IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no. 12994/2021

In re: the amicus curiae application of

FOREST PEOPLES PROGRAMME

In the matter between:

OBSERVATORY CIVIC ASSOCIATION	First Applicant
GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL	Second Applicant
and	
TRUSTEES FOR THE TIME BEING OF LIESBEEK LEISURE PROPERTIES TRUST	First Respondent
HERITAGE WESTERN CAPE	Second Respondent
CITY OF CAPE TOWN	Third Respondent
THE DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1), LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	Fourth Respondent
THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	Fifth Respondent
CHAIRPERSON OF THE MUNICIPAL PLANNING TRIBUNAL OF THE CITY OF CAPE TOWN	Sixth Respondent
EXECUTIVE MAYOR, CITY OF CAPE TOWN	Seventh Respondent
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eighth Respondent

FOUNDING AFFIDAVIT

I the undersigned

GORDON BENNETT

do hereby make oath and say:

1. I am an adult, male, senior counsel at Forest Peoples Programme whose offices are located at Moreton-in-Marsh, GL56 9NQ, United Kingdom.

2. I duly depose to this affidavit on behalf of the Forest Peoples Programme (**FPP**). I provide further details regarding the FPP below.

3. The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context makes it clear that they do not. I confirm that those facts are to the best of my knowledge, true and correct.

4. Some of the averments I make herein deal with matters of law. To the extent that I do so, I rely on the legal advice obtained from my legal representatives during consultation and in the preparation of this affidavit. I accept the correctness of that legal advice.

I INTRODUCTION

5. This is an application for admission as an amicus curiae. The applicant amicus, FPP, seeks to be admitted in a matter between the Observatory Civic Association (**OCA**) and the Liesbeek Leisure Property Trust (**Trust**).

6. OCA has applied to this Court to interdict the Trust from developing certain land (**site**) pending a review of various decisions authorising the Trust to develop the site. OCA

justifies its application, among other reasons, by alleging that several public officials failed in their duties towards indigenous peoples by approving the development.

7. FPP is a human rights non-governmental organisation specialising in the rights of forest and other indigenous peoples. The matter between OCA and the Trust raises various issues relating to indigenous persons. FPP intends to make submissions on South Africa's international legal duties towards indigenous peoples. I attach to this affidavit the submissions FPP intends to make (**GB1**). These submissions will assist the Court in determining whether it should grant OCA an interdict. No other party has made these submissions.

8. FPP, through its lawyers, approached the parties to this matter for their consent to admit FPP as amicus. The applicants consented; the fourth and fifth respondents indicated that they will not oppose this application, while the first, third, sixth and seventh respondents refused to consent. The respondent's refusal means that FPP must bring this application.

9. This affidavit deals with the requirements for admission as an amicus. It is structured as follows:

9.1. **PART II**: FPP's interest in this matter.

9.2. **PART III**: The submissions made by FPP.

9.3. **PART IV**: Compliance with rule 16A.

II FPP'S INTEREST

10. FPP is a human rights organisation that supports forest and other indigenous peoples to secure their rights under international human rights law (**IHRL**). It was founded in 1990, registered as a Dutch Stichting in 1997, and has been a registered charity in the United Kingdom since 2000. It has consultative status with the United Nations (**UN**) and observer status with the African Commission on Human and Peoples Rights (**ACHPR**)

11. FPP has significant legal expertise in its field and has made many submissions to governments, human rights bodies and other organisations. It has published a wide range of reports and other material on the legal and human rights of indigenous communities. It has an interest in ensuring that the Court is made aware of the scope and content of IHRL so far as it applies to the present proceedings.

12. FPP does not specialise exclusively in indigenous peoples reliant on equatorial forests or biomes. As FPP's submissions demonstrate, South Africa owes duties to indigenous peoples regardless of whether those indigenous peoples live in a forest. Although we focus on forest dwellers, many of the communities with which we work live in mixed ecosystems. By way of example, in Kenya we have provided and continue to provide significant legal support to both the Ogiek and Sengwer. The traditional territories of these peoples include grassland, savannah and moorland as well as forest. Some of our publications pertain to the rights of indigenous peoples generally, whether or not they are also forest peoples. For example, we recently published Volume VII of a series of comprehensive reports entitled "Indigenous Peoples and United Nations Human Rights Bodies: A Compilation of UN Treaty Body Jurisprudence, Special Procedures

of the Human Rights Council, and the Advice of the Expert Mechanism on the Rights of Indigenous Peoples". These reports reflect the fact that, with one exception, international human rights law draws no distinction between the rights of indigenous peoples who live in forests and those who do not. The exception relates to remote forest dwellers who have still had little no contact with the outside world, but is not relevant to the present case.

