REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

20/5/2016.

CASE NO: 60314/2015

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

20/5/16 ..... DATE

..... SIGNATURE

In the matter between

THE STANDARD BANK OF SA LTD	**First Intervening Party**
NEDBANK LTD	**Second Intervening Party**
VETA INVESTMENTS 12 CC	**Third Intervening Party**

In re

BELFY TRADING CC	**First Applicant**
JACOBUS MICHIEL VAN TONDER N.O	**Second Applicant**

and

KATOMPA, NZEBA TSHIBUMBU	**First Respondent**
KATOMPA, BERNARD MWAMBA	**Second Respondent**
KATOMPA, ALAIN	**Third Respondent**
THE STORE MANAGER OF JACARANDA MY STORE	**Fourth Respondent**

and

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **Third Party**

JUDGMENT

MADIMA, AJ

Introduction

1. Before me are various litigants seeking diverse relief. Standard Bank of SA LTD, Nedbank Limited and Veta Trading 12 CC seek leave to be joined as fifth, third and fourth applicants respectively in the main application. The main application is launched by the first and second applicant against the first to fourth respondent. For the first and second applicants this application follows on the footsteps of a *rule nisi* of 4 August 2015. The respondents for their part seek the *sine die* postponement of the proceedings and costs in the event of opposition.

2. In the main application the first and second applicant seek *inter alia* an order

(1) The forms and service provided for in the Uniform Rules of Court are dispensed with and this matter shall be dealt with as one of urgency in terms of Rule 6(12).

(2) directing the first to fourth respondent to immediately provide unrestricted access to the Jacaranda Spar situate at Corner of 9th and De Beer Streets, Wonderboom South ("the premises");

(3) authorizing the first applicant to enter into the premises to take possession of and retain all or any movable property, cash and other assets within the premises, and to retain such possession for so long as the first applicant deems fit, and/or to sell and dispose thereof or any portion thereof in such manner and on such terms as

the first applicant may decide in the execution of his statutory duties in terms of Chapter VI of the Companies Act, Act 71 of 2008;

(4) authorizing the first applicant to carry on the business of the second applicant relating to the movable property in the name of and at the expense of the second applicant, and for such purposes to purchase goods and to do whatever he deems necessary in the execution of his duties stated afore;

(5) authorizing the first applicant to operate and draw on any and/or all banking accounts of the second applicant, to instruct all funds in the accounts including such funds which may forthwith be paid into any accounts, not be withdrawn therefrom without the express written consent of the first applicant;

(6) Alternatively and in the event of the first to forth respondents failing and/or refusing to act and comply with the terms of prayers 1, 2, 3 and 4, the Sheriff of this Honourable Court id directed and authorised to assist the first applicant to give such orders;

(7) The first to third respondents be ordered to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying the other to be absolved;

(8) That a rule nisi do issue returnable on no less than 5 (five) days' notice and on a date and time to be arranged with the Registrar of this Honourable Court calling upon the respondents to show cause why the orders contained in prayers 1, 2, 3 and 4 should not be made final, and the first to third respondents should not be ordered to pay the costs of this application on the attorney and client scale jointly and severally the one paying the other to be absolved.

(9) Further and/or alternative relief.

The parties

3. The first applicant in the main application is Jacobus Michiel Van Tonder ("Van Tonder"). He is a business rescue practitioner ("BRP") acting in his nominated capacity and duly appointed as the BRP of the second applicant.

4. The second applicant is Belfy Trading CC t/a Jacaranda My Store Supermarket, a close corporation duly incorporated in terms of the company laws of the Republic of South Africa with its place of business at corner of 9th and De Beer Streets, Wonderboom South, Pretoria. The second applicant is under business rescue by virtue of a resolution passed by the sole member of second applicant on 19 January 2015.

5. The first respondent is Nzeba Tshibumbu Katompa, a businessman and sole member of the second applicant. He resides at Kyalami Estate, in Midrand. The second respondent is married to the first respondent and resides with first respondent at Kyalami Estates. The third respondent is the manager of the second applicant and the son of first and second respondents. The fourth respondent is the store manager of second applicant.

