITEM 23.1 OF BUNDLE A, DOCUMENT A, ON THE SAID FARM.

1. The Western part is in a square form, about 16 metres wide (North to South) and 20 metres long (East to West).

2. Entry to the upper floor is through a door on the Western side (there is another door in the Eastern wall through which people came and went but the area beyond that exit was not inspected and nothing was pointed out there) which gives access to a passage which runs for almost the length of the shed and ends up at the conveyor belt which conveys the produce to the top of the two boxes wherein the augurs are (see paragraph 3 infra). Left of the entrance is an opening, with steel edging over the bricks at the bottom of the opening so as to prevent the vehicles from damaging the wall which steel edging was welded to the vertical "I" beam in the corner of the Northern and Western sides of the shed. The produce can be tipped through this opening in bulk into a steel container (size about 2.5 metres x 4 metres). This container is not affixed to the concrete floor. Drawing the produce from underneath the container there is an electrically powered single conveyor belt, which is not affixed to the concrete floor, which delivers the products into 4 separate bolted together steel bins, almost adjoining the Northern wall of which the third and fourth were welded together (size of each bin about 2.5m x 3.5m x 2.5m high). On the bottom Western side of each of the four bins there is a fan cover (diameter about 50cm) which fan (not visible) apparently sucks air down through the produce in each of the bins. On the Western side of the 4 bins in the passage a stairway leads to a platform along which a person can walk and look into the 4 bins. On the Northern side of the four bins there is an electrically powered conveyor belt, which is not affixed to the concrete floor, which conveys the produce from the four bins which produce at the end of the conveyor belt drops through a funnel placed in a hole in the concrete floor, into a container on the bottom floor of the shed.

3. From the latter container there is an inclined electrically powered conveyor belt, which is not affixed to the concrete floor, which scoops the produce from the container and deposits it into a hopper which is situated on top of two square box like steel containers. The Eastern box with 3 pulleys visible on the Northern side of it which are driven through fan belts by one electrical motor situated at the bottom of the box and the one on

the Western side with 2 pulleys which are driven by fan belts by one electrical motor also situated at the bottom of the box. These boxes are not affixed to the concrete floor but is supported in the middle with a single vertical metal strut which is also not bolted onto nor bedded into the concrete floor. From the hopper on top the produce apparently drops into the two boxes where there is an augur attached to each pulley which augurs turn and cracks the husks of the produce. The husks drop through a funnel through the concrete floor into a container which is situated on the bottom floor of the shed. The kernels (nuts) fall onto two electrically powered conveyor belts, where the kernels are sorted, which conveyor belts are not affixed to the concrete floor, which conveyor belts point in a Western direction and at the end of which another electrically powered conveyor belt, which is also not affixed to the concrete floor, conveys the kernels to an overhead conveyor belt running horizontally in an East to West direction, from which the kernels can be dropped down into three rows of 7 each square metal containers (each about 2.2m x 3.5m x 2.5m high) (one row is on the Western side of the passage referred to in paragraph 2 supra and the two outer rows adjoins each other between the first mentioned row and the Southern outer wall of the shed. These 21 containers are not affixed to the concrete floor of the shed. Beneath the 21 containers, which are bolted together, there is instead a wooden floor consisting of spaced wooden beams (about 60mm x 60mm thick) supported by thick horizontally placed, wooden main beams which rest on interspaced round vertical concrete pilings embedded into the ground floor of the bottom section, with here and there horizontal steel bars between the mentioned thin and thick wooden beams. On the Western side the containers have no steel sides, instead the Western brick wall of the shed is used as the fourth side of the three most Western containers. On the Western side of the passage on the top floor there is another electrically powered conveyor belt, which is not affixed to the concrete floor, which conveys the kernels from the 21 containers to a point where the kernels are bagged.

4. In the shed on the Eastern wall of the top section there are two main electrical switch boards.

5. In the bottom section, that is underneath the concrete floor of the upper section, the following were pointed out:

5.1 The bottoms of the 21 steel bins which rest on the floor

consisting of the wooden beams, can be observed together with an elaborate network of steel ducting pipes about 50cm in diameter through which air is drawn through the kernels in each of the 21 containers by means of electrically powered Donkin fans, which ducting is attached to the bottoms of the bins. Three of the eleven ducts were supported by one metal hanger each which were bolted to the horizontal wooden bars;

5.2 The small container attached to the conveyor belt which scoops the produce from underground where it dropped into after having been conveyed there by the conveyor belt running horizontally along between the 4 containers and the Northern wall, and deposit them into the hopper on top of the boxes where the augurs are in;

5.3 There is an electrical fan encased in a housing which drives air through underneath the little container into which the husks are dropped from under the boxes where the augurs are in and get blown through a blue plastic pipe with a diameter of about 15cm to a heap outside the shed;

5.4 There is a conveyor belt which has three U-shaped steel hangers placed apart along its length and the hangers' tips were in hooklike forms and hung over wooden beams of the floor but were welded onto the steel section of the conveyor belt.

6. The following were pointed out regarding the outer wall of the shed:

6.1 The heads of 6 metal bolts with small flat sections of metal between them and the bricks of the wall are visible randomly spaced on the Southern part of the outer wall near the corner with the Western wall;

6.2 The round heads of 4 metal bolts, evenly spaced apart, were visible along a horizontal line more or less on an equal height as the old outer wall of the building before the new outer wall was built and about the height of the thick horizontal wooden beams inside upon which the 21 containers rested;

6.3 The welding of the steel edging (protecting the brick wall) to the vertical "I" beam in the North Western corner of the shed.

NOTE: Remarks which were made by counsel regarding the items which were pointed out is evidence and must be led in open court and were therefore ignored by the Court."

The Court, mindful as to the applicable authorities, during the inspection paid particular attention to whether which items, if any, were affixed to the floor or walls and counsel accepted the minutes as compiled by the Court.