13. As FPP's submissions demonstrate, South Africa owes duties to indigenous peoples regardless of whether those indigenous peoples live in a forest.

III FPP'S SUBMISSIONS

14. OCA's application has been brought urgently. FPP does not intend to delay proceedings by applying to intervene as an amicus. Accordingly, FPP has already briefed counsel to draft the submissions FPP would make at the hearing of this matter. A copy of the heads of argument FPP would submit if it were admitted as amicus is attached (**GB1**).

15. In summary, the submissions comprise two parts. First, on a factual level, FPP assumes that the site is of cultural significance to the Khoi-San People. FPP also assumes that either the relevant authorities did not properly consider the cultural significance of the site or that developing the site will permanently undermine the cultural significance of the site for the Khoi and San. FPP understands that these factual assumptions are in dispute between OCA and the Trust. As an amicus, FPP will and should not take a side on these factual disputes.

16. However, if these factual assumptions turn out to be true, then the second part of FPP's submissions is relevant. The second part of the submissions is that international law requires South Africa to do the following:

16.1. Protect and take positive steps to promote indigenous peoples' right to practise and revitalise their cultural traditions and customs.

16.2. Consult with and ensure active participation of indigenous peoples in respect of any project that may affect them.

16.3. Limit the uses that may lawfully be made of land even in which a community claims no right of property. Restrictions may be required, for example, to ensure that the community enjoys access to land of cultural significance to it.

16.4. Where no single organisation or group of individuals is clearly authorised to represent the views of the community, South Africa must develop an alternative process to ensure that the community can nevertheless effectively participated in relevant decisions.

16.5. If the development is likely to have a significant direct impact on the cultural integrity of a community or otherwise pose a major threat to it, South Africa may permit the development to proceed only with the community's free, prior, informed consent (**FPIC**).

17. The implication of these duties is that this Court must interdict the Trust from developing the property if FPP's factual assumptions are true. South African authorities, prima facie at least, failed in their duties towards the Khoi and San People. The development of the site will mean that the Khoi and San People's rights as

indigenous people will be irreparably violated. Pending review of the relevant decisions, the status quo should be maintained to avoid this irreparable harm.

18. The submissions are relevant to these proceedings. The submissions can assist the Court in determining whether sections 30 and 31 of the Constitution, prima facie, face irreparable harm if the development proceeds. The submissions may also speak to prospects of success in the review, which affects the balance of convenience in deciding whether to grant the interim interdict.

19. A significant portion of OCA's case is that the respondent officials failed to consider properly the cultural significance of the site. OCA contends, among other things, that the heritage impact report compiled by the Trust did not consider the intangible cultural aspects of the site. If this is true, then, as FPP's submissions demonstrate, the interdict should be granted. South Africa's international legal duties require it to consider all aspects of the site's cultural significance, including the intangible.

20. No other party has made these submissions.

IV SERVICE, CONSENT, AND DELAY

21. On 27 October 2021, FPP's attorneys, the Legal Resources Centre, wrote to the parties in the OCA application (**GB2**). FPP sought their consent under rule 16A to be admitted as amicus.

22. The applicants consented on 29 October 2021 (**GB3**).

23. The fourth and fifth respondents indicated in a letter dated 29 October 2021 that should FPP bring an application to be admitted as amicus, they will not oppose the application (**GB4**).

24. The other respondents refused to consent.

24.1. On 29 October 2021, the Trust's attorney wrote a letter refusing consent (**GB5**). The Trust refused consent because (a) FPP's submissions would not assist the Court and (b) FPP has no interest in this matter since it does not concern a forest.

