(Western Cape Division, Cape Town)

[REPORTABLE]

Case No: 12696/2021

In the matter between:

CHARLES HENRI EMILE MACHARD	**Applicant**
vs	
MINISTER OF DEFENCE AND MILITARY VETERANS	**First Respondent**
CHIEF OF THE SANDF	**Second Respondent**
SECRETARY OF DEFENCE	**Third Respondent**
ADJUDANT-GENERAL: LEGAL SERVICES DIVISION OF SANDF	**Fourth Respondent**
THE SURGEON GENERAL OF THE SOUTH AFRICAN NATIONAL DEFENCE FORCE	**Fifth Respondent**

JUDGMENT DELIVERED ELECTRONICALLY ON 1 JUNE 2022

MANTAME J

A Introduction

[1] The applicant seeks an interim interdict preventing the first to fifth respondents (*"SANDF/respondents*") from implementing the sentence of cashiering

that was handed down by the Court of Military Appeals *("CMA")* dated 17 September 2020 and communicated to the applicant on 23 July 2021 pending the institution of legal proceedings (review) challenging that sentence within thirty (30) days of the granting of this order. In essence, the applicant seeks a court order preserving the status quo pending the final determination of his rights.

[2] The respondents opposed this application and raised three (3) points in *limines*, i.e. (i) the Western Cape Division of the High Court does not have jurisdiction to grant an interdict and / or a subsequent review in this matter; (ii) the applicant has not made out a case of urgency; and (iii) one of the requirements for an interim interdict is that the applicant should not have an alternative remedy or no other remedy.

[3] At the commencement of these proceedings, the issue of urgency was not persisted with. This Court would therefore assume that since the matter was heard by a semi-urgent Court, the urgency has since fallen away. This would therefore mean that the Court would deal with the two (2) remaining points, the last of which would be dealt with in the ordinary course, as it forms part of the requirements for the granting of an interim interdict

B Background Facts

[4] The applicant is employed by the SANDF as a male professional nurse holding a rank of a captain at 9 South African Infantry Battalion ("*SAIBN*"), Eerste Rivier, Western Cape Province since 1992.

[5] On 14 March 2019, the applicant appeared before the Military Court, Cape Town and was charged with three (3) counts of sexual assault in terms of Section 5(1) of the Criminal Law Sexual Offences and Related Matters Amendment Act, No 21 of 2007 ("*SORMA*") with an alternative charge of contravening Section 45(a) of the Military Disciplinary Code (unseemly behaviour). The applicant pleaded not guilty to these charges.

[6] On 19 March 2019 the Court of Military Judge ("*CMJ*"/"*CDR WP Venter*") convicted the applicant of; (i) unseemly behaviour in respect of the first charge

relating to the first complainant; (ii) sexual assault in respect of the other charge relating to the first complainant; and (iii) sexual assault in respect of the charge relating to the second complainant. The applicant was sentenced to a lower commissioned rank of lieutenant and imprisonment for a period of twelve (12) months coupled with a mandatory sentence of cashiering, suspended for three (3) years on condition that he was not convicted of sexual assaults committed during the period of suspension.

[7] The applicant did not appeal this decision (conviction and sentence). He was then informed by the CMJ (CDR WP Venter) and his Military Defence Counsel (Major Ndou) that the matter would be forwarded to the Court of Military Appeals for automatic review in terms of Section 34(2) of the Military Discipline Supplementary Measures Act, No: 16 of 1999 ("*MDSMA*") seating in Pretoria. Section 34(2) reads:

> "*Every sentence of imprisonment, including a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge shall be reviewed by a Court of Military Appeals and shall not be executed until that review has been completed.*"

[8] According to the respondents, it was open to the applicant to exercise his right of appeal or review in terms of Section 8 of the MDSMA to the CMA. It was therefore conceded by the respondents that no right of appeal lies from the CMJ to the High Court. Having so advised, he elected not to exercise the right of appeal.