6. Nedbank and Standard Bank are public companies duly registered and incorporated in accordance with the company laws of South Africa with their principal place of business situated at Rivonia Road, Sandton, Johannesburg, and Standard Bank Centre, 5 Simmonds Street, Johannesburg respectively. Veta Trading 12 CC is a close corporation with limited liability, duly registered and incorporated in accordance

with the Close Corporation Act of 1984, Act No.69 of 1984 with its chosen domicilium citandi et executandi at Mark Efstratiou Incorporated, Suite 12 Avocet Corner, Hazeldean Office Park, Silverlakes Drive, Pretoria, Gauteng. Veta Trading is the landlord and creditor of the second respondent, and seeks the eviction of the second respondent from the premises known as Shop Number 5 Wonderboom Plaza, Wonderboom South, Pretoria.

Background

7. In an *Ex Parte* application before this court, the applicants sought an order to gain control over the business of second applicant. The reason for the application was on the grounds that the second applicant was in business rescue. The further reason was that the first applicant who had been duly appointed as a senior business rescue practitioner was being precluded from performing his statutory duties by the threatening conduct of the respondents.

8. The Order of Jansen, J was obtained on 4 August 2015. The first applicant and the Sheriff attempted to execute the order on 8 August 2015. They did not succeed as the respondents refused to co-operate. Instead the respondents anticipated the return day and served an answering affidavit on the applicants' attorneys on 10 August 2015. The respondent's affidavit therein stated that:

8.1. The first applicant does not have *locus standi* to have brought the application as the business rescue had been terminated;

8.2. The application is fatally defective on the basis that CIPC has not been joined;

8.3. The order granted was a nullity or had lapsed as no specific return date was provided therein;

8.4. The first applicant was disqualified from being a business rescue practitioner due to him being found guilty of the contravention of the Securities Services Act. 36 of 2004.

9. Regarding the assertion that the first applicant lacked the *locus standi* to launch the application and to represent the second applicant, the respondents' claim is that the business rescue proceedings have been terminated.

10. The first applicant contends that he prepared a report addressed to the CIPC in terms of section 132(2) and (3) read with section 141(2) of the Companies Act 71 of 2008. Specifically section 132 provides *inter alia* that business rescue proceedings end when (a) the court (i) sets aside the resolution or order that began those proceedings; or (ii) has converted the proceedings to liquidation proceedings, and (b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings.

11. The instructions of the creditors in the report are clear. The first applicant is not to terminate the business rescue proceedings prior to all the creditors' payments being made during April, May and June 2015. It appears that the second applicant had not achieved the projected results and that the repayment of debt envisaged in the approved business rescue plan would not be achieved and thus the first applicant was of the view that there were no reasonable prospects of rescuing the second applicant. The first applicant decided to terminate the business rescue proceedings and would file for liquidation of the second respondent.

12. The first applicant submits that the conclusion he reached in this regard was in accordance with the provisions of section 141(2) (a) (i) and (ii) of the Companies Act. The first applicant thus still considers himself as duly appointed and authorised.

13. Regarding the non-joinder of the CIPC, the first applicant submits that in any matter dealing with the status of a company or close corporation, the CIPC ought to be joined. The reason thereof is apparent as CIPC will have to note the change in status on their records. This application deals with a close corporation that is under business rescue. It does not deal with a change of its status. The CIPC therefore have no interest in the matter when they are not joined as a party in the proceedings.

14. The first applicant submitted that the fact that a *rule nisi* does not have a specified return date does not render the Order a nullity or that it has lapsed. The order refers to a date to be arranged with the Registrar.

15. Regarding the disqualification of the first applicant as a BRP it was contended that no application for his removal has been launched. Until that is done, first applicant remains duly authorised and appointed.

16. The first and second applicants seek a punitive cost order against the respondents and their legal representatives *de bonis propriis.* This the applicants base on the events of 8 August 2015 when the second respondent, with the assistance of his attorney of record and counsel attended at the premises and forcefully and in contravention of the court order, took possession of the shop. Despite being alerted to

their unlawful conduct by the applicants' attorney, the second respondent, his attorney of record and counsel ignored him.

