IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: B39161/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

10/08/2023
DATE SIGNATURE

AKASIA ROAD SURFACING (PTY) LTD First Applicant
(Registration number 1996/010877/07)

ACORN PROPERTIES (PTY) LTD Second Applicant
(Registration number 2019/117075/07)

RAUBEX ROADS AND EARTHWORKS HOLDINGS (PTY) LTD Third Applicant
(Registration number 1997/000224/07)

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This matter is complex and has a long history relating to disputed outstanding rates and taxes. The clearance figures throughout the pleadings do not add up and make sense. It is difficult to ascertain what is due and what the amount due relates to. Consequently, reference will only be made to the amount that is allegedly due to the Respondent, and to a limited extent, other amounts may be referred to.

[2] This is an application brought by the First Applicant seeking this Court to, *inter alia*, declare an amount of R2 454 297.91 in respect of disputed outstanding rates and taxes not due to the Respondent and that the Respondent be ordered to issue a rates clearance certificate to the First Applicant as per section 118(1) of the Municipal Systems Act[1] (the Systems Act). The basis for this is that the said rates and taxes are a historical debt and ought to be excluded from the clearance figures that were requested in May 2021.

[3] The Respondent opposed the application on the basis that it is inter alia entitled to withhold the First Applicant's rates clearance certificate pending the payment of all outstanding rates, and taxes and that the First Applicant seeks to resolve a February/March 2014 rate and taxes dispute via a February 2020 property sale transaction.

PARTIES

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[1] 32 of 2000.

[4] The First Applicant is Akasisa Road Surfacing (Pty) Ltd with a registration number 1996/010877/07, a company duly registered and incorporated in terms of the laws of the Republic of South Africa whose main place of business is at 47 Graf Road, Bon Accord, Pretoria, Gauteng Province.

[4.1] The First Applicant was previously known and registered as Bonn Plant Hire (Pty) Ltd.

[4.2] The First Applicant is a wholly owned subsidiary of the Third Applicant.

[5] The Second Applicant is Acorn Properties (Pty) Ltd with a registration number 2019/117075/07, a company duly registered and incorporated in terms of the laws of the Republic of South Africa and whose main place of business is at 21 McHardy Avenue, Holland PARK, Qgebhera, Eastern Cape Province.

[5.1] The Second Applicant underwent a name change and was previously known and registered as Raubex Property Investments (Pty) Ltd. This name has since been changed to Acorn Properties (Pty) Ltd.

[6] The Third Applicant is Raubex Roads and Earthworks Holdings (Pty) Ltd with a registration number 2006/023666/06, a company duly registered and incorporated in terms of the laws of the Republic of South Africa and whose main place of business is at Building 1, Highrove Office Park, 50 Tegel Avenue, Highveld, centurion, Gauteng Province.

[6.1] The Third Applicant is a wholly owned subsidiary of Raubex Group Ltd, a Public company listed on the Johannesburg Stock Exchange since March 2007.

[7] The Second and Third Applicants are said to have a direct and substantial

interest in this matter as they will be severely affected if the property transaction is not finalized.

[8] The Respondent is the City of Tshwane Metropolitan Municipality which is a Metropolitan Municipality with a separate legal personality duly established in terms of the Gauteng Provincial Notice 6770 of 2000, issued in terms of Section 12 of the Local Government: Municipal Structures Act[2] with its office and/or principal place of business situated at office of the City Manager, Tshwane House East Wing, 2nd Floor, 320 Madiba Street, Pretoria, Gauteng Province.

[9] The City of Tshwane is vested with the power and authority by virtue of Chapter 7 of the Constitution of the Republic of South Africa, 1996 (the Constitution) to *inter alia* oversee and enforce, the Constitution, the Systems Act, and its By-Laws relating to credit control and debt collection.

THE ISSUES

[10] The issues to be determined by this Court are:

[10.1] whether the relief sought by the Applicants is competent.