[9] The CMA on 8 July 2020 and 17 September 2020 heard the automatic review and upheld the finding but varied the sentence in accordance with Section 8(1)(d) of the MDSMA to cashiering with a majority decision of two to one. The said decision was communicated to the applicant on 23 July 2021 and was informed that the cashiering was to take place on 30 July 2021. It was for this reason that the applicant approached this Court on an urgent basis on 29 July 2021, asking for an interim interdict pending the outcome of the legal proceedings and / or review proceedings to be instituted by him in this Court.

C Point in limine – Jurisdiction

[10] Before I deal with the merits of this application it would be prudent for this Court to first deal with the point of jurisdiction that was raised by the respondents. The respondent acknowledged that Section 21 of the Superior Courts Act 10 of 2013 ("*SCA*") provides that a division (of the High Court) has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power-

(a) to hear and determine appeals from all Magistrate's Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

(c) in its discretion, and at the instance of any intended person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[11] Despite this acknowledgment, the respondents contended that the applicant's conviction and sentence was reviewed by the CMA in terms of Section 34(2) of the MDSMA seating in Pretoria. Pretoria falls within the jurisdiction of the North Gauteng High Court Division. The decision of CMA in their view, would be subject to the jurisdiction of the North Gauteng High Court Division. As a result, this Court does not have jurisdiction to either grant an interim interdictory relief nor a subsequent order of review to be launched.

[12] In opposing this point in *limine*, the applicant stated that, *first* in terms of Section 42(2)[1] of the SCA, this Court has jurisdiction to hear this matter, and if necessary, its court processes or Court orders could be served and have legal effect on the CMA in Pretoria. In *Steyler NO v Fitzgerald*[2] it was held:

> "*A Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit but also of giving effect to its judgment.*" See also *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*[3]

[1] The civil process of a Division runs throughout the Republic and may be served or executed within the jurisdiction of any Division
[2] 1911 ADD 295 at 346
[3] 1962 (4) SA 326 (A) at 336 A-B

[13] *Second*, it was asserted that the applicant is employed by the respondents within the jurisdiction of this Court. When the trial commenced, he was stationed at the 9 South African Infantry Battalion in Elsies Rivier. Although the decision of the CMA was taken in Pretoria, it adversely affected the applicant's legal capacity and right to be employed by the SANDF in Cape Town as a professional male nurse. The applicant possesses an antecedent right to be employed, and the *situs* of that right is within the jurisdiction of the Court - See *Tayob v Ermelo Local Road Transportation Board & Another.*[4]

[14] *Third,* the sentence of the trial court was handed down at Simon's Town. The CMA did not impose its own sentence, but varied the sentence by the CMJ. This means that the sentence is still that of the original CMJ, although it has been varied.

[15] *Fourth,* it was indicated that a decision of the CMA had no legal efficacy until it was promulgated in terms of section 35 of the MDSMA read with section 69 of the Regulations[5] - which states that it had to be communicated to the applicant: until such communication took place, there was no decision which could form the subject-matter of an appeal or review. The relevant legislation contemplated that the SANDF would inform the applicant in writing of its decision, and that written communication constituted the decision which formed the subject-matter of the applicant's complaint. As such communication was made to the applicant in Cape Town, these proceedings had their origin within the jurisdiction of this Court which accordingly has jurisdiction in regard to that decision – See *Lek v Est Agents Board,*[6] *Est Agents Board v Lek*[7]*.*

[16] It is indeed so that with the promulgation of the SCA, the issue of the high court's jurisdiction has to be interpreted purposefully and according to the matter at hand other than territorially as it used to be the case.

[17] Section 21 of the SCA is instructional. It states that a division of the high court has jurisdiction over all persons residing or being in, and in relation to all causes

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[4] 1951 (4) SA 449 A-C
[5] Published in GN R747 of 1999 GG 20165 OF 11 June 1999
[6] 1978 (3) SA 160 (C)
[7] 1979 (3) SA 1048 (A)

arising and all offences triable within, its area of jurisdiction. It is therefore common cause that the applicant, although employed by the SANDF which is a national government department, resides in this jurisdiction; perform his services as an employee in this jurisdiction, the triable offence occurred in this jurisdiction; the military trial court was constituted in this jurisdiction and in all pragmatism, he falls within the jurisdiction of this Court.