The first and second applicant seek an order in terms of prayers 2, 3, 4, 5, 6 and 7 of the Notice of Motion.

Previous orders of this Court

17. In an Order dated 4 August 2015, Madame Justice Jansen granted the first applicant all of the prayers sought, that is, the prayers described in paragraph 2, above.

18. In yet another Order dated 13 August 2015 Madame Justice Tlhapi ordered the following:

1. Pending the finalization of this application the Respondents will:

    1.1. Grant access to the first applicant to all financial documents and/or information and bank account statements of My Store Jacaranda situated at Corner of 9th Avenue and De Beer Streets, Wonderboom South ("the premises"), forthwith;

    1.2. Grant access to the first applicant to the premises on a 2 weekly basis with 24 hours prior written notice to the respondent's attorneys, to be accompanied by the representatives of the respondents attorneys at which time there must not be any interference with staff, management, customers or suppliers.

1.3. Make no payments from any bank accounts or the business unless they are business related (i.e. for formal business expenses such as – for wages/salaries, rent, water & electricity, purchasing of stock, fuel).

1.4. Provide the first applicant with a financial reconciliation and/or financial information pertaining to the second applicant on a weekly basis which will include the turnover, cash and credit card reconciliation.

1.5. Grant the first applicant CCTV access and footage for the cameras at the premises on or before 19th August 2015.

2. Pending the finalization of this application the order granted on 4 August 2015 is not enforceable.

The intervening applications

19. In Nedbank's application to intervene in the proceedings, its Recoveries Manager Deirdre Lindeque deposed to the affidavit. Condonation was also sought for service on the respective attorneys for the various respondents in the main application. Nedbank's basis for intervention are the following:

19.1. It has a direct and substantial interest in the subject matter of the main application; and

19.2. It has, by virtue of section 145(1) (b) of the Companies Act, the statutory right to participate in the main application.

20. Nedbank further stated that it is a creditor of the second respondent and the second respondent is indebted to it in the sum of R55 366.31, R235 519.08,

R388 435.45 and R8 232 194.41 together with interest on each such sum. The bank has commenced action to recover these amounts. The action is premised on the fact that the third respondent bound herself in writing as surety for and co-principal debtor *in solidum* with the second respondent's indebtedness towards Nedbank. This action is pending. The debt remains unpaid.

21. The Nedbank submits that the outcome of the main application will have a material and determinative effect on the prospects of Nedbank obtaining payment from the second respondent in settlement of the second respondent's indebtedness to it.

22. Nedbank contends further that section 145(1) (b) of the Companies Act provides that each of the second respondent's creditors is entitled to participate in any court proceedings arising during the business rescue proceedings.

23. Nedbank supports the first and second applicant in the main application as well as the relief sought therein.

24. Veta Investments 12 CC's ("Veta") affidavit in its application to intervene was signed by Antony Peter Yazbek. He is the General Manager. Veta also seeks condonation for serving the application via the respective attorneys of the respondents who have agreed to such service via email in terms of Rule 4A.

25. Veta's claims to intervene in the main application on the basis that it has a direct and substantial interest in the subject matter of the application; and it has a right to so intervene in terms of section 145(1)(b) of the Companies Act.

26. Veta is also a creditor of the second respondent. It is the landlord of the business premises which are currently occupied by the second respondent and which Veta claims are currently unlawfully held over and unlawfully occupied.

27. The second respondent's indebtedness to Veta is in respect of arrear rental and other charges payable by the second respondent to Veta pursuant to a written lease agreement. The arrear rental and other charges payable under the lease agreement as at 1 March 2016 is in the amount of R327 865.26.

28. Veta contends that the lease agreement was cancelled by agreement between Veta's attorneys and the BRP. The reasons for the cancellation being that the second respondent refuses to pay any rental or consumption charges. Furthermore the second respondent refuses to vacate the business premises.

29. Veta further seeks an eviction order against the respondents on one month's notice. The second respondent has not paid any rental for a period in excess of twelve months. Furthermore Veta argues as inconceivable that the second respondent and its employees can continue to occupy the premises to the detriment of all parties including Veta.