[10.2] whether this Court ought to grant an order declaring the outstanding municipal debt in respect of the properties name, R2 454 297.91, as not due for the purposes of the clearance figures in terms of section 118(1) of the Systems Act.

[10.3] whether the First Applicant is entitled to clearance certificates to be

[2] Act 117 of 1998.

issued by the Respondent in terms of s 118(1) of the Systems Act, excluding the amount of R 2 454 297.91.

[10.4] alternatively, whether the First Applicant is entitled to interim relief pending the finalisation of the disputes lodged by the First Applicant.

FACTUAL BACKGROUND

[11] The First Applicant is the registered owner of various properties including Portion 47 of the Farm Onderstepoort 33, Registration Division JR, Gauteng (Portion 47) and Portion 50 of the Farm Onderstepoort 300, Registration Division JR, Gauteng (Portion 50) which are part of the dispute relating to outstanding rates and taxes.

[12] The aforesaid properties have various municipal accounts for utilities and/or levies linked to them in the following manner,

[12.1] Accounts 5003804893 and 5015417194 are linked to Portion 47.

[12.2] Accounts 50003804877 and 5015417216 are linked to Portion 50.

[13] During February/March 2014, a dispute arose between the First Applicant and the Respondent wherein the Respondent had levied and charged the First Applicant an amount of R 1 119 811.80 for rates and taxes as well as consumption of water and electricity on account number 50003804877 and/or 5015417216 of Portion 50.

[14] According to the First Applicant, the attempts to resolve the dispute with the employees of the Respondent after the receipt of the outstanding rates and taxes for the period of March 2014 have yielded no positive results.

[15] On 10 September 2014, the First Applicant's former attorneys wrote to the Respondent and inter alia stated that they had not received a computation of figures linked to Portion 50 and that as of December 2013, the First Applicant did not owe the Respondent, and that on March 2014 amounts of R227 135.64, R68, 879.50, R1, 119, 8111.80 and R66, 810.82 were added to the First Applicant's account without explanation. Consequently, on 10 September 2014, the First Applicant raised another dispute in terms of section 95(f) read together with section 102(2) of the Systems Act.

[16] According to the First Applicant, on 3 November 2016, the Respondent's rights, title, and interest under case numbers 73276/2014 and 89809/2015 were sold in execution because of the Respondent's failure to pay the First Applicant's cost orders under the aforesaid case numbers. According to the First Applicant, the sale in execution extinguished the Respondent's claim for debts allegedly owed by the First Applicant under account 5003804877 of Portion 50.

[17] On 26 July 2017, the First Applicant received a final demand from the Respondent about an amount of R 1608 905.79 that was due and payable under account 5003804877. However, the First Applicant replied to the effect that the matter was resolved through litigations and that the debt was no longer outstanding.

[18] On or about 4 February 2020, the First Applicant sold the properties to Raubex Property Investments (Pty) Ltd (Raubex Property), and Raubex Property took occupation on 28 February 2020. According to the First Applicant, the aforesaid properties form part of a Broad-Based Black Empowerment

transaction.[3]

[19] On 18 May 2021, the First Applicant applied for clearance figures from the Respondent and received them on 15 June 2021.[4]

[20] As of 22 July 2022, the closing balance on account number 5015417216 was R2 454 209.00 which is R88.91 less than the balance provided to the First Applicant as the clearance figure of R 2 454 297.91 issued on 11 July 2022 by the Respondent.

[21] The First Applicant lodged a dispute in terms of section 102(2) of the Systems Act relating to inter alia account number 5003804877 which is linked to Portion 50.

[22] The Respondent declined to provide the First Applicant with the rate clearance certificate until all the debts relating to rates and taxes as indicated in the clearance figures have been settled.

[23] The First Applicant's case is that the amount of R 2 454 297.91 which is linked to account number 5003804877 and/or 5015417216 is older than 2 years preceding the date that the First Applicant applied for clearance figures in terms of section 118(1) of the Systems Act and therefore should be excluded from the rate clearance figures that have been furnished to the First Applicant by the Respondent.