[18] It is when the matter went for an automatic review in terms of Section 34(2) of the MDSMA that it was dragged to Pretoria after having all the military court proceedings been initiated in Cape Town. Although it came across as a focal point that the CMA sat in Pretoria and therefore the high court in that jurisdiction is empowered to hear the matter – no legal basis was laid empowering that Court to have jurisdiction in this matter. It was not intimated why there are no equally qualified persons who could undertake and / or entertain this automatic review in Cape Town as nothing in the legislation states that it should be held in Pretoria. Pretoria was only said to be the headquarters of SANDF, and nothing further turned from this argument. The fact that this automatic review was chaired by a judge of North Gauteng High Court Division does not immediately empower or promote the proceedings at the CMA to that high court, which in any event did not originate from that jurisdiction. Notably, when the judge sat in the applicant's automatic review proceedings, she sat as a Chairperson of the CMA and not as a judge of the North Gauteng High Court. A judge shall be appointed as such in terms of Section 7 of the MDSMA. In my view, the CMA sat in Pretoria for its convenience and not for any jurisdictional requirements.

[19] It is specifically stated that the object of the MDSMA is to provide proper administration of military justice and the maintenance of discipline. The military courts are created in order to maintain military discipline; and to ensure a fair military trial and an accused's access to the High Court of South Africa. If the military courts had the same legal standing as the South Africa Court system, there would have been no need for the accused's persons to access the High Court of South Africa, as the Objects of the MDSMA stipulates.

[20] Further, there is no provision in the MDSMA which specifies that the chairperson of the CMA shall be a judge from the North Gauteng High Court Division. It follows then that there are judges and retired judges in all other High Court jurisdictions of South Africa who are equally placed to discharge the MDSMA legislative mandate, if so required.

[21] In my analysis, the question of whether a Court has jurisdiction or not to entertain a matter, depends solely on the facts and statutory interpretation of the legislation concerned. The undisputed facts holistically point to the fact that the applicant is resident, employed, the offence concerned and the court of first instance all happened within the area of this Court's jurisdiction. If one has regard to the MDSMA which regulates the conduct of proceedings in the military court, nowhere it states that the CMA should be held in Pretoria.

[22] In fact, the fact that the military court proceedings were initiated in Cape Town suggest that the respondents submitted or acquiesced to this Court's jurisdiction. The SCA in *Tralex Limited v Maloney and Another*[8] stated that the correct approach to determine whether the appellant had submitted to the jurisdiction of the Court is to ask if the cumulative effect of the proven facts establish a submission on a balance of probabilities – See also *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd.*[9]

[23] Most importantly, I tend to agree with the applicant's fourth submission that the CMA decision had no legal efficacy until it was promulgated in terms of Section 35 of the MDSMA and communicated to the applicant in Cape Town. There is no suggestion that the CMA decision was made known to the applicant in Pretoria. This all point to the fact that the respondents submitted to the jurisdiction of this Court. The CMA's decision was given effect in Cape Town.

[24] It appears that only single process that happened in Pretoria was the CMA's automatic review. Judging from its judgment, the panel considered oral submissions on sentence from the parties on 17 September 2020. The North Gauteng High Court

[8] (838/2015) [2016] ZASCA 128 AT PARA [24] (27 September 2016)
[9] [2004] ZASCA 116; 2005(2) SA 522 (SCA) para [13]

Division could not find jurisdiction simply because of that one single instance. Effectively, if the respondents adhered strictly to territorial jurisdictional requirements, it would not have heard one segment of the proceedings in Pretoria. In the circumstances where jurisdiction is not a requirement in the MDSMA in the conduct of the military court proceedings, it then follows that it cannot be taken as a point in *limine* simply because the chairperson happened to be a judge in the North Gauteng High Court Division.

[25] For these reasons, I incline to the view that this Court has jurisdiction to hear the rule *nisi* and the subsequent review for that matter.

[26] The last point in *limine* – alternative remedy or no other remedy will be dealt with in the normal course later in the judgment with all other requirements of an interim interdict.

D Issues

[27] This Court is called upon to determine whether the applicant is entitled to an interim order interdicting the respondents from cashiering him from the SANDF pending the review and / or legal proceedings to be instituted by the applicant to overturn an order made by the Court of Military Appeal on or about 17 September 2020.

E Legal Submissions

[28] The applicant asserted that for an interim interdict to be granted, the applicant must prove (i) *prima facie* right; (ii) irreparable harm; (iii) balance of convenience; and (iv) no other satisfactory remedy.

G Prima Facie Right

[29] The applicant contended that the military justice system is distinct from a civilian justice system. For instance, in *Mbambo v Minister of Defence*[10]*, the* court found that the CMA has review powers that are wider than that of the High Court when it sits on appeal. The CMA does not only reconsider cases before it, on the

[10] 2005 (2) SA 225 (T) at 283 A

record of proceedings but has a wider power to allow further evidence. The court found that the offender has a right, in terms of the Constitution, to the meaningful reconsideration of his conviction and his sentence by a higher court than the one that convicted and sentenced him in the first place. This was provided for in the procedures contained in the Act.

[30] The applicant contended that, when the applicant initially appeared before the CMT, it was irregularly composed. Further, it was unclear whether the trial court was a Court of Military Judge, or a Court of Senior Military Judge. It was however, one or the other, and the requirements for both are identical. In addition, one of the members of the court must be an assessor unless the accused elects on two (2) assessors in terms of Section 30(24), one of whom may be a warrant officer. It was contended that both versions of the military court require an assessor. In the applicant's trial, there was none. This means therefore that the trial court was not constituted in the manner peremptorily prescribed by the MDSMA. The findings of that court are therefore void. The applicant did not waive his right to an assessor. The composition of the court is a legal requirement and not a right, so said the applicant.

[31] It was therefore submitted that if the foundation of that order was unsound in law it follows therefore that the decision of the CMA was also void. In *Government of the Republic of South Africa and Others v Von Abo*[11] it was stated:
"*As a matter of logic the second order arose from the first order and has no independent existence separate from the first order. As the second order was given in consequence of the first order, and would not nor could have been given if it were not for the first order, it follows that if the first order is wrong in law, the second order is legally untenable.*"

[32] Similarly, it was submitted the CMA was irregularly constituted. Section 7(1)(b)(i) stipulates that the chairperson of the CMA shall be a judge or a retired judge of the High Court of South Africa, or a magistrate or retired magistrate who has held that office for a continuous period of not less than ten (10) years. The judge who

[11] [2011] ZASCA 65 para 18

chaired the CMA did not have the mandatory ten (10) years in the office of a judge. Therefore, the CMA was irregularly constituted and was incapable of taking valid decisions.

[33] The applicant postulated that the CMA, having been so irregularly constituted, increased the applicant's sentence. In this regard, there are two (2) grounds that must be considered seriatim; (i) the decision to interfere with the sentence; and (ii) the infringement of the rights of the applicant. In order to succeed with the review application, the applicant must allege and prove that the CMA erred and misdirected itself in interfering with the sentence of the trial court and increased the sentence to one of cashiering.

[34] Upon conviction, the CMJ was required to exercise a true or strict discretion and impose a sanction as provided for in Section 12 of the MDSMA. When a lower court exercises a discretion in the strict sense, it would ordinarily be inappropriate for a higher court to interfere unless it is satisfied that the discretion was not exercised judicially, or that the exercise of the discretion had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. In circumstances where the applicant did not dispute either the finding or the sentence, accordingly, there was nothing to uphold. In the result, the CMA did not have jurisdiction to intervene in the applicant's sentence.

[35] The respondents argued that the applicant failed to deal with these grounds of review in their application for an interim interdict. These were only advanced on their heads of argument. In doing so, the applicant seeks to compel this Court to deal with the merits of the proposed review application. It was not the applicant's case that the CMJ and CMA were irregularly constituted.