24.2. On the same day, the third, sixth and seventh respondents (**City officials**) wrote a letter refusing consent (**GB6**). Their reason was that they could not give consent since more than 20 days had passed since OCA had filed its founding papers.

25. Rule 16A(5) provides that if a party cannot obtain consent to be admitted as an amicus, then that party must approach the court to be admitted. Since the Trust and the City officials refused consent, FPP was forced to make this application. I submit that the requirements for admission as an amicus have been made out above, along with the annexed submissions.

26. I make three further points about the first to third respondents' refusal of consent.

27. First, it is not true that FPP does not have an interest in this matter. FPP's work is primarily concerned with people who live in forests. But FPP also works with indigenous peoples generally, and has expertise in the human rights of all indigenous

peoples, particularly with regard to their rights to land and culture. The principles that apply are the same whether people live in forests or not. And the rules developed in the context of people living outside forests will impact on the development of the law for forest peoples. The Trust's point, that FPP lacks an interest in this matter because there is not forest on the site, is accordingly unfounded.

28. Second, no rule 16A notice was filed in this application. I am advised that the implication of this failure is that the 20 days period for obtaining consent under rule 16A did not begin to run. The rationale behind the period is that interested parties are given 20 days to intervene as amicus once the constitutional point has been made public on the rule 16A notice board. So if no rule 16A notice is filed, then the 20 days' period does not apply. Otherwise, parties could furtively raise constitutional points and bar amici from intervening after 20 days. Further, potential amici would be expected to read every High Court application in search of constitutional points.

29. Third, even if FPP is out of time, this Court can dispense with the requirements of rule 16A if it is in the interests of justice to do so. The 20 days period should be dispensed with in this case because no rule 16A notice was filed. FPP could not have learned of the application's constitutional facets through the rule 16A notice board.

30. FPP first learned of this application on 30 September 2021 in a meeting with the Legal Resources Centre (**LRC**) which had contacted us to ascertain if we would be interested in intervening as an *amicus curiae.* We asked the LRC to send us the record in the matter so we could assess whether FPP had an interest, and what submissions we might be able to make. The LRC sent the record, together with a brief describing the case to

FPP on 17 October 2021. After studying the record, FPP decided to brief the LRC as our attorneys. The LRC had to instruct counsel to consider the matter and the letter was sent on 27 October 2021. Once that consent was refused, on 29 October 2021 this application was drafted. This application will be filed on 9 November 2021.

31. Moreover, there is sufficient time between now and the hearing of this matter for the respondents to address the issues raised in FPP's proposed submissions.

V CONCLUSION

32. FPP has an interest in this matter. The matter concerns the rights of indigenous peoples. The Trust intends to develop the site in a manner that infringes on the cultural heritage of the Khoi-San People. The allegation by OCA is that South African officials, when authorising this development, failed to consult with affected indigenous people, or failed to consider their interests properly. If the facts underlying these allegations are true, then South Africa's international legal duties are engaged. This Court, accordingly, should admit FPP as an *amicus curiae* and consider those duties in determining this matter.

GORDON BENNETT

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to before me at _____ on this the _____ day of August 2021, the regulations contained in Government Notice No. 1258 of 21 July 1972,

as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.

_____

COMMISSIONER OF OATHS

IN THE HIGH COURT OF SOUTH AFRICA
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In the matter between:

OBSERVATORY CIVIC ASSOCIATION	First Applicant
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TRUSTEES FOR THE TIME BEING OF LIESBEEK LEISURE PROPERTIES TRUST	First Respondent
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THE DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1), LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	Fourth Respondent
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EXECUTIVE MAYOR, CITY OF CAPE TOWN	Seventh Respondent
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eighth Respondent
and	
FOREST PEOPLES PROJECT	Applicant for admission as *Amicus curiae*

FOREST PEOPLE PROGRAMME'S SUBMISSIONS

CONTENTS

I INTRODUCTION

1. Forest Peoples Programme (**FPP**) is a human rights organisation which supports forest and other indigenous peoples to secure their rights under international human rights law (**IHRL**). It was founded in 1990, registered as a Dutch Stichting in 1997 and has been a registered charity in the United Kingdom since 2000. It has consultative status with the United Nations (**UN**) and observer status with the African Commission on Human and Peoples Rights (**ACHPR**).