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[3] Some of the issues, such as the Broad-Based Black Empowerment has become moot due to the passage of time which required the property sale to be completed before 28 February 2023. Consequently, they will not be dealt with in this judgment.

[4] CaseLines: 003 at item 10.

APPLICABLE LEGAL PRINCIPLE

[24] The Systems Act provides a framework for the registration of immovable property, issuance of rates and taxes certificate, and collection of municipal services fees including property rates. Section 118(1) provides that:

> "A registrar of deeds may not register the transfer of property except on production to that registration officer of a prescribed certificate -
>
> (a) issued by the municipality or municipalities in which that property is situated; and
>
> (b) which certifies that all amounts due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid" (own emphasis added).

[25] A simple reading of the aforesaid provision entails that the Respondent is in law entitled to recover any current debt owed to it by the First Applicant and that debt should not be older than two years preceding the date of the application for the certificate. However, a debt that falls outside the scope of two years preceding the two years of the date of application for the certificate is not covered by the aforesaid provision. In other words, a historical debt cannot be included in the two years preceding the date of the application for the certificate.

[26] Does it mean that the Respondent has no other mechanisms to recover a historical debt that is not covered by the provisions of section 118(1) of the Systems Act? The quick answer is no. The Systems Act provides a mechanism for the Respondent to recover any of its outstanding debt. As was correctly

found in *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others*[5] where the Constitutional Court held that:

> "And the statute does indeed provide a full-plated panoply of mechanisms enabling efficient debt recovery in the cause of collecting publicly vital revenue. Here the parts of section 118(3) that are uncontested are integral. These are the charge on the property against the existing owner, and the municipality's preference over registered mortgagees. During argument the municipalities conceded, correctly, that the provision enables them to enforce the charge against the existing owner up to the moment of transfer – and to do so above and before any registered mortgagees. And they were constrained to concede, also correctly, where there are unpaid municipal debts, that the charge enables them to slam the legal brake on any impending transfer by obtaining an interdict against transfer".

[27] The above paragraph reveals that there are legal channels that are available to the Respondent to recover any debt that has not prescribed against a consumer of municipal services as per section 118(3) of the Systems Act.

[28] Similarly, it is now settled that "*upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under*"[6] section 118(3) of the Systems Act.

[29] I now turn to consider the circumstances of this case taking into consideration the written and oral submissions of the parties including evidence before this Court to ascertain whether the First Applicant has made out a case for the relief sought.

FIRST APPLICANT'S SUBMISSIONS

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[5] 2017 (11) BCLR 1370 (CC) at para 54.

[6] *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* at para 81.

[30] The First Applicant's submissions were brief and could be summarized as follows:

[30.1] Section 102(1)(c) of the Systems Act authorises a municipality to implement any of the debt collection and credit control measures for recovery of any arrears on any of the accounts. However, section 102(2) of the System Act further provides that section 102(1)(c) does not apply where there is a dispute between the municipality and a consumer of services about any specific amount claimed by the municipality from that person.

[30.2] Relying on *Real People Housing (Pty) Ltd v City of Cape Town*[7], the First Applicant inter alia contended that the amount which the applicant for a clearance certificate had to pay to be issued with a clearance certificate was limited to a period of two years preceding the date of application for the said clearance certificate. Furthermore, the First Applicant argued that the Respondent was obliged, on request, to provide the First Applicant with such itemised billing for municipal fees due for payment during the two-year period preceding the date of application for the required certificate, and to issue the First Applicant with the required clearance certificate when the amount due had been paid.

[30.3] Additionally, the First Applicant argued that section 118(1)(b) of the Systems Act prohibits the Respondent from including historical amounts older than two years preceding the date the application for

[7] 2010 (1) SA 411 (C) AT paras 30 and 31.

clearance figures was made for the purposes of obtaining a clearance certificate.