H Irreparable Harm

[36] The applicant acknowledged that it had a duty to show that there is a reasonable apprehension that the continuance of the alleged wrong will cause

irreparable harm. However, if the applicant has established a clear right, his apprehension of harm need not be established. It was the applicant's contention that the applicant has established a clear right particularly in so far as the composition of the court a *quo* and the court a *quem* are concerned. He has demonstrated that he will suffer irreparable harm if the sanction of cashiering were to take place. It was his contention that he will not be able to be "*uncashiered*" as the indignity which he will suffer at the cashiering parade cannot be reversed.

[37] The respondent conceded that the sanction of cashiering is finalised at parade. However, it is not what the applicant portrayed it to be.

I Balance of Convenience

[38] The applicant asserted that the balance of convenience favoured the granting of an interim interdict. The Court was urged to weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice the respondent will suffer if it is. The exercise usually involves the consideration of the prospects of success and the balance of convenience. The stronger the prospects of success, the less the need for a balance to favour the applicant, and the weaker the prospects of success, the greater the need for it to favour him. In the circumstances it was argued that the applicant has strong prospects of success and the balance of convenience favour him. If the interim order of interdict is granted, the cashiering parade will not take place immediately. If the applicant is ultimately successful in its future application, he will not be subjected to the indignity of the cashiering parade. However, if the applicant is ultimately unsuccessful, the respondent will still proceed to conduct it cashiering parade.

J No other satisfactory remedy

[39] According to the applicant, this requisite is closely linked to that of an irreparable harm. It was stated, if the injury envisaged will be irreparable and is allowed to continue, an interdict will be the only remedy. On the other hand, if there is some other satisfactory remedy, the injury cannot be described as irreparable.

[40] The respondent submitted that the applicant does have an alternative remedy. Section 34(5) of MDSMA provides that an offender may within the time limits and in

the manner prescribed in a rule of the Code, apply for the review of the proceedings of his or her case by a Court of Military Appeals. The applicant has not shown that there is a pending review in respect of the increase of his sentence. In circumstances where the relief is readily at the disposal of the applicant it was contended that this interdict is unwarranted

K Discussion

[41] In approaching this Court for an interim interdict preventing the respondents from cashiering him, the applicant claimed that the events emanating from CMJ and CMA were irregular and flawed and stood to be reviewed in the proceedings soon to be launched. Despite the automatic review being finalised on 17 September 2020 by the CMA, whose composition is impugned, the outcome of those proceedings was communicated to the applicant on 23 July 2021. The cashiering was due to be carried out on 30 July 2021.

[42] According to the applicant, when the CMJ issued a conviction and sentence reducing him to the lower commissioned rank of lieutenant, and cashiering and imprisonment for twelve (12) months which was wholly suspended, he did not appeal the decision. In his opinion, the CMA exercised its discretion in an impermissible manner and interfered with a sentence in circumstances it was not entitled to do so. In addition, he was not afforded an opportunity to address the CMA on the possible increase of sentence.

[43] Most concerning to the applicant is the manner in which the sentence of cashiering will be carried out as it is an unlawful violation of the fundamental right to the dignity of the person subjected to this treatment, and is contrary to the provisions of Section 10 of the Constitution. The sentence of cashiering ought to be enough without public humiliation and / or degradation at parade. The applicant stated, he intend instituting the proceedings in this Court challenging the constitutionality of this procedure. The applicant *inter alia*, asserted his right to employment and his right not be stripped of his dignity and be humiliated in public as a result of the decisions of an improperly constituted CMJ and CMA. If these grounds were to be challenged on review, in my view there would be good prospects of success. I have noted the respondent's displeasure that these points were raised only in the applicant's heads

of argument and the respondents expeditiously responded to these allegations in their supplementary heads of argument. To the extent that such points reflected an arguable case and a demonstrable good prospects of success on review – such points were only for consideration of a future case on review, and are not points for determination by this Court. As a result, this Court will consider these points as such.

[44] In *National Treasury v Opposition to Urban Tolling Alliance,*[12] the Constitutional Court remarked as follows:

> *"[48] At the outset the high court had to decide whether the applicants had established a prima facie right, although open to some doubt. It examined the grounds of review and was persuaded that they bore prospects of success and that therefore the applicants had established a prima facie right to have the decisions reviewed and set aside. Two comments are warranted. First, we heard full argument on the merits on the grounds of review. I am unable to say without more that they bear any prospects of success. That decision I leave to the review court.*
>
> *[49] Second, there is a conceptual difficulty with the high court's holding that the applicants have shown 'a prima facie right to have the decision reviewed and set aside as formulated in prayers 1 and 2.' The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.*
>
> *[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendant lite.*

[12] 2012 (6) SA 223 (CC) paras 48, 49,50

[45] The applicant stated that he had established a clear right worthy to be protected with regard to the composition of the CMJ and CMA. In *Niewoudt v Maswabi NO,*[13] it was held that where an applicant sought interlocutory relief to protect his right pending the resolution of the dispute in the main action, he was required to prove not a clear right but a prima facie right to payment for the work he had done.

[46] The applicant further contended that as a result of the sanction of cashiering by the CMA, it would be carried out in such a manner as to humiliate and strip him of his dignity in terms of Section 10 of the Constitution. The Constitutional Court considered the issue of protected right (*albeit* in the context of final interdicts) in *Masstores (Pty) Ltd v Pick 'n Pay Retailers*[14] where it was stated *'[I]f the conduct complained of is illegal or is not justified in law, then the interdict may be granted to protect the applicant's rights. Nobody is entitled to violate another person's rights if the law does not authorise the breach.'*

[47] It is my considered view that the object and purpose of the MDSMA and the Code is for the continued administration of military justice and the maintenance of discipline. However, if the resulted decisions *prima facie* emanate from irregularly constituted military courts, and the alleged infringement of a person's dignity, in the circumstances, the interim interdict should be granted in order for the applicant to assert his rights. It follows then that the respondent has not disputed the applicant's irreparable harm. As a consequence thereof, the balance of convenience favours the granting of the interim interdict. The respondent argued that the applicant had an alternative remedy in the sense that it should have reviewed the decision of the CMA. In a situation where the decision of the CMA was communicated to the applicant six (6) days before the date of the actual cashiering, it is not clear where the applicant would have found an opportunity to file an application for a review.

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[13] 2002 (6) SA 96 (0) at 102 H-J
[14] 2017 (1) SA 613 (CC) at para [87]

[48] In the circumstances, the applicant was justified in seeking to prevent the alleged infringement of his rights pending the launch of review and / or legal proceedings.

[49] In the result, I grant the following order:

49.1 A *rule nisi* is hereby issued calling on First to Fifth respondents to show cause on 30 June 2022 why pending the final determination of the legal proceedings referred to in paragraph 49.2 below, an order should not be made:

49.1.1 Interdicting first to fifth respondents from implementing the sentence handed down by the Court of Military Appeals dated 17 September 2020 and communicated to the applicant on 23 July 2021;

49.1.2 Directing that the costs of this application shall form part of the costs of the application referred to in paragraph 49.2 below.

49.2 Directing the applicant to institute legal proceedings within thirty (30) days of the granting of this order in which he claims the relief referred to in 49.1.

49.3 Directing that pending the said return date the provisions of paragraph 49.1.1 above shall have an interim effect.

MANTAME J
WESTERN CAPE HIGH COURT

Coram	**:**	**B P MANTAME, J**
Judgment by	**:**	**B P MANTAME, J**
FOR APPLICANT	**:**	**ADV P TREDOUX** **021 424 9646** **advocate@postman.co.za**

Instructed by	**:**	**SB Attorneys** **C Speirs - 021 422 1356** **carol@sb-attorneys.co.za**
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Date (s) of Hearing	**:**	**26 April 2022**
Judgment delivered on	**:**	**01 June 2022**