2. FPP has significant legal expertise in its field and has made many submissions to governments, human rights bodies and other organisations. It has published a wide range of reports and other material on the legal and human rights of indigenous communities. It has an interest in ensuring that this Court is made aware of the scope and content of IHRL so far as it applies to the present proceedings. It seeks leave to be admitted as an *amicus curiae* in these proceedings.

3. The applicants in this matter have asserted their rights under section 31 of the Constitution. They claim that if the Liesbeek Leisure Property Trust (**Trust**) proceeds with developing certain land (**site**) while the applicants review the decisions authorising the development, then their rights to enjoy their culture will be irreparably harmed.

4. This Court must consider international law when interpreting the applicants' right in section 31.[1] This includes (albeit with less weight) non-binding international law, such as declarations, treaties to which the state is not a party, general comments on the

[1] Section 39(1)(b) of the Constitution.

meaning of treaties, and decisions by tribunals tasked to interpret treaties and international law.[2] FPP's submissions focus primarily on relevant international law to assist this Court in this regard.

5. In summary, FPP contends that according to international law, the Court should refuse an interdict only if it is satisfied that the KhoiKhoi and San people (**Khoi-San**) have been afforded an opportunity to participate effectively in the decision to permit the proposed development of the site. IHRL may even require that the development should only proceed with the free, prior and informed consent (**FPIC**) of the Khoi-San.

6. With respect to the facts of this matter, FPP has assumed that the site is of historical importance to the Khoi-San, in particular that:

6.1. the site saw early confrontations between colonial settlers and the Khoi-San;

6.2. the Khoi-San were driven off the site from about the middle of the seventeenth century, as barriers were erected to exclude them and private grants were issued to Dutch settlers;

6.3. the Khoi-San continue to attach profound significance to the confluence of the Black and Liesbeek rivers on the site, which they regard as the sacred birthplace of the Khoi-San Nation

6.4. the greater part of the surviving Liesbeek river will be in-filled and landscaped

[2] *Mlungwana v S* [2018] ZACC 45; 2019 (1) BCLR 88 (CC); 2019 (1) SACR 429 (CC) at fn 70.

6.5. the site is known in Khoi-San oral history as the "Place of the Stars"; and

6.6. the site's development as an urban park is likely to deprive permanently these factors of all or most of their cultural significance for the Khoi-San.

7. FPP understands that some of these facts are disputed between the parties. FPP makes no submissions on the truth of these facts. Its submissions are premised on a conclusion that the Applicants have established a prima facie case that these facts are true.

8. If the Applicants meet that burden, then various international legal duties are engaged. Moreover, if these assumptions are well-founded, and the Khoi-San constitute a "cultural community", the Court should consider whether its refusal to grant an injunction might contravene section 31(1)(a) of the Constitution. This section provides that *persons belonging to a cultural community may not be denied the right with other members of that community to enjoy their culture*.

9. The Constitution does not define the scope or content of this right or define "culture". The balance of these submissions deals with international legal duties that provide content to this right. It does so under the following headings:

9.1. Treaties; and

9.2. Judicial decisions.

10. These submissions do not address the FPP's admission as *amicus curiae*. They are filed together with the FPP's application for admission. If the application is opposed, the

grounds of opposition will be addressed in oral argument at the hearing of the application.

II TREATIES

11. There are four relevant treaties, all of which South Africa has ratified.

12. First, s 31(1)(a) of the Constitution is modelled on article 27 of the International Civil and Political Rights Covenant (**ICCPR**) – which South Africa has ratified. This legally binding guarantee stipulates:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture."

13. Second, art15(a) of the International Covenant on Economic Social and Cultural Rights (**ICESCR**) requires State Parties to recognise the right of everyone to take part in cultural life.

14. Third, under Article 17(2) of the African Charter on Human and Peoples Rights (**African Charter**) every individual may freely take part in the cultural life of his community.

15. Fourth, South Africa has also adopted the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which clarifies how the right to culture applies to indigenous peoples. While UNDRIP is a non-binding instrument, the Supreme Court of Appeal has

relied on UNDRIP to interpret the scope of the Constitution in matters concerning customary rights and culture.[3]

16. Article 11(1) of UNDRIP provides:

> "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites."