[12] Knoetze testified that for about two and a half years after 2001, he designed the plant and sourced material from Port Elizabeth, Johannesburg, Pretoria, Tzaneen, Louis Trichardt and Levubu.

[13] He testified that he used labour and equipment from his own farm and he did the assembling of the bins and plant inside the shed. The four big pre-drying bins were designed by him to be merely bolted together inside the shed after the sections thereof were carried through the door.

[14] He testified that his understanding regarding immovable improvements was that if he effected any after the date in the Government Gazette, he would forfeit it as he would not be compensated therefor and he ensured that the de-husking plant be planned and created so as to be

removable. The dryer bins appearing on photo 2 in bundle A were put together inside the shed. No items he used and installed were too big to come into the shed through the door and once the whole plant consisting of the many sections would have to be dismantled and be carried out of the shed only the outer framework of the drying bins would have to be reduced into pre-planned smaller sections.

[15] The blue pipe appearing on some of the photos, through which the husks were blown onto a heap outside, would merely be dug up.

[16] He was adamant that the removal of the various sections of the plant would not cause any damage to the structure of the shed. This evidence was not controverted.

[17] The various sections of the plant would be re-installed in a similar shed to be built at Knoetze's one farm in the Western Cape.

[18] After having received the valuation of their valuator, one Klaff, the necessary request for permission to purchase the farm was prepared by the Commission and forwarded to the Minister who approved the purchase.

[19] A deed of sale was prepared by the Commission and forwarded to Knoetze's lawyers in George.

[20] In the deed of sale the plaintiff's employees defined the property which was the subject of the sale as "Portion 2 (portion of portion 3 of the Farm Appelfontein 35 LT, measuring 158,8855 hectares" and reads further "and all immovable improvements thereon". The purchase price was stated to be R15,000,000.00 which was to be payable 50% thereof in cash within 30 days of the signature of the agreement and the balance thereof upon transfer and registration of the farm in the name of the Commissioner's nominee.

[21] After the pleadings were closed the Commission amended its particulars of claim, firstly, claiming a declarator to the effect that the "de-husking machine" is "an immovable improvement" on the property and was therefore part of the property sold to the plaintiff by the defendant".

[22] Secondly, and alternatively, "in the event of the Court finding that the de-husking machine is not an immovable improvement and therefore not included in the definition of the property", the Commission claims rectification of the contract.

[23] Thirdly, and in the further alternative, the Commission claimed a refund of the R4,500,000.00 allegedly paid to Knoetze for the de-husking machine which was paid "in the *bona fide* and reasonable belief that a de-husking machine was part of the property".

[24] In his plea Knoetze denied the Commission's allegations regarding the three claims and filed a counterclaim based on the *rei vindicatio* for the delivery of the whole de-husking plant to him alternatively for the payment of R4,500,000.00 being the value of the de-husking plant.

[25] In a special plea to the counterclaim the plaintiff alleged that the Ravele Communal Property Association became "the owner of the immovable property and all immovable improvements including the de-husking machine".

[26] As a consequence the Ravele Communal Property Association was eventually joined as the second defendant in the matter.

[27] Knoetze filed an amended counterclaim and the Commission filed alternative counterclaims in reconvention.

[28] The matter thereafter went on trial.

[29] The first witness was a Mr Nkatinga, the Director: Operations Management of the Commission in Limpopo, who was the project co-ordinator and he testified that he compiled settlement submissions regarding each farm purchased, for submission to the Minister. He testified that the Commission caused one Klaff, a valuator, to value Knoetze's farm.

[30] He considered Klaff's valuation report. He then caused a letter to be addressed to Knoetze on 3rd March 2004 (annexure "B" in Bundle A) wherein an offer of R15,000,000.00 was made and paragraph 4 thereof reads as follows:

> "4. The availability of all items that were valued."

At this stage Knoetze did not know what Klaff considered as "immovable property".

[31] On the 19th March 2004 Knoetze replied (annexure "C" in Bundle A) and with regard to the quoted paragraph 4 of annexure "B" stated:

> "2. g) In regards to point 4 of your purchase offer:
>
> Only fixed items were valued."

[32] In his letter Knoetze also offered his assistance to the purchasers to be

joined in a post-settlement plan by a partnership to make the post-settlement period successful. This generous offer was not taken up.

[33] A deed of sale was drawn up by the Commission and forwarded to Knoetze, paragraph 2. thereof bears the heading "DEFINITIONS" and paragraph 2.3 thereof reads as follows:

> "2.3 "The Property" means
> 2.3.1 Portion 8 (Portion of Portion 3 of the Farm Appelfontein 35 LT measuring 158,8855 ha, Vhembe Municipality, LIMPOPO PROVINCE. And all immovable improvements thereon."

[34] Paragraph 7.1 of the deed of sale reads as follows:

> "7. "VOETSTOOTS"
> 7.1 The purchaser acknowledges that it has inspected the Property and that it has satisfied itself of all the relevant facts in connection with the Property. The sale of the Property is therefore deemed to be "voetstoots".

[35] It is common cause that Knoetze was not provided with a copy of Klaff's valuation before the deed of sale was signed and according to Knoetze's evidence he only came into the possession of a copy thereof after litigation commenced.

[36] In his evidence in chief Mr Nkatinga stated that the R15,000,000.00 offer was based on Klaff's valuation. Mr Coetzee, who appeared for Knoetze, objected thereto and Mr Notshe, who appeared for the

Commission, replied that with regard to the main claim for a declaratory order it was not admissible but with regard to the claim for rectification it was admissible. The Court ruled that it would be provisionally admitted but at the end of the trial come to a final decision. I am of the view that it is inadmissible and that portion must be expunged from the record.

[37] Mr Nkatinga conceded under cross-examination that he neither verbally nor in writing informed Mr Knoetze that the de-husking machine was also included in the sale. He also conceded that he could not dispute evidence of Mr Knoetze to the effect that Mr Knoetze designed and built the de-husking machine himself. He also conceded that he could not dispute evidence of Mr Knoetze to the effect that he acquired the many components of the set-up and started assembling it and had it starting to operate a long time after the publication of the notice in the Government Gazette and with regard to the question put to him that Mr Knoetze designed and assembled the machine specifically with the aim and purpose for it to be removed when he left the farm, Mr Nkatinga replied:

"I don't know".

[38] Mr Nkatinga also conceded that the only way Mr Knoetze would or could be informed that he was selling the de-husking machine was by way of

correspondence and he conceded that when he addressed the two letters, respectively annexure "B" in Bundle A (on 3 March 2002) and annexure "D" in Bundle A (on 21 April 2004), to Mr Knoetze, that he was in the possession of Klaff's valuation.

[39] Mr Coetzee then put the following question to Mr Nkatinga:

> "Do you concede that if Mr Knoetze held the view that the de-husking machine or the set-up was not valued by Mr Klaff he would not have understood your offer on pages 9 and 10 (being annexure "B" of Bundle A) to include the farm with the de-husking machine or the set-up?"
> Answer: "I don't understand the question".

[40] The Court then repeated the question whereupon the witness stated:

> "I do not understand the question".

[41] When the question was repeated again by Mr Coetzee the witness replied:

> "It is my understanding that he was in the knowing that the de-husking machine was included".

[42] The witness then stated that through the reading of the two letters, annexures "B" and "D" in Bundle A, Mr Knoetze would have known that the de-husking machine was included, but under further cross-examination he conceded that it would not have informed Mr Knoetze thereof.

[43] In further cross-examination it was put to Mr Nkatinga that it was the state of mind of Mr Knoetze that he did not regard the machine as immovable and Mr Nkatinga conceded that that was the state of mind of Mr Knoetze and he stated that he understood why Mr Knoetze drafted paragraph 2 (g) of his letter annexure "C" in Bundle A and stated therein "only fixed items were valued".

[44] The inspection *in loco* was held on the next day and Mr Nkatinga continued his evidence on the day thereafter namely the 15th October 2009.

[45] Mr Nkatinga conceded that it was the state of mind of Mr Knoetze when he wrote annexure "C" in Bundle A that he would retain the de-husking plant, dryers etc, and he stated that that was not his own understanding.

[46] On several occasions in his cross-examination of Mr Nkatinga, Mr Coetzee remarked that the witness was evading questions and the witness conceded that as he did not know what was in the mind of Mr Knoetze regarding the de-husking plant Mr Knoetze may have been of the view that the de-husking plant was not included in the sale.

[47] It was put to Mr Nkatinga that there was no common error regarding the de-husking plant when the deed of sale was entered into. Mr Nkatinga stated that there was a misunderstanding between the parties.

[48] Mr Nkatinga testified further that a copy of pages 6 and 7 of Klaff's valuation were made for Mr Knoetze, but that the whole of the bottom part of page 7 containing paragraph 24, was cut off. That paragraph contained the summary of Klaff's valuation.

[49] From a perusal of the said page 6 and part of page 7 it would appear that the reference to the nut shed and fixtures in it (without specifying whether the fixtures were movable or immovable) would make the reader of the two pages none the wiser as it was too vague to be conclusive.

[50] The witness testified that he personally handed the said page 6 and portion of 7 to Mr Knoetze when "they negotiated" about the purchase of the farm. It is not clear who "negotiated" on behalf of the Commission, with Mr Knoetze.

[51] The witness conceded that the Commission brought an urgent application in the Land Claims Court to prevent Mr Knoetze from

removing the de-husking plant and he conceded that the application was dismissed. He conceded that in the founding affidavit to the urgent application he stated that he gave the full valuation report to Mr Knoetze whereas in this Court he testified under oath that only page 6 and the top portion of page 7 were given to Mr Knoetze. He testified that only the one and a half pages were given to Mr Knoetze as the Department would then loose their bargaining strongpoint. He did not explain the discrepancy in his evidence in the two courts.

[52] It was put to him that the farmers were told at the meetings that copies of the valuation reports would not be made available to them and in reply to a statement that Mr Knoetze would testify that the full report only came to hand after the case started in 2006, the witness stated that he had no comment to make.

[53] The Court then, at the request of the parties, ordered that the three claims in convention had to be resolved as a preliminary point and the second defendant's legal representative were excused as the adjudication thereof did not require the second defendant from taking part in the proceedings.

[54] The next witness was one Ernst Klaff. He was elderly and very hard of

hearing. He testified that after he was appointed by the Commission to do the valuations of the farms to be purchased, he visited the farm of Mr Knoetze on the 28th August 2002 to value it. He looked at everything on the farm, the shed with the tractors inside and even the shed with the various components forming the de-husking plant. He asked Mr Knoetze what the de-husking plant cost him and Mr Knoetze replied "R4.5 million". He did not inform Mr Knoetze why he wanted the information. Klaff took a photograph of the shed with the tractors but not of the shed with the de-husking machine inside.

[55] He testified further that he valued Knoetze's farm and that he valued the de-husking plant at R4.5 million and as a fixture. He testified that after his valuation he was requested by the Commission to update his first valuation and that he adjusted the figures regarding the land value but not that of the de-husking plant.

[56] Klaff's figures relating to the shed with the de-husking plant inside on page 7 of his report is not understood. If he got the value of R4.5 million for the de-husking plant from Mr Knoetze and he intended to reflect that as the value of the de-husking plant, it meant that he valued the shed wherein the plant was in effect as "nil". This oddity was not explained by Mr Klaff. In this valuation done on the 20th August 2002 he

reflected the following outbuildings:

"1 pump house	12m²
Big all purpose double storey shed	370m²
Big Macadamia shed	360m²
	742m²"

He did not even disclose the existence of the 259m² adjoining the "macadamia" shed (see paragraph [62] of this judgment, no mention is also made by him of the 36m² store wherein the Caterpillar tractor is stored).