[30.4] The First Applicant argued that the statements provided by the Respondents resulted in the First Applicant seeking a detailed computation of the outstanding balance and several disputes that were lodged by the First Applicant. For example, the First Applicant contended that account number "*5015417216 outstanding balance increased from R651 220.61 to R2 452 297.91*".

[30.5] Furthermore, the First Applicant argued that the disputed amounts date back as far as February/March 2014.

[30.6] The First Applicant contended that the Respondent's rights, title, and were sold in execution because of the Respondent's failure to pay the First Applicant's cost orders. Consequently, the First Applicant submitted that the sale in execution extinguished the Respondent's claim for debts allegedly owed by the First Applicant.

[31] Based on the above, the First Applicant submitted that a proper case was made out for the relief sought as per the notice of motion.

RESPONDENT'S SUBMISSIONS

[32] Counsel for the Respondent submitted that the relief sought by the First Applicant was incompetent as the requirements for declaratory relief were not met.

[33] Further, counsel argued that the Respondent, as part of its administrative role, conducted various "*investigations, made decisions and provided detailed feedback and figures to the First Applicant*" regarding the outstanding debt. As a result, counsel argued that this was the basis for withholding a clearance certificate.

[34] Counsel further submitted that this court was not in a position to declare the debt not due as sought by the First Applicant. In addition, counsel for the Respondent submitted that there was an "unfounded assumption that section 118(1) of the Systems Act somehow expunges the outstanding debt preceding the two years to transfer of the property; alternatively, that the debt has been extinguished by the sale in execution".

[35] The Respondent confirmed that this case is "an old matter going back to 2014". Furthermore, counsel for the Respondent submitted that the First Applicant was "attempting to resolve a 2014 dispute through a February 2020 transaction" in that they sought clearance figures almost 18 months after the alleged sale of the property.

[36] Relying on *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others,* counsel submitted that municipalities are entitled by the provisions of section 118(3) to legally stop the transfer of property where there are unpaid municipal debts.[8]

[37] Ultimately, counsel advanced a tax law argument to the effect that the First Applicant must "pay now, argue later".

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[8] See above fn. 5 at para 54.

[38] Therefore, the Respondent argued that the First Applicant's case had no merit and ought to be dismissed.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[39] The First Applicant and the Respondent in unambiguous terms admitted that the dispute in respect of the amount allegedly owed by the First Applicant originates from February/March 2014. This alone settles this case. Accordingly, there is no need to venture into an interpretative exercise about what section 118(1) of the System Act entails save to cite with approval the decision of the Supreme Court of Appeal in *City of Cape Town v Real People Housing (Pty) Ltd (77/09)*[9] where the court held that:

> "…indeed, any proviso that would have the effect of entitling the City to withhold a certificate until all debts were paid – would nullify the express language of the section and it might just as well not be there. I do not think it is necessary to cite authority for the trite proposition that a term cannot be implied in a statute if it would contradict its express terms. Had it been intended not to limit the period to two years then the words would not have appeared at all" (own emphasis added).

[40] The fact of the matter is, that the debt claimed by the Respondent is older than 2 years preceding the date of application for clearance figures and therefore the amount of R2 454 297.91 should be excluded when computing the correct clearance figures. In other words, the said amount is not due only for the purposes of the two 2 years preceding the date of application for clearance figures as per section 118(1)(b). Anything beyond the two-year time frame remains a pending dispute between the parties. In my view, this cannot be

[9] [2010] 2 All SA 305 (SCA) at para 14.

regarded as an unjustified intrusion into the terrain of the Respondent. As was correctly held in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[10] albeit in a different context that:

> "in a dispute as the present one, this does not mean that an organ of state is immunised from judicial review only on account of separation of powers. …"

[41] In addition, a simple reading of section 118(1) and (3) does not reveal any statutory power whatsoever conferred on the Respondent to withhold the clearance certificate. The Respondent is resorting to self-help something that is impermissible in our constitutional democracy.