17. Article 13(1) reads:

> "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons".

18. Article 32(1) provides that "*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage*".

19. UNDRIP's drafting history indicates that these provisions attracted a wider measure of support from states than almost any others. Significantly, only 5 years after UNDRIP came into effect in 2007, the International Law Association adopted a Resolution[4] providing:

[3] *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S* [2018] ZASCA 87; [2018] 3 All SA 307 (SCA); 2018 (5) SA 104 (SCA); 2018 (2) SACR 367 (SCA) at para 58.

[4] Resolution No. 5/2012 Rights of Indigenous Peoples: The 75th conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012

> States are bound to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith – through all possible means – in order to ensure its preservation and transmission to future generations. Cultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.
>
> Indigenous peoples have the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent.

III JUDICIAL AND QUASI-JUDICIAL DECISIONS

20. This Court should have regard not only to the texts identified above but also to the manner in which they have been interpreted by the judicial or quasi-judicial bodies appointed under the treaties to monitor their observance. Their pronouncements are as much a source of international law as the treaties themselves.

21. These bodies have identified three connected duties which State Parties owe to their indigenous communities: to take positive steps to protect their cultural rights; to enable them to effectively participate in decisions which might threaten their ability to exercise those rights; and in certain circumstances not to permit projects to proceed without their FPIC.

22. This has been achieved through a broad and purposive construction of articles 27 of the ICCPR, 15(1)(a) of ICESCR and 17(2) of the Charter, significantly assisted since 2007 by references to UNDRIP. These bodies have held that the purpose of these articles

has been to safeguard indigenous culture, which has been rightly seen as crucial to the very survival of indigenous peoples as peoples.

23. FPP submits that this Court should follow the same approach to section 31(1)(a). Below, we canvass the approaches judicial bodies have taken to the right to enjoy one's culture under international law. We do so under the following headings:

23.1. IHRL Principles;

23.2. Indigenous peoples;

23.3. Culture;

23.4. Duty to protect and consult;

23.5. Representation; and

23.6. Free, prior and informed consent.

IHRL PRINCIPLES

24. FPP submits that the current international law, as interpreted by judicial and quasi-judicial institutions in the manner discussed below, is to the effect that:

24.1. The State is dutybound to protect the right of community members to enjoy their own culture, including the right to preserve their cultural heritage.

24.2. This duty persists even if the ability of the community to follow traditional customs and practices has been eroded by social or economic factors beyond their control.

24.3. Pursuant to its duty the State may have to limit the uses that may lawfully be made of land in which the community itself claims no right of property. Restrictions may be required, for example, to ensure that the community enjoys access to land of cultural significance to it.

24.4. If a proposed development will prevent this access or otherwise adversely impact the community's right to enjoy its culture it will be permissible, if at all, only if the impact is limited and the community has had the opportunity to effectively participate in the decision whether to permit the development.

24.5. Where no single organisation or group of individuals is clearly authorised to represent the views of the community, the State must develop an alternative process to ensure that the community can nevertheless effectively participate~~d~~ in relevant decisions

24.6. If the development is likely to have a significant direct impact on the cultural integrity of a community or otherwise pose a major threat to it, the State may permit it to proceed only with the community's FPIC. It will be for the Court to determine on the evidence whether and to what extent the development of the Site will affect the right of Khoi-San to enjoy their own culture; whether the community was given an opportunity to participate effectively in the decision to permit the development; and whether its FPIC should have been sought before any decision was made. The Court need not consider the elements of

FPIC itself, because there is no suggestion that FPIC has been either sought or obtained.

25. To demonstrate how judicial bodies have held these principles, we break down how courts and international bodies have approached the key elements of the right to enjoy one's culture in international law: (a) indigenous peoples; (b) culture; (c) protection and consultation; (d) representation; and (e) FPIC.

INDIGENOUS PEOPLES

26. The Khoi-San are an "ethnic minority" for the purposes of ICCPR article 27, and individual members of the community are protected by ICESCR article 15(1)(a) and Charter article 17(2) as of right.

27. To claim the protection of the IHRL principles listed above, