IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

CASE NO: 019883/2023

In the matter between:-

TRANSASIA MINERALS (SA) PTYLTD	First Applicant
TRANSASIA 444 (PTY) LTD	Second Applicant
VS	
LUNGANI HECTOR KUNENE	First Respondent
UMSOBOMVU COAL (PTY) LTD	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
GLADNESS NKAMISILE MTSHALI	Fourth Respondent
SENZO MBATHA	Fifth Respondent

Coram: Kooverjie J

Heard on: 16 March 2023

Delivered: 24 March 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *Caselines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 17H30 on 24 March 2023.

SUMMARY: The High Court has inherent jurisdiction to set aside a subpoena *duces tecum* issued in the criminal court in circumstances where the conduct of the parties constitutes an “abuse of process”. The circumstances of each case must be evaluated when making a determination on the abuse issue.

ORDER

It is ordered:-

1. The matter is heard on an urgent basis as contemplated in Rule 6(12) and the Applicants' failure to comply with the Rules of court in respect of service and time periods is condoned.
2. The Subpoena Duces Tecum in the matter between 'The State and Lungani Hector Kunene and Umsobomvu Coal (Pty) Ltd under case SCCC-078-2021 in the Regional Court Division of Gauteng held at the Specialised Commercial Crime Court, is set aside.
3. The relief pertaining to the contempt of court and/or constructive contempt on the part of the first and fifth respondents is struck off the roll.
4. Each party is to pay its own costs.

JUDGMENT

KOOVERJIE J

[1] The applicants in this urgent application seek interim relief pending the return date of 15 August 2023 for:

1.1 the setting aside of a subpoena *duces tecum* issued in the Regional Court ("the subpoena"); and

1.2 declaring certain conduct of the first respondent (Mr Kunene) and the fifth respondent (Mr Mbatha), to be in contempt of court and of constructive contempt of court and/or further in violation of Section 165(3) of the Constitution.

[2] The applicants' core contention is that if the subpoena is not set aside, the fourth respondent will be compelled to testify in the criminal court and disclose information (both confidential and proprietary) of the applicants to which it is not entitled to.

[3] The applicants further contended that the second respondent, Umsobomwu, and the fifth respondent, Mr Mbatha, are in contempt of court, in that they abused the processes of the court when they caused the subpoena to be issued.

THE SUBPOENA

[4] The subpoena was issued in the Regional Court, Gauteng, which required the regional manager of the Department of Minerals and Energy ("the Department") to appear on 20 April 2023 and to disclose the following documents, namely:

1. *"All correspondence including all electronic communication between the Department of Mineral Resources and Energy and*

1.1 Transasia (Pty) Ltd;

1.2 Transasia Minerals (Pty) Ltd;

1.3 Transasia 444 (Pty) LTd;

1.4 Lyudmyla Royblat;

1.5 11 Miles Investments (Pty) Ltd;

1.6 Nakedi Matthews Phosa;

1.7 Umsobomvu Coal (Pty) Ltd; and

1.8 Hector Lungane Dominica Kunene.

2. *All documents and submissions and correspondence considered by the Minister of Mineral Resources and Energy, or his delegate in the application for consent in terms of the Mineral and Petroleum Resources Act, Act 28 of 2002 ("the Act") relating to the mining rights under the reference in KZN/30/5/1/2/2/1002MR and KZN/30/5/1/2/2/1003MR (the mining rights)."*

[5] The said subpoena emanates from criminal proceedings where charges have been laid against the first respondent, Mr Kunene, and the second respondent, Umsobomvu, which includes counts of theft and money laundering. It was alleged that they had acted unlawfully and with the intent to defraud the applicants (who were the complainants in the criminal proceedings). Despite the undertaking by the complainants to pay the purchase price, the respondents had neither intention to cede the mining rights to them nor did they have the intention

to authorize the application for ministerial consent in terms of Section 11 of the Act.

URGENCY

[6] On the applicant's version, this application should be considered on an urgent basis in the context of not only setting aside the subpoena but also declaring the second and fourth respondents to be in contempt of court. With regard to the subpoena proceedings, the applicants hold the view that there is a well-grounded apprehension of irreparable harm if the subpoena is not stayed. Ms Mtshali (the fourth respondent) would be compelled to comply with the subpoena thereby disclosing the applicants' Section 11 mining rights application, more particularly, the confidential and proprietary information which the respondents are not entitled to.

[7] The respondents contended that there could be no urgency in the matter as Ms Mtshali is only required to appear on 20 April 2023 and furthermore that the applicants have failed to demonstrate that the contempt orders are urgent.

[8] I will deal with the latter contention more in detail herein later. I am, however, of the view that this matter does warrant urgent attention insofar as the execution of the subpoena is concerned. It is not disputed that Ms Mtshali is required to testify

and make available the documentation listed in the subpoena on 20 April 2023. That in itself renders the matter urgent. The applicant would most certainly not obtain substantial redress in the normal course of court proceedings.

BACKGROUND

[9] The central dispute between the parties is premised on the disclosure of documentation identified in the civil proceedings and the criminal proceedings, which pertain to the Minister's decision to approve the applicants' Section 11 mining rights application.

[10] It is no secret that the parties have been embroiled in extensive civil litigation for several years. Of relevance to this matter is the Minister's approval of the mining rights application. When the Minister approved the applicants' mining rights, the second respondent, dissatisfied with the outcome of the application, appealed the said decision and requested the record of the said Section 11 application. The respondents alleged that the Department is statutorily obliged to furnish such record in terms of Section 23 and Section 96 read with Regulation 78 of the Act.

[11] Since the applicants failed to abide to this request, an application compelling them to do so was heard before Mngqibisa-Thusi J, who granted an order in the

respondents' favour ordering the applicants to furnish the said record. Such order was granted on 28 June 2022.

[12] The applicants, dissatisfied with the open-ended order, filed a rescission application which was heard before Millar J. On 29 August 2022, Millar J did not grant the rescission application, nor did he dismiss the application. He instead granted an order ordering the applicants to furnish the Section 11 record. With regard to the probable proprietary and confidential documents he stipulated a "confidentiality regime" that would safeguard the alleged confidential documents and proprietary information (known as the Crown-Cork Order).

[13] Once again, the applicants, dissatisfied with the outcome of Millar J's judgment, filed their application for leave to appeal as well as an application for leave to intervene. On 3 January 2023 Millar J granted Transasia Minerals' application to intervene but dismissed the application for leave to appeal.

[14] I wish to reiterate that in respect of the confidential documents considered by Millar J, he held the view that certain confidential proprietary information may form part of the record. It was on this basis that he undertook to impose the confidentiality regime.[1]

[1] Annexure 'FA9' P 02-59 of Millar J's order

[15] The applicants, Transasia Minerals and Transasia 444, then applied to the Supreme Court of Appeal for the leave to appeal against the whole of Millar J's order. It was alleged that such applications were respectively served on the second respondent, Umsobomvu, and the fifth respondent, Mr Mbatha, on 7 February 2023. Further that on 3 of February 2023 the applicants advised the respondents that they would proceed with the applications for leave to appeal to the Supreme Court of Appeal.

[16] The applicants pointed out that despite further correspondence of 9 February 2023 (two days later after the service of the applications for leave to appeal), Mr Mbatha requested the regional manager to comply with Millar J's order. The applicants as well as the legal representatives of the Department, being the State Attorney, objected to the said request. The respondents were advised that in light of the pending court processes, more particularly, the pending leave to appeal application, they were not entitled to the documents. On 10 February 2023 Mr Mbatha was further advised in writing of the aforesaid. Surprisingly, two days later, on 16 February 2023, the respondents proceeded in having the subpoena issued.

POINTS *IN LIMINE*

[17] Two specific points *in limine* were raised, more particularly the respondents contended that this court does not have jurisdiction to set aside the subpoena and secondly that the applicants do not have *locus standi* to seek the setting aside of the subpoena. At the hearing, the respondent did not persist with these points, and, in my view, rightly so.

[18] On the aspect of the jurisdiction dispute, the High Court is entitled to review proceedings of any magistrate court situated in its jurisdiction. It derives its powers from Section 22 of the Superior Courts Act. Even though the regional court is the best placed court to determine a challenge on a subpoena, which it conducts as part of the criminal trial proceedings, in certain circumstances the High Court may set aside a subpoena if there is sound reason therefore. In particular, if there is an abuse of court processes.

[19] It is trite that the magistrate court is a statutory creature and it neither has statutory power nor does it have inherent jurisdiction to set aside the subpoena. The power to do so can only be exercised by the High Court in circumstances, particularly, when it constitutes an abuse of process.[2]

[20] The *locus standi* point also has no merit. An applicant who has a proprietary interest in the documents referred to in the impugned subpoena would have the

[2] S v Matisonn 1981 (3) SA 302 AD at 313 E-F

necessary *locus standi* to seek the setting aside of such subpoena provided that there is justification therefore.[3] It is common cause that the applicants have a direct and substantial interest in the outcome of the litigation.

THE DOCUMENTS AND INFORMATION SOUGHT

[21] The respondents take issue with the setting aside of the subpoena. It was argued that the documents listed in the subpoena are relevant.[4] In fact, it was pointed out that this court is not in a position to entertain the relevance issue. It did not have the benefit of the record in the criminal trial or the evidence led to date nor the arguments presented by the State. It had not even had sight of the charge sheets in the criminal trial. On this basis it is not able to draw any conclusions regarding the relevance of the documents.

[22] Furthermore, the subpoena and the Millar J order are not in conflict. The regional court would be able to regulate access to the documents in terms of the subpoena in a manner that does not conflict with the Millar J order.

[23] This court was further cautioned not to interfere with the process before the criminal court as it is best placed to assess the relevance of the documents. It was argued that a court should not be urged to pre-empt the determination of the

[3] SA Coaters (Pty) Ltd v St Paul Insurance Co Ltd 2007 (6) SA 624 (D & CLD)
[4] Answering Affidavit 06-26, 78 to 87

very issues which the regional court will be required to do. The regional court is properly placed to determine the question of relevance of the documents listed in the subpoena.

[24] It was submitted that the documentation listed in the subpoena were relevant in that it would, *inter alia*, assist in determining whether the ministerial consent was obtained fraudulently and/or unlawfully. The respondents' version is that the consent was premised on a fraudulent power of attorney. A witness in the criminal proceedings had already testified that the Section 11 application was approved by the Minister and the (Malangeni) mining right had already been ceded and registered in the name of Transasia in the Mining Titles Registry.

[25] They further submitted that Ms Mtshali would be required to testify, *inter alia*, make available the documentation that would demonstrate the manner in which the consent was furnished.

[26] On the issue of the overbreadth of the subpoena it was explained that the subpoena was not crafted in a broad manner. The documentation pertaining to the various entities had been requested as the respondents were not aware of which of the Transasia entities were involved.

[27] I have taken cognisance of the applicants' explanation that the documents furnished to the Minister constituted the Section 11 application which included various proprietary and confidential information namely:

(i) business and trade secrets which had to be disclosed in the application, more particularly documentation containing annual financial statements, financial guarantees and financial information;

(ii) technical data to demonstrate that Transasia has the ability to conduct the proposed mining operations optimally and the company structures which includes a shareholder agreement.

[28] I have further noted the argument advanced by the respondents: namely that since they have not been privy to the Section 11 application record, they were not able to confirm if such confidential documentation, in fact, existed.

[29] Having regard to the pleadings as well as the submissions made on the part of both parties, I have noted the following aspects which cannot be disputed, namely that:

(i) the disclosure of the documents and information sought in the High Court applications and the documents and information requested in the subpoena, both centered on Transasia's Section 11 mining rights application record[5];

[5] Annexure 'FA4' P 02-17

(ii) In both the civil and criminal proceedings, amongst the core issues, the respondents intend canvassing whether the ministerial consent was obtained lawfully. The documents listed in the subpoena were *"all documents and submissions and correspondence considered by the Minister or his delegate in the application for the consent of the Section 11 of the Act relating to the mining rights under the reference KZN/30/5/1/2/2/1002MR and KZN30/5/1/2/2/1003MR"*;[6]

(iii) moreover the confidentiality of certain of the documents, that form part of the Section 11 application, was canvassed to a large extent before Millar J. The respondents did not deny the possibility of the existence of the confidential documents. In fact, it was at their behest that the confidentiality regime came into existence and which Millar J endorsed;[7]

(iv) the respondents were in fact furnished with the Section 11 application by way of a drop-box folder prior to the litigation that ensued between the parties. Dissatisfied therewith the respondents argued that not only were substantial portions of the record redacted, they further argued that the full contents of the application were not furnished to them.

[30] The respondents' further argument that the documents requested in the subpoena differ from those that formed the subject matter of the civil proceedings, particularly before Millar J, in my view, has not been substantiated. There is no

[6] Annexure 'FA1' P 02-4, Annexure 'FA6' P 02-26
[7] Annexure 'FA9' P 02-59

merit in this contention. The wording of the subpoena illustrates that it constitutes documents pertaining to the Section 11 mining rights application.

[31] The respondents were *au fait* that the ambit of the evidence centered on the Section 11 mining rights application.

[32] I am mindful that the subpoena may have been crafted wider. However, one must have regard to the context of the subpoena. The respondents explained that they had sought documents relating to various other entities as they were not sure which Transasia entity was involved. However, such disclosure was once again only sought to the extent that it related to the mining rights identified in the subpoena.

[33] The court before Millar J would not have secured the documentation and endorsed the confidentiality regime if there was no merit thereto. The applicant had further in its papers identified the nature and extent of the confidential and proprietary information it referred to.

ABUSE OF PROCESS

[34] On the issue whether the subpoena constitutes an abuse, it is an established principle that this court may only set aside the subpoena if it can be shown that it

constitutes an abuse of process. Although there is no all-embracing definition of the abuse of process, there are a plethora of authorities which have identified instances where a case for abuse of process had been established.

[35] I however find it apt to refer to the ***Price Waterhouse Coopers*** matter[8] where the court summarized the broad principles established over time by our authorities, namely that:

(i) a court is entitled to protect itself and others against an abuse of process (court referred to ***Western Assurance Co v Caldwell Trustee 1918 AD 262 at 271***; ***Beinash v Wixley 1997 (3) SA 721A at 734D; Brummer v Gorfil Brothers Investments (Pty) Ltd 1999 (3) SA 389 SCA at 412 C-D***);

(ii) there is no specific definition for an abuse of process;

(iii) there are various instances where conduct under certain circumstances are considered to constitute an abuse of process, namely when there is a frivolous and vexatious litigation;

(iv) when proceedings are used for an ulterior purpose;

(v) legal process which is utilized properly when it is invoked for the vindication of rights or the enforcement of just claims can constitute abuse when it is diverted from its true course so as to serve extortion or oppression or to exert pressure so as to achieve an improper end;

[8] Price Waterhouse Coopers Inc and Others v National Potato Cooperative Ltd 2004 (6) SA 66 SCA para 50

(vi) the mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof of *mala fides*. In order to prove *mala fides* a further interference that an improper result was intended is required;

(vii) purpose or motive, even a mischievous or malicious motive is not in general criteria for unlawfulness or invalidity;

(viii) an improper motive may, however, be a factor where the abuse of court process is in issue;

(ix) a plaintiff who has no *bona fide* claim but intends to use litigation to cause a defendant financial or other prejudice will be abusing the process (see ***Beinash*** matter);

(x) it must not be forgotten that courts of law are open to all and it is only in exceptional cases that a court will close its doors to a litigant who wishes to prosecute an action (see ***Western Assurance Co*** matter);

(xi) the importance of a right in terms of access to courts are enshrined by Section 34 of the Constitution and where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with *bona fide* disputes.

[36] More recently in ***Moodley N.O. & Others v PIC***[9] at paragraph [14] the court acknowledged that the concept “abuse of process” is wide and must be evaluated

[9] 3609/2023 [2023] ZAWCHC 49

by having regard to parties' conduct in each matter. It also confirmed that *mala fides* is not a requirement. It was expressed:

" *"Abuse of process" is a term that bears with the stigma of conscious misuse of the court processes. I do not think that the judgment in Beinash should be read to suggest that it is only in cases of that sort that a court will be persuadable to set aside the subpoena. A court will also do so in less opprobrious circumstances, such as when the subpoena is prejudicially non-compliant with the rules of court or when it calls for the production of documents or things that are not relevant to the issues in the case or where the material might more reasonably be obtained from a party to the proceedings, (say through discovery) than from a third party. Those situations can even occur where there is no intention by the procurer of the subpoena to abuse the court's processes. Where they do occur the court will intervene irrespective of the procuring parties' bona fides."* (my emphasis)

[37] In principle, it is common cause that under certain circumstances a High Court can intervene and set aside a subpoena if it is considered to be an abuse of process. As alluded to above, the term "abuse of process" connotes a wide definition. An abuse of court process may arise even in less "opprobrious circumstances". This essentially means "in abusive or contemptuous circumstances".

[38] The civil and criminal proceedings encompass the Section 11 mining rights application. In fact, on the respondent's own version, it sought the reasons and the basis that led to the ministerial consent in respect of the Section 11 mining rights application.

[39] On the "relevance" issue, I do not dispute the respondents' version that this court is not in the position to make a determination on the relevance of the documents identified in the subpoena.

[40] A subpoena may still amount to abuse of process of court, notwithstanding the fact that the subpoenaed witness may be able to furnish relevant evidence or produce relevant documents. Issues of relevance and abuse of process, though possibly inter-related, are considered to be separate and distinct. Hence, even though evidence may be relevant, the issued subpoena can still amount to abuse of process.[10]

[41] There is a pending application for leave to appeal before the Supreme Court of Appeal. It is trite that Section 18(1) of the Superior Court Act suspends the operation of Millar J's order. The respondents could hardly be oblivious of the fact that there is a pending application for leave to appeal against Millar J's order in its entirety and the outcome of such application has not been pronounced as yet.

[10] Meyers v Marais and Another 2004 (5) SA 315C at 324B

[42] Therein the applicants have challenged not only the disclosure of the proprietary and/or confidential documents but the disclosure of the entire contents of the Section 11 application. Hence there is the possibility that if the subpoena is not set aside, the respective courts (civil and criminal) may come to different findings and which may be in conflict.

[43] Even though I accept that civil proceedings are distinct and separate from criminal proceedings, one must appreciate the difficulty that the documents concern the same subject matter. It is necessary to consider the matter in context. The accused's constitutional rights in the context of a criminal trial cannot under these particular circumstances be fettered by a civil court judgment.

[44] It is inevitable and common sense infers that if the subpoena is not set aside, Ms Mtshali would be compelled to furnish the entire Section 11 application record, which would then include not only the confidential and proprietary information appended to such application.

[45] The existence of the subpoena, in my view, would inevitably interfere with the administration of the court proceedings before the Supreme Court of Appeal. If the subpoena is not stayed, the effect thereof would be that the outcome of any decision by the Supreme court of Appeal would become moot. It would most

definitely interfere in the continuation of the appeal process, in particular if leave is granted by the Supreme Court of Appeal. In my view, compliance with the subpoena would frustrate and render meaningless whatever outcome there may be.

[46] I am in agreement with the applicants that:

"When judgments are given and the matter is on appeal, it is necessary that all parties must refrain from any conduct which is designed to destroy the efficacy of the pending appeal process. If they do not refrain from such conduct, they make themselves guilty of undermining the administration of justice."[11]

[47] The respondents' argument was that irrespective of the outcome of the pending leave to appeal process before the Supreme Court of Appeal ultimately cannot *"change the legislative requirement that the record of decision must be produced"* must be qualified. That may be so, but once again, one must consider the disclosure in the context of the facts in this matter. A final word on this issue has further not been pronounced by the Supreme Court of Appeal. The applicants may be prejudiced if the confidential and proprietary information are not protected.

[11] Para 49 of the applicants' heads of argument

[48] Consequently, in these circumstances, I find that the conduct of the respondents constituted an abuse of the court's process, as per the test defined in ***Price Waterhouse Coopers*** and the ***Moodley*** matter.

URGENCY REGARDING THE CONTEMPT OF COURT RELIEF

[49] On the contempt of court issue, I find that the applicants have failed to satisfy this court that same should be dealt with on an urgent basis. On the plain facts before me, I have noted that Mr Mbatha and Mr Kunene were mindful that application for leave to appeal of Millar J's order was instituted in the Supreme Court of Appeal and the outcome thereof had not been pronounced at the time the subpoena was issued.

[50] As alluded to above, there is no evidence on the papers that gainsays that the core documents sought in both proceedings pertained to the Section 11 mining rights application that was presented to the Department for adjudication and most certainly included documents that illustrated Umsobomvu's attitude to the approval of the mining rights in favour of the applicants.

[51] Even though the ambit of the documents requested in the subpoena may have included additional information, once again it can also not be disputed that the disclosure of the section 11 application record was material.

[52] I am in agreement with the respondent that this issue can be dealt with in the normal course of the proceedings. It is trite that the courts' power to condone non-compliance with the rules, and to accelerate the hearing of the matter should be exercised with judicial scrutiny and in light of sufficient and satisfactory grounds.

[53] First and foremost, in my view, there is no prejudice if the applicants adjudicate the contempt issues in due course. There is no doubt that the applicants would be afforded substantial redress at a hearing in the normal course of the courts' processes.

[54] Secondly, the loss that the applicants have alleged that they would suffer, by not being afforded an immediate hearing, is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public.

[55] A further aspect that this court is required to take into cognisance is the timing of this urgent application. I am mindful of the fact that the respondents were required to prepare their answering affidavits and obtain the services of counsel

for the hearing in great haste. [12] Time and again our courts have expressed their dissatisfaction of this approach. In ***Luna Meubels*** the court stated:

"Practitioners should carefully analyse the facts of each case to determine for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules and of the ordinary practice of the court is required. The degree or relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith."[13]

[56] The sentiments expressed in a recent matter of ***Fraser Solar GMBH***[14] should also be noted:

"It is true that contempt is inherently urgent. Contempt on its own is not sufficient to entitle an applicant to jump the queue and have its application heard in determining the urgent court…."

RELIEF SOUGHT

[57] I am of the view that the subpoena issue has properly been disposed at this hearing. It would be nonsensical to prescribe a return date in the form of a rule

[12] Marco Caterers at 113H – 114B / IL+B Marcow Caterers (Pty) Ltd v Greabenas** SA Ltd and Another 1981 (4) SA 108C at 113H to 114B
[13] see Harvey v Niland 2016 (2) SA 436 (ECG) at par 19
[14] Fraser Solar GMBH v Trans-Caledon Tunnel Authority and Others in re Scolan Trans Caledon Tunnel Authority v Fraser Solar GMBH & Others (2020/33700; 2021/35990) [2021] ZAGPJHC 834 (dated 29 December 2021)

nisi. Both parties have filed their complete papers and have fully addressed this court on their submissions.

[58] With regard to the contempt of court issue, I am of the view that this urgent court should not have been seized with this issue. The applicants have not demonstrated imminent prejudice or harm that they would suffer if this issue is not disposed of on an urgent basis.

COSTS

[59] This court has a judicial discretion in respect of awarding costs. Based on my findings, neither of the parties have been substantially successful. Although the applicants were successful on the subpoena issue, it has not succeeded on the contempt issue. I accordingly deem it an appropriate order that each party bear their own costs.

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H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:	
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Counsel for the first and second respondents:	*Adv A Milovanovic-Bitter*
Instructed by:	*Edward Nathan Sonnenbergs Inc*
Attorney for the fourth respondent:	*The State Attorney*
Counsel for the fifth respondent:	*Adv A Subel SC*
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Instructed by:	*Edward Nathan Sonnenbergs Inc*
Date heard:	*16 March 2023*
Date of Judgment:	*24 March 2023*