[42] I also fail to understand the basis for withholding the clearance certificate because there were disputes lodged regarding the amount in dispute. This is contrary to section 102(1)(c) of the Systems Act which provides that section 102(1)(b) of the Systems Act does not apply where there is a dispute between the municipality and a consumer of services about any specific amount claimed by the municipality from that person.

[43] Concerning the "*pay now, argue later*" principle, it is difficult to appreciate how a principle that is applicable in tax disputes found its way into the current dispute. Regrettably, counsel for the Respondent did not refer this Court to any authority to substantiate this submission. Therefore, I agree with counsel for the First Applicant in that this submission is misplaced.

[44] Concerning the Respondent's contention that municipalities are entitled by the provisions of section 118(3) to legally stop the transfer of property where there

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[10] 2012 (6) SA 223 (CC) at paras 63-64.

are unpaid municipal debts, I agree with this submission. If this was not the case, municipalities would be crippled and thereafter unable to render municipal services within their jurisdictions. The Respondent, if it so wished, had an opportunity of obtaining an interdict[11] against the intended transferor but did not do so. Instead, it resorted to self-help. I need not say more about self-help.

[45] Concerning the sale in execution that supposedly extinguished the Respondent's claim for debts allegedly owed by the First Applicant, again the Respondent presumably knows the avenues that are available to them to challenge that judgment if they are not satisfied with it. But for reasons known to this Court, they have not done anything.

[46] About the First Applicant being entitled to a declaratory order, the First Applicant correctly submitted that this argument was not raised in the Respondent's answering affidavit, and therefore should not stand. I agree. The argument is not evidence, and it is not given under oath.[12] The heads of argument do not serve as answering affidavits. Therefore, the Respondent must stand or fall by averments made in its answering affidavit. Furthermore, "an owner cannot be expected to tender payment if he or she has no knowledge of what is due".[13] In my view, the Applicant is entitled to the relief that it seeks.

[47] Regarding the granting of the relief, to order the Respondent to issue the

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[11] *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* at para 54.
[12] *Maboho and Others v Minister of Home Affairs* (833/2007, 1128/2007) [2011] ZALMPHC 4 at para 13.
[13] *Real People Housing (Pty) Ltd v City of Cape Town* at para 17.

clearance certificate pending the finalisation of the pending dispute, this Court should exercise a degree of caution and be careful not to unjustly venture into the terrain of the Respondent. To do so may have unintended consequences that will limit the powers of municipalities in recovering debt. I am aware that the First Applicant has tendered security that was paid[14] into the trust account of their attorneys in the amount of R 2 454, 297.91. Consequently, they seek this Court to order the Respondent to issue the clearance certificate. The Respondent had sought such security to be paid into their attorneys' trust account too. I am of the view that this Court is not able to grant such a relief when the current and unclear debt during the two years preceding the date of application for the certificate have not been fully paid as per the provisions of section 118(1)(b) of the Systems Act.

[48] The First Applicant and the Respondent are at liberty to revisit a possibility of an arrangement about to whom security should be furnished if they so wish to enable the transfer to unfold pending the finalization of the dispute. It is not for this Court to decide whose trust account is best suited to keep security.

[49] To grant an order against the Respondent to issue the clearance certificate will in my view amount to judicial overreach as this court will delve into debt-collecting measures that fall in the purview of the Respondent. In *City of Tshwane Metropolitan Municipality v Afriforum and Another*[15], the Constitutional Court held that:

> "…Intrusion into the sphere of operation reserved only for the other arms of State is an exercise not to be unreflectingly or over-zealously carried out by a court of law. It calls for deeper reflection and caution. The State

[14] Caselines: 003 at Item 73.
[15] ZACC 19; 2016 (9) BCLR 1133 (CC) at para 70.

> operates better when due deference is shown by one branch to another, obviously without approaching its obligations so timidly as to incorrectly suggest that there is an undue measure of self restraint. That said, an attitude that is dismissive of the constitutional fire-wall around the powers of other arms of State is not conducive to the proper observance of separation of powers and exhibits disregard for comity among the branches of Government".

[50] Consequently, this Court will be slow to condone issuing of clearance certificates outside the prescripts of the Systems Act and pending the issuance of clearance figures for the two years preceding the date of application for the certificate excluding the historical debt of R 2 454, 297.91. This may open floodgates for litigants to seek clearance certificates when outstanding debts have not been paid as per section 118(1)(b) of the Systems Act.

[51] Notwithstanding the above, I am of the view that the First Applicant has made out a case for the other forms of relief mentioned at the end of this judgment.

COSTS

[52] From the onset, it was clear that the amount in dispute originated from February/March 2014. This is something that is known to both the First Applicant and the Respondent. However, for unknown reasons, the Respondent persisted with the inclusion of a debt falling outside the parameters of section 118(1)(b) of the Systems Act when the current clearance figures were sought.

[53] The Respondent also on more than one occasion failed to provide an explanation of how the outstanding balance on rates and taxes was arrived at.

Different figures were provided and later changed. There were also countless discrepancies with the figures. For example, on 14 October 2015, the First Applicant owed the Respondent an amount of R73.06 but there was an interest charged in the amount of R 9 579.48 on that balance.[16] Again, there was no explanation for this exorbitant interest on a mere debt of R73.06. There has been an inexcusable failure by the Respondent to provide an explanation of its outstanding charges.

[54] It must also be noted that the First Applicant has never disputed that he owes the Respondent. The concern has been how the figures were calculated. I do not think that the First Applicant should be out of pocket because of the Respondent's inability to explain its computation methods. In any case, the First Applicant has been to a large extent been a successful party in these proceedings. Accordingly, there is no basis as to why the costs should not follow the results.[17]

ORDER

[55] I, therefore, make the following order:

(a) The amount of R2 454 297.91 reflected as "Outstanding Amounts" on the Written Statement issued in terms of section 118(1) of the System Act dated 11 July 2022 in relation to account number 5015417216 is declared not due in connection with the property only for purposes of section 118(1) of the Systems Act.

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[16] Caselines: 003, Item 32 at page 003-242.
[17] *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).

(b) The Respondent is ordered and directed to issue the First Applicant with full and itemised particulars of the amounts which became due for payment in respect of municipal service fees, surcharges on fees, property rates, and other municipal taxes, levies, and duties (and which remain unpaid) for a period of two years prior to the date of the request in respect of account numbers(s) 5003804877 and/or 5015417216 owed by the First Applicant excluding the historical debt of R2 454 297.91 within 30 (thirty) days of the order granted by this Court.

(c) The Respondent is ordered and directed, on receipt of payment of such sum tendered specifically for the purpose of discharging that indebtedness, to issue to the applicant a certificate as contemplated in section 118(1) of the systems Act within 7 (seven) days of the order granted by this Court.

(d) The Respondent is ordered and directed to resolve the dispute(s) which form(s) the subject of this application within 60 (sixty) calendar days of the date of granting this order, and to provide such resolution by way of an affidavit to be transmitted to the First Applicant's attorneys of record.

(e) That, upon receipt of the resolution of the dispute, the First Applicant is afforded 30 (thirty) calendar days within which to launch appropriate legal proceedings to impugn the resolution, if necessary.

(f) Should the First Applicant fail to launch legal proceedings as contemplated in paragraph (e), the amount found to be due in the resolution is to be paid over to the Respondent within 7 (seven) days of the expiry of the period in paragraph (d).

(g) The Respondent is ordered to pay the costs of this application on an attorney and client scale.

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M R PHOOKO

ACTING JUDGE OF THE HIGH COURT, DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 August 2023.

APPEARANCES:

Counsel for the Applicants:	Adv N. Snellenburg SC & Adv J.J. Buys
Instructed by:	York Attorneys' INC
Counsel for the Respondent:	Adv K Mvubu
Instructed by:	Lekhu Pilson Attorneys
Date of Hearing:	2 May 2023
Date of Judgment:	10 August 2023