[57] He testified that he also, at the request of Knoetze's auditors, valued Knoetze's farm for Capital Gains Tax purposes and he also valued the de-husking plant as immovable. At this state Mr Coetzee, counsel for Mr Knoetze, objected on the basis that Klaff was not identified as an expert witness and that the requirements of Rule 36 (9) (a) and (b) were not complied with. This evidence will be ignored as inadmissible.

[58] Klaff's evidence in this regard is in any case rather hazy. It apparently and was supposedly to mean to be that Mr Knoetze "was not honest" and for purposes of the Capital Gains Tax wanted the de-husking plant valued by Klaff as being immovable and that Knoetze was trying to make out a case against the Commission that the de-husking plant was movable.

[59] In the valuation for Capital Gains Tax which was not signed by anybody, and which is to be found on pages 15 – 28 of the Bundle, the evidential value of which document in any case is therefore in doubt, Klaff in paragraph 4 thereof stated the following:

> "4. Die doel en datum van waardasie.
> Om die markwaarde van die ondergenoemde eiendom vir die doel van Kapitaal Wins Belasting (KWB) te bepaal soos op 1 Oktober 2001".

[60] According to the uncontested evidence of Mr Knoetze he only commenced buying the parts for the de-husking set-up much later.

[61] In sub-paragraph 15.4 of that valuation appears the heading in Afrikaans "Store". There is a description of a so-called "hoofgebou". Particulars are then given of a shed with three floors of respectively the following areas $370m^2$ x $116m^2$ and $170m^2$ = $656m^2$.

[62] Sub-paragraph 15.5 of that valuation has no heading and 15.5 and 15.6 read as follows (quoted verbatim):

> "Die 2de gebou is ook van steen gebou met 'n IBR staan sinkdak en bestaan uit:
> Die neut ontskil- en droogingsaanleg 22,5m x 16m ($360m^2$). Dit is ook 'n dubbelvloer-gebou.
> Onder is:
> - Al die waaiers en uitlaai sluise.
> - Opvangbak en waaier wat die skille en beskadigde neuter met 'n pyp wegvoer na die hoop buitekant die gebou.
>
> Bo is:
> - Aflaai hopper met 4 voordroog bins.

- 2 Dehuskers (1 x 4 baan + 1 x 3 baan).
- 2 Lugskeiers met
- 2 Sorteer bande.
- 21 Droog- en bergings bins wat gesamentlik 150 ton macadamianeute hou.
- Die nodige vervoerbande
- Al die bins is van waaiers voorsien wat met behulp van horlosies aan- en afskakel, sodat al die motors nie gelyk loop en onnodig krag gebruik nie.

Teenaan is 'n gedeelte van 16m x 16.2m (259m^3) wat 'n plat IBR sinkdak het en toegebou is met steen mure. Hierin is 'n hoenderhok, meelkamer, kalwerhok, melkstal, hooistoor en 'n kuilvoertoring. Onder die vloer is 'n slaapstal vir die beeste. Daar is ook sement- en steenkrippe vir water, hooi en voer.

Die kraal is van staalpyp vervaardig met 'n pyp drukgang.

15.6 Die 3de gebou huisves die kruiptrekker en 'n toesluitbare oliekamer, 6.2 x 5.8m (36m^3)."

(The combined size of all the sheds referred to in par 15.5 amounts to 1,311m^2.)

[63] Several anomalies now crop up. In Klaff's first valuation for the Commission (done on 20 August 2002) (which valuation Mr Knoetze did not see) Klaff reported the following sheds:

"1 x Pump house	12m^2
Big all purpose shed	370m^2
Double Storey shed (no size stated).	
Big shed with equipment with proceeding (sic) nuts plant and dry bind (sic) complete	360m^2
All purpose shed	259m^2
Tractor shed	36m^2
	1,037m^2"

(Full details are to be found on page 57 of Bundle A before the Court.)

[64] In his second valuation (so-called re-valuation) done for the Commission which Mr Knoetze also did not see until the court case started, Klaff reported the following sheds:

"1 pump house	12m²
Big all purpose double storey shed	370m²
Big Macadamia shed	360m²
	742m²."

[65] In his report for Capital Gains Tax (see paragraphs [59], [60], [61] and [62] of this judgment) he gave particulars of sheds in extent 1,311m².

[66] It would appear that, as a result of the confusion reflected in Klaff's reports, Mr Knoetze was underpaid for his farm. That is, however, now water under the bridge.

[67] The Court must address the matter of the bundle of photographs prepared by Klaff on the 9th October 2009 (i.e. three days before the trial commenced before me on the 12th October 2009) (see pages 29 – 51 of Bundle A). The overall picture gleaned from the photographs is that it is a number of separately functioning units harmonized to receive raw macadamia nuts still husked and fed to two separately functioning de-huskers and transported from there by conveyor belts to drier bins. This

plant did not exist in the form it appears in the photographs taken in 2009 by Klaff, and also did not exist when the notice appeared in the Government Gazette and when Klaff made his two valuations for the Commission and the valuation for Capital Gains Tax.

[68] Klaff did not make a good impression as a witness.

[69] Klaff, under cross-examination, stated that he just looked into the shed in which the plant was and did not examine in detail what was inside the shed and what the plant consisted off and he accepted that it was one plant which was included as a fixture. He, however, conceded that he did not ask Mr Knoetze for his opinion whether Mr Knoetze regarded it as a fixture or as movable and he stated that he did not think that it was necessary to do so. Mr Knoetze in any case disputed that he was with Mr Klaff when the latter looked at the shed and the contents thereof.

[70] Klaff also testified that he looked at the plant as essential to the operations on the farm and that affirmed his belief that it was a fixture. That, in itself, however, is a misguidance and is not the legal test to determine what is a fixture and what is a movable asset on a farm.

[71] Klaff conceded that he never informed Mr Knoetze that he valued the

de-husking plant as a fixture.

[72] Klaff conceded that he was not aware of the legal rules regarding fixtures and movables and he just assumed that the plant was a fixture.

[73] Klaff conceded that many of the components of the plant were not visible on the photos in the album which photos were taken seven years after he did the valuation.

[74] There was a dispute regarding the welding of a plate covering the brick wall over which the nuts would be dropped from outside into a hopper to a vertical beam. According to Mr Knoetze it was not welded in 2002 when the valuation was done and that the welding was done subsequently. The welding itself is immaterial as it is not to a part of the plant itself.

[75] Klaff also stated that the massiveness of the de-husking plant also caused him to believe that it was a fixture as it was too large to move. Here he overlooked the fact that Mr Knoetze, in a very expert manner, designed the various sections of the plant that they operated in harmony, but were not joined to each other and could be disassembled and be taken apart and moved out of the shed. Klaff concluded his

evidence under cross-examination by making the concession that Mr Knoetze told him at some stage that the plant was not going to be included in the sale of the farm.

[76] It is clear that Klaff, himself, conceded that he did not possess the knowledge and/or experience to value a plant as intricate and involved as the plant Mr Knoetze designed and put into operation. A further consequence of his lack of knowledge and proficiency in this field is that he, according to his own knowledge, was not acquainted with what amount was involved to build such a plant and he, himself, did not investigate how the various loose standing components of the plant were affixed to the floor of the shed, to enable him to voice an opinion whether the plant was a fixture or a movable asset.

[77] The next witness for the plaintiff was one Carel Aron Nolte. He is a valuer. He could not remember when he was admitted as an attorney and stated that it was somewhere in the seventies. He did not state any facts which would or could cause the Court to find that he has sufficient mechanical knowledge to be able to give an expert opinion regarding the joining together of several loose components to form one operating plant and whether the plant was a fixture or a movable.

[78] He testified that he inspected the plant in 2010 and had a discussion with Klaff and he agreed with Klaff's point of view. The Court already pointed out that Klaff completely misguided himself.

[79] Nolte tried, by juggling with figures, to prove that R4.5 million was paid for the plant by the Commission. His arguments were, at best, for him, speculative.

[80] He based his opinion that the de-husking plant was a fixture on five points.

[81] The first point being that the shed and the de-husking plant were one unit. He based this on the fact that certain of the components were bolted to each other "and the bottom floor" (without specifying what were allegedly bolted to the bottom floor). He also referred in this regard to the electrical cables which supplied electricity to the electrical motors powering the various components. This point has no merit as everything could be loosened and removed from the shed without demolishing the shed or any part of it. The electrical box could be unscrewed from the wall according to the evidence and all the electrical wires removed.

[82] The second point being what he referred to as "the sheer weight" of the structure adjoined the plant "permanently" to the floor. So went his argument. This point is ludicrous on facts and in terms of legal authorities.

[83] The third point being that the first four drying bins were bolted together and the walkway was welded to the bins and the 21 other bins on the southern side of the shed were similarly welded to form a unit, which was also extremely heavy and in his view formed part of the shed. He also testified that the two de-husking machines themselves, although not affixed to the floor were so heavy that it was, due to its sheer weight, permanently attached to the floor of the shed. No evidence as to the actual weight of each of the various components was adduced by any of the plaintiff's witnesses. Nolte, apparently, has no knowledge of heavy plants being assembled piece by piece and then when due, be disassembled piece by piece again and removed. There is no merit whatsoever in this point either.

[84] The fourth point being that the floor of the shed would be damaged as the underground electrical "pipes" as he referred to it, would be removed. These are, however, mere conduit tubing which is left *in situ* and need not be dug out. The electrical wiring in fact is merely

loosened from the electrical motors and pulled out through the conduit tubing. The openings of the conduit tubes are then sealed as are the holes where some of the sides of some bins were bolted by rawl bolts to some of the walls of the shed.

[85] The fifth point was a further absurdity advanced by him namely that, according to him, a permanent de-husking machine was an essentiality on the farm. How and where he could bring such an argument into play where the question is whether the de-husking plant is a fixture or a movable, is not clear. There is also no merit in this point.

[86] Nolte conceded that he did not know what went on in the minds of the signatory on behalf of the Commission and Mr Knoetze.

[87] He conceded that the Court was in a better position than he was to adjudge the issue because the Court did a thorough inspection *in loco* and he had to rely on hearsay and in some respects form an own opinion.

[88] Under cross-examination regarding the first point he relied upon, he stated that he saw the shed and the de-husking plant and he formed such an opinion.

[89] He conceded that he had no mechanical training and for his opinion he relied upon previous valuations he made. When taxed about it, he conceded that this was the first time he inspected and came across a de-husking plant. He conceded, when taxed about this by adv Coetzee, that his and adv Coetzee's knowledge about de-husking machines was at par namely "nil". He also conceded that the bins and other components bolted together could be unbolted.

[90] When cross-examined about the alleged weight of the plant he replied that he "observed" that they were very heavy. In reply to a question by the Court he admitted that he did not weigh any of the components. He conceded that all the parts could be disassembled after the bolts were loosened and the spot welding ground off with an angle grinder.

[91] He also testified that he saw the welding of the plate of the receiving bin covering the bricks to the vertical beam and stated that he could not say when it was done.

[92] He conceded that what damage may be caused to the shed when the plant is disassembled and removed, could be repaired.

[93] Nolte was apparently called as a witness to bolster the evidence of Klaff, but he did not succeed and he in fact proved Mr Knoetze's case that the plant was not a fixture but a movable.

[94] The next witness was a Mr Ravele. He testified that the community was invited to the farm in 2004 by the Commissioner to view the farm the Commission bought for them. He testified that they were not told that the de-husking plant would be removed from the farm. The evidence of this witness did not take the case any further and there being no cross-examination, the witness was excused.

[95] Mr Notshe, counsel for the plaintiff, applied for a postponement to be able to call a further witness as the evidence of the previous witness took him by surprise. Such leave was granted.

[96] The next witness was one Tshinetisa Maumela Moila. He testified that in 2006 he was employed as senior project officer and he was aware of the Appelfontein project.

[97] He did a "site inspection" of the farm to assess whether the remaining 50% of the purchase price of the farm could be paid out or not. The inspection entailed that he had to visit the farm to check whether all the

items valued were still on the farm. He could not remember the date he did the inspection and he invited members of the Department of Agriculture and of the Ravele Communal Property Association along. He met a representative of the owner, Mr Knoetze, on the farm, he being Mr Martin Knoetze. He explained the reason for the visit to the representative.

[98] The witness testified that he had a copy of Klaff's valuation with him and checked every item. At the macadamia shed a bit of a dispute arose because Mr Martin Knoetze indicated that it was his understanding that the de-husking plant did not form part of the valuation and that the plant would be removed by Mr Knoetze. The witness stated that he informed Mr Martin Knoetze that he differed. He proceeded with the inspection but indicated that the de-husking plant could not be removed. He stated that he wrote a report about the attitude of Mr Martin Knoetze and that there was a dispute about the de-husking machine.

[99] Under cross-examination the witness conceded that he sat in the public gallery listening to the evidence of Mr Nkatinga and he conceded that he attended the inspection *in loco*. He stated that he was at no stage requested to leave the court. He could not confirm ever having spoken to Mr Knoetze.

[100] He conceded that his 50% inspection was not to negotiate or re-negotiate the terms of the deed of sale and the only purpose was to see if everything was still there and whether the last 50% of the purchase price could be paid out. He stated that he was to see if everything Klaff valued was still on the farm, but was not to see if everything purchased was still on the farm or not. He testified that he had the valuation report and could not recall whether he had any other documents regarding the sale with him or not.

[101] The witness testified that he did not see any differences regarding the plant and fixtures described in the valuation. It was common cause that the inspection was in April 2006 and that the transfer only went through on the 22nd May 2006.

[102] When put to him that when Mr Knoetze signed the deed of sale Mr Knoetze was under the belief that the de-husking plant was not sold with the farm and the witness replied that he could not comment.

[103] The witness stated that he made out a report of his inspection but that he was not certain whether he gave a copy thereof to Mr Martin Knoetze.

[104] It was pointed out in cross-examination that a copy of the report was not discovered and the witness replied that a copy thereof should be in the head office file. He stated that in his report he stated that there was a dispute regarding the de-husking plant.

[105] It was put to him that Mr Knoetze never intended to sell the de-husking machine and the witness replied that he could not comment.

[106] The witness conceded that after head office received the witness's report they let the transfer go through and paid the remaining 50% of the purchase price.

[107] The case was stood down to have a copy of the report by Mr Moila faxed to Pretoria and when it could not be found, the matter was stood down till the next day to enable Mr Moila himself to go to Polokwane to fetch the report and bring it to court the next day. The next day he turned up and stated that his report could not be found.

[108] The next witness was Mr Mashile Mokone. He testified that he was now practicing as an attorney and previously worked for the Land Claims Commission of Limpopo. After receipt of Klaff's valuation he made out

the offer to Mr Knoetze and he himself signed the offer.

[109] Under cross-examination he conceded that he and Mr Knoetze never met personally and he never handed any documents to Mr Knoetze and he could not confirm whether a copy of Klaff's valuation was ever handed to Mr Knoetze. He also stated that he would not know whether Mr Knoetze had seen a copy of Klaff's valuation before signing the deed of sale.

[110] The witness confirmed that movable items were never valued and did not form part of the agreement.

[111] He also testified that he and Knoetze did not sign the agreement in each other's presence.

[112] The witness stated that he would not know whether Mr Knoetze, when he signed the deed of sale, was under the impression that the de-husking plant was not included in the sale.

[113] The plaintiff's case was then closed with regard to the three counter claims in convention.

[114] The first witness for the defendant was Mr Martin Knoetze. He testified that he was employed during 2005/6 by Mr Knoetze as manager of Appelfontein. He testified that he remembered the handing over meeting he held with the previous witness, Mr Moila. He stated that he explicitly stated to Moila that the de-husking plant was not included in the sale. He himself was never given a copy of Klaff's valuation. At the de-husking plant he informed Moila that he had to disassemble the plant and cause it to be taken to George.

[115] Under cross-examination he stated that he was not the manager of the farm at the time the valuation was made by Klaff. He explained under cross-examination how the plant would be dismantled and that in George it would be assembled again and used there.

[116] The next witness was the defendant Mr Knoetze. He testified that the notice was published in the Government Gazette in 2000. At that time he used a rubber tyre to de-husk the nuts. He realized that he would have to relocate and he bought two farms, one in George in the Cape, and another close by where he commenced planting macadamia trees. He realized that the performance rate of the rubber tyre was not satisfactory and he decided to design and build a de-husking machine on Appelfontein which would not be a fixture and which could easily be

dismantled and removed and be assembled in George again. He stated that he was made aware thereof that every fixture he erected on Appelfontein after the date of the publication in the Gazette, would be forfeited and he intentionally designed and built the de-husking plant so that it would not be a fixture and it was not anchored to the floor of the shed.

[117] He testified that the assembling of the de-husking plan and the bins was done by himself with his own workers on the farm.

[118] He gave vast particulars of the plan of the de-husking machine and how it was put together and why certain materials were in used certain places.

[119] The general impression of Mr Knoetze's evidence is that he was an honest and quite capable farmer, with vast experience of the growing of macadamias and the plant used all over the world to do the de-husking of the nuts, that he used his knowledge to build a de-husking plant which was not a fixture so that he could eventually remove it and assemble it at George where he was then farming with macadamias.

[120] He testified that when Klaff visited the farm to do the valuation in 2002

the de-husking plant was not finished yet and he left the shed open for Klaff to inspect the shed at his leisure. He stated that Klaff asked some general questions but they did not have a discussion whether the de-husking plant was a fixture or be a movable. He opened all the sheds on the farm for Klaff to inspect at his leisure and responded to questions put by Klaff to him.

[121] He testified that at one of the meetings held later by the Commission's representative with the farmers, the farmers did ask to see the valuations but the representative of the Commission responded that the Commission paid for it and that it was the Commission's property.

[122] He testified that at one stage Klaff was commissioned to do a valuation of Appelfontein for Capital Gains Tax but that Klaff's report could not be used as it had mistakes in it. The valuation of the farm was as it was on the date of the notice in the Gazette and Klaff even had that wrong in his report and at that stage there was nothing in the shed wherein the de-husking machine was later assembled in. The valuation had other inaccuracies in it too and his auditors declined to use Klaff's valuation.

[123] The Court already dealt in paragraphs [54] – [66] of this judgment with the differences between the three valuations made by Klaff.

[124] Mr Knoetze testified that when he signed the deed of sale he did not regard the de-husking machine as an immovable improvement to the farm.

[125] Under cross-examination Mr Knoetze testified that when he commenced building the de-husking machine the shed was just a sheep shed and he also built up the walls of the shed.

[126] He testified that he no longer had the invoices of the purchases of parts of the plant as it was done ten years ago and he did not keep his documents that long.

[127] He testified that Klaff was telephonically requested to do the Capital Gains Tax valuation and he was specifically asked not to value the farm as it was in 2001 and not to add things brought onto the farm thereafter. When Klaff's report for the Capital Gains Tax came to hand he and his auditor discussed it, having noticed the inaccuracies in it, they decided not to make use of the report at all.

[128] Mr Knoetze testified that he did not obtain an independent valuation of Appelfontein when he got the offer of R15 million and he regarded R15

million as a fair price for an excellent farm and warranted a price of R15 million and the trees would each year yield more nuts and become more prosperous.

[129] With regard to the phrase "subject to the availability of all items valued", Mr Knoetze testified that he did not know what was valued as fixtures.

[130] Mr Knoetze testified that the Commission refused him a copy of Klaff's valuation and he accordingly could not comment.

[131] The final and binding document, according to him, was the deed of sale.

[132] The Court unhesitatingly finds Mr Knoetze to be a credible, honest and truthful witness.

[133] The Court now must decide the three alternative claims of the plaintiff namely:

[a] Whether the definition of "the property" in the deed of sale includes the de-husker in other words, is the de-husking plant a fixture or is it a moveable;

[b] Whether the deed of sale should be rectified "by the inclusion of the de-husking machine in the definition of the property sold"; and

[c] Whether there should be a repayment by the defendant to the plaintiff of R4,500,000.00.

[134] Both counsel filed comprehensive heads of argument and ably argued the matter in court.

[135] With regard to whether the de-husking plant was a fixture or not, both counsel referred to many cases. The then Appellate Division of the High Court in Pettersen and Others v Sorvaag 1955 (3) SA 624 (A) in a judgment by Hoexter JA finally laid to rest the issue of the weight of the thing attached. On page 627 B – F Hoexter JA stated the following:

> "In a matter of this kind the elements chiefly to be taken into consideration are-
> (1) the nature of the thing annexed,
> (2) the degree and nature of its annexation, and
> (3) the intention of the person annexing it.
> *(MacDonald Ltd. V. Radin, N.O. and The Potchefstroom Dairies & Industries Co. Ltd.,* 1915 A.D. 454).
>
> The house, as has been stated, consisted of a number of parts – wood and iron – imported by Ellefsen from Norway, transported to the site and there assembled. In that process of assembling, parts were fitted into one another but nails were also used. In its completed state it was a large double-storied house of nine major and in all 14 rooms which rested upon a brick or concrete foundation without being fixed to it. The house was a

heavy structure – able because of its weight to withstand any storm.

It was stated in evidence that in Norway such a house was considered a movable: it could by the use of jacks and rollers or twelve-wheel trollies be moved bodily to another site; it could also be dismantled and re-erected on another site. From this it was argued that the house was a movable. It may be that a distinction should be drawn between a pre-fabricated structure of this kind and 'the house solidly built upon foundations solidly sunk into the earth' referred to in *Newcastle Collieries Co. Ltd. V. Borough of Newcastle,* 1916 A.D. 561 at p. 564, and the 'house built into and upon the soil' referred to in *van Wezel v. van Wezel's Trustee,* 1924 A.D. 409 at p. 417. If this distinction be drawn the nature of the structure and the method of its annexation would not be conclusive: one would then have to examine the intention with which the house was annexed. And here one is in certain respects in the realm of speculation, for there was no evidence - direct or indirect – of Ellefsen's intentions, nor of the terms on which he leased the land from Mrs. Hugo, and whether the house was specially dealt with."

At 628 A – D Hoexter JA stated the following:

"But we have to deal here with a pre-fabricated house which in Norway is regarded as a moveable. The fact that the house was very heavy and probably incapable of being moved as a unit does not detract from the fact that it was so constructed that it could be taken to pieces which could be removed and put together again on another site. The house was brought from Norway by a Norwegian and there is no evidence to show that Ellefsen did not regard it as a movable house.

In the next place there is the fact that the house regarded by Ellefsen as a movable house was erected by him on property belonging to another. The possibility that he may have contemplated a removal of his whaling operations from one site to another cannot be disregarded; and in the case of such a removal it is probable that he would have moved the house together with his other paraphernalia. Finally there is the fact that at all relevant times the house appears to have been regarded as a movable by all the persons who had any interest in it. The inference that it was so regarded because Ellefsen, when he erected it, intended it to remain a movable, appears to be a strong one. In all these circumstances I have come to the conclusion

that the respondent has established that the house remained a movable after its erection by Ellefsen."

[136] Taking everything into consideration and considering the evidence adduced in court, it is clear that the de-husking plant was not a fixture and was never intended by Mr Knoetze to be a fixture, but remained a movable and the counter claim in this regard must fail.

See also: **MacDonald v Radin N.O. and Another 1915 AD 454;**

Gault v Behrman 1936 TPD 37;

Cape Town & District Gas, Light & Coke Co Ltd v Director of Valuations 1949 (4) SA 197 (C); and

Potchefstroom Dairies v Industries Co Ltd 1915 AD 454 at 467.

Klaff's valuation is not clear and in any case cannot be binding upon the parties. Klaff never was a party to the deed of sale and his knowledge, or rather lack of knowledge of a de-husking plant, is irrelevant and cannot oust the Court's jurisdiction to adjudicate the matter on its own peculiar facts.

[137] The plaintiff in the alternative claim rectification of the deed of sale "by the inclusion of the de-husking machine in the definition of the property sold".

[138] Harms in the 6th Edition of **Amler's Precedents of Pleadings** on page **298** described the requirements to succeed with a claim for rectification as follows:

[a] The object of rectification is to have a written contract conform to the common intention of the parties;

[b] **Onus:** A party who wishes to rely on rectification must claim rectification in the particulars of claim, the plea or a counterclaim. That party bears the onus of proof and must prove its case clearly.
Benjamin v Gurewitz [1973] 1 All SA 401 (A), 1973 (1) SA 418 (A) 428
Lazarus v Gorfinkel [1988] 2 All SA 338 (C), 1988 (4) SA 123 (C) 131
Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd [2004] 2 All SA 366 (SCA), 2004 (6) SA 29 (SCA).

[c] **Rectification as a claim:** The following facts must be alleged and proved:
Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd [2007] 3 All SA 18 (SCA).

(a) An agreement between the parties which was reduced to writing.

(b) That the written document did not reflect the common intention of the parties correctly. The common continuing intention of the parties, as it existed when the agreement was reduced to writing, must be established.

[d] An intention by both parties to reduce the agreement to writing.
Meyer v Kirner [1974] 4 All SA 201 (N), 1974 (4) SA 90 (N) 103.

[e] A mistake in drafting the document.
Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd

[1962] 3 All SA 371 (T), 1962 (3) SA 399 (T) 411
Neuhoff v York Timbers Ltd [1981] 4 All SA 675 (T), 1981 (4) SA 666 (T) 674.

The mistake may have been the result of

(i) a *bona fide* mutual error; or
Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 2001 (4) SA 1315 (SCA) para. 32

(ii) an intentional act of the other party.
Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd [1962] 3 All SA 371 (T), 1962 (3) SA 399 (T) 411 (explaining *Mouton v Hanekom* [1959] 1 All SA 69 (A), 1959 (3) SA 35 (A)).

[f] The wording of the agreement as rectified. It does not suffice to give the general import of the common intention.
Levin v Zoutendijk 1979 (3) SA 1145 (W)
These facts must appear at least by way of necessary implication from the pleading.

[g] **Prayer:** The relief is for rectification of the agreement, with or without consequential relief.
Levin v Zoutendijk 1979 (3) SA 1145 (W).

[h] **Rectification as a defence:** A defendant may rely on rectification as a defence without having to claim rectification. The facts necessary to establish rectification must be alleged in the plea. The court is then asked to adjudicate the matter on the contract as rectified.
Gralio (Pty) Ltd v DE Claassen (Pty) Ltd [1980] 1 All SA 423 (A), 1980 (1) SA 816 (A) 824.
It is advisable to counterclaim for rectification. If rectification is sought by means of a counterclaim, the procedure for a claim should be adopted. Whether a defendant can dispense with a counterclaim for rectification when the contract must in law be in writing is uncertain.
Gralio (Pty) Ltd v DE Claassen (Pty) Ltd [1980] 1 All SA 423 (A), 1980 (1) SA 816 (A) 824."

It is clear that the plaintiff did not prove any common intention on the part of the parties that rectification should be granted and this counterclaim must also fail.

[139] The third claim is for the payment of R4,500,000.00. It is clear from the aforegoing that this claim must also fail.

[140] It follows that the three counter claims must be dismissed with costs including the costs of the second defendant, the Ravele Communal Property Association, and that the defendant, Mr Knoetze, is entitled to remove the de-husking plant if the parties cannot come to a suitable financial arrangement about it.

[141] The following order is accordingly made:

[a] The three counterclaims in reconvention of the plaintiff against the first defendant, Mr Knoetze, are dismissed.

[b] The Plaintiff must pay the costs of the action which costs will also include:

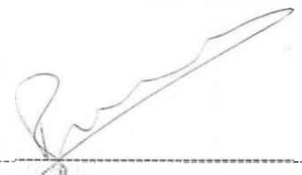
[i] All costs reserved and all wasted costs in connection of which no order has been made yet;

[ii] The expenses of Mr Knoetze and his brother,

Martin, whom are both declared necessary witnesses which costs will include their travelling costs to Pretoria to give evidence in court and for the inspection *in loco* to Levubu, including the necessary accommodation to attend the trial.

[iii] The plaintiff must also pay the costs of the second defendant, The Ravele Communal Property Association.

[c] The outstanding aspects of the matter are postponed *sine die* and the parties must approach the Court to arrange a suitable date in the near future to resume the trial.



P Z EBERSOHN
ACTING JUDGE OF THE HIGH COURT

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