30. Invoking section 145(1) (b) of the Companies Act, Veta submits that it is entitled to participate in any court proceedings arising during the business rescue proceedings. Veta supports the applicants in seeking the relief that they does in the main application and will support the relief sought.

31. The affidavit of Standard Bank's application to intervene was deposed to by Taki Makhale, its manager of Business Support. In its Notice of Motion Standard Bank sought leave to intervene in the main application, the joinder of CIPC, conversion of the business rescue proceedings of the first applicant to liquidation proceedings and/or the first applicant be placed in final liquidation. Finally that the costs of the application, including the costs of intervening, be costs in the liquidation of the first applicant.

32. Standard Bank is also a substantial creditor of the first applicant. Standard Bank is owed monies with respect to the sale of four vehicles to the first applicant. These vehicles are a 2011 Kia 270-0 Workhorse, a 2011 Toyota Hilux 2.5D P/O S/C, a 2010 Toyota Hilux 3.0 4X4 DC A/T and a 2013 Mitsubishi Fuso FX10-240 FC (CKD).

33. The first applicant was also favoured with an overdraft facility on 20 May 2014. The first applicant also bound itself as surety and co-principal debtor to Standard Bank for the debts of third respondent limited to an amount of R2 450 000.00.

34. Standard Bank claims that the second respondent is indebted to it pursuant to these various credit agreements, including two home loans granted to him, a medium term loan, an overdraft current account, a revolving credit plan facility, a credit card facility and a vehicle sold pursuant to an instalment sale agreement. Seven certificates of balance totaling R2 947 694.17 have been attached by Standard Bank to its application to intervene.

The respondent's application for postponement

35. The respondent filed its application for postponement of the main application on 17 May 2016, one day before the hearing of the matter. In its Notice of Motion the respondents seek in addition to an order for postponement, an order that costs be costs in the cause save where opposed, in which event those opposing be ordered to pay attorney and own client costs.

36. The second respondent deposed to the affidavit and states therein there existed numerous factual disputes that cannot be resolved on the submitted papers. He further states that the application to postpone is brought *bona fide* so that the respondents are afforded an opportunity to prepare their case. This is not a delaying tactic, so he asserts.

37. The second respondent states that he is an active member of a very important political movement in the Democratic Republic of Congo ("DRC"). He would be running for the presidency of the DRC. His responsibilities have taken a lot of his time as he had to travel extensively since the beginning of the year. He has not been in the country for more than two weeks at a time since the beginning of 2016. In the period he had been in the country he had not been able to properly consult with his legal representatives.

38. Regarding the application by Standard Bank to intervene, the second respondent states that no proof was furnished that service was effected at the business premises of second applicant. The applications of Standard Bank, Nedbank and Veta to

intervene only came to his knowledge on 10 May 2016 and he was only able to consult with his lawyers on 12 May 2016.

39. The second respondent further states that the intervening application was served on 9 May 2016 by email, and therefore the time period for filing opposing papers has not yet lapsed.

40. Regarding the Nedbank application the second respondent states that the application was issued on 22 January 2016, but was never served on the business or himself but served on John Hunter who no longer represented him.

41. The second respondent states further that *this application* was only sent to us by the first applicant on 31 March 2016 having been served on John Hunt on 21 January 2016. He concludes by saying that without proper service there was no obligation on him to act.

42. According to the second respondent Nedbank's service of the application was defective as it was never served on him personally or at the business address of the second applicant.

43. With regard to Veta's application the second respondent states that it was served on 26 April 2016 by email and by agreement between the respective attorneys. He contends that the opposing papers are not due until 26 May 2016. His attorneys could not get instructions from him to oppose the intervening application due to his unavailability.

44. The second respondent states that the intervening applications brought new information and evidence relating to the debt that is owing to certain creditors which is disputed and needed to be investigated. He requires time to consult with his attorneys in that regard.

45. Regarding the merits in the main application the second respondent states in his affidavit that the prayers sought are redundant. He says that there is no provision for the sale of assets in the business plan. The interim order granted the first applicant access to the premises. This then is an indication that the relief sought is redundant. Further the second respondent states that the relief sought is against the spirit of section 7 of the Companies Act in that the relief limits the power of the respondents to take further steps in rescuing the company.

46. The second respondent contends that there shall be no prejudice to the applicants should the matter be postponed. He asserts further that it would be in the interest of all the parties if the matter is postponed. Most importantly the second respondent states that he has found potential purchasers of the business. The proceeds of the envisaged sale would then be able to satisfy the debt owing to creditors.

47. The second respondent contends further that he is advised that in an application for postponement it is necessary to deal with his defence. He states that the respondents will deal with their defence in the opposing affidavits.

Analysis of the evidence

48. I deal first with the three applications to intervene, followed by the main application and the application for postponement. All three applicants have submitted that they are creditors of the respondents. Nedbank for its part attaches to its papers certificate of indebtedness contemplated in clause 6 of the suretyship agreement confirming the amounts owed by the respondents. These amounts are R55 366.31, R235 519.08, R388 435.45 and R8 232 194.41 totaling R8 911 515.25.

49. There is no credible explanation from the respondents resisting these monetary claims. The first applicant in its particulars of claim states that it concluded a written agreement in terms of which it granted an overdraft facility in the amount of R1 000 000.00 and a medium term loan facility of R9 300 000.00. The amount owing to Nedbank are yet to be paid by the respondents.

50. Veta is owed, as at 1 March 2016 by the respondents, the amount of R327 865.26 with respect to unpaid rent and associated costs. There has been no denying by the respondents that they indeed owe Veta and are in arrears with their rental of the property. All the second respondent states is that there are new allegations in the applications to intervene that need to be investigated. It is not stated what those allegations are.

51. I am satisfied that the three applications to intervene have met the requisites of (a) direct interest and (b) right by virtue of section 145(1)(b) of the Companies Act to participate.

52. I am further satisfied that with regard to Veta, a proper case for eviction has been established and the eviction of the respondents seem inevitable. The prayer for eviction is buoyed by the support thereto by the first and second applicant.

53. There is little doubt that the current status regarding control of the business of the respondents vests in the business rescue practitioner until such time that the court orders a liquidation. There is further little doubt that the respondents are not in a position to pay off their debt to Nedbank LTD, Standard Bank of SA LTD and Veta. The respondents' indebtedness has not been denied with any credibility.

54. The BRP's report similarly makes it clear that the business has long past redemption.

55. The conduct of the respondents in their refusal to obey an order of this court by their refusal to vacate the premises and physically and threateningly prevent the first applicant to execute his statutory mandate as BRP deserves this court's strongest condemnation. It is unacceptable for legal practitioners who are most importantly officers of this court to conduct themselves in a manner which brings the court and the judicial system into disrepute.

56. For the attorney and counsel for the respondents to accompany the second respondent to the premises and forcefully and in contravention of the court order, take possession of the shop is nothing short of dishonourable conduct and unlawful. The lawyers ought to know that there are always available lawful ways to protect the interests of their clients.

57. It is my view that the attorney and counsel must be reported to their respective professional or other relevant bodies or organisations. This conduct cannot be condoned.

58. The applicable principles regarding application for postponement are settled. I deal with some of these principles as stated in *Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS)*. These are as follows:

(1) The trial Judge has a discretion as to whether an application for a postponement should be granted or refused.

(2) The discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

(3) A Court should be slow to refuse a postponement where the true reasons for a party's non-preparedness has been fully explained, where his readiness to proceed is not due to delaying tactics and where justice demands that we should have further time for the purpose of presenting his case.

(4) An application for postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant....

(5) An application for postponement must always be bona fide...

(6) The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

59. I have considered the second respondent's reasons for seeking a postponement of the proceedings. They boil down to a single factor. The second respondent is more of a politician than a businessman. This fact he makes clear by his conduct. He travels extensively and frequently in and out of the Republic of South Africa in pursuit of his political interests in the DRC. His involvement in the politics of his country might well be rewarded with him ascending to the highest office. It appears that despite being in business in South Africa, this he conducts in an *adhoc* fashion. His heart is in politics and in the DRC.

60. This might well explain why, despite being served with the application to intervene by Nedbank LTD on 31 March 2016, he was only able to consult with his attorneys on 12 May 2016. Veta served its application on 26 April 2016. The second respondent retorts that he is not time barred with his answering papers in this regard.

61. The second respondent offers no explanation why his application for postponement was only served on 17 May 2016, a day before the hearing of the main application.

62. I have the discretion whether to grant or refuse an application for postponement. I am alive to the fact that this discretion I must exercise judiciously. *Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398.* I do not understand judicial discretion to

include feeling sorry for the second respondent or his circumstances. Indeed I need to consider whether the second respondent has demonstrated the necessary diligence in thwarting and fobbing off his legal challenges. The conclusion I arrive at is that this is not so. It appears that the second respondent approaches his legal challenges in a lackadaisical manner as he has more important issues such as taking over a country to contend with.

63. Counsel for the respondents was not able to explain to the court why the application for postponement was brought a day before the hearing of this matter. I similarly do not find satisfactory the explanation in the second respondent's affidavit in that regard. An applicant seeking to find favour with the Court must bring her application timeously. *Greyvenstein v Neethling 1952 (1) SA 463 (C) at 467F.*

64. In the circumstances I make an order in the terms that follow:

With respect to the application for postponement

1. The application for postponement is dismissed.
2. The first, second and third respondent to pay the party and party costs of the first and second applicant, including the costs of two counsel, as well as the party and party costs of the first, second and third intervening party jointly and severally, the one paying the other to be absolved.

With respect to the application to intervene of the first intervening party

1. The application for condonation for irregular service is upheld.
2. The application to intervene is upheld.

3. The application for the liquidation of the second applicant is postponed to 6 July 2016.
4. All affidavits in answer to the liquidation application brought by the intervening party are to be served and filed by 8 June 2016 and all replying affidavits thereto, if any are to be served and filed by 22 June 2016 wherafter the normal periods as per the Court's Practice Manual will apply.
5. The Companies and Intellectual Property Commission is joined to the main application as the fifth respondent.
6. The first, second and third respondent to pay the first intervening party's costs on a party and party scale, jointly and severally, the one paying the other to be absolved.

With respect to the application to intervene of the second intervening party

1. The application for condonation for irregular service is upheld.
2. The application to intervene is upheld.
3. The first, second and third respondent to pay the second intervening party's costs on a party and party scale, jointly and severally, the one paying the other to be absolved.

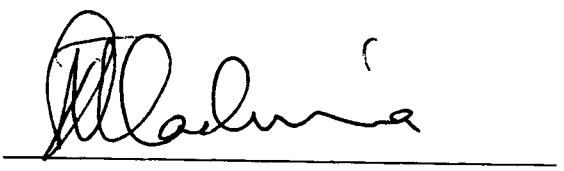
With respect to the application to intervene of the third intervening party

1. The application for condonation for irregular service is upheld.
2. The application to intervene is upheld.

3. The application for the eviction of the respondents from the premises situate at corner of 19th Avenue and De Beer Streets, Wonderboom South, Pretoria on 15 June 2016 is upheld.
4. The first, second and third respondent to pay the third intervening party's costs on a party and party scale, jointly and severally, the one paying the other to be absolved.

With respect to the first and second applicants

1. The rule *nisi is* made final.
2. The orders contained in prayers 1, 2, 3 and 4 are made final.
3. The first, second and third respondent to pay the first and second applicant attorney and own client costs, jointly and severally, the one paying the other to be absolved, including the cost of two counsel.



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the First Intervening Party:	Adv Adv E Furstenburg
Instructed by:	Ramsay Webber Attorneys
On behalf of the Second Intervening Party:	Adv C. A. C Korf
Instructed by:	Snyman de Jager Attorneys
On behalf of the Third Intervening Party:	Adv G. T. Avvakoumides
Instructed by:	Mark Estraficu Attorneys

On behalf of the First and Second Applicant:	Adv W. J. Bezuidenhout
Instructed by:	JF van Deventer Inc
On behalf of the Respondents:	Adv S. J. J Van Rensburg
	Adv A. Smit
Instructed by:	Titinger Attorneys
Dates of Hearing:	18 May 2016
Date of Judgment:	20 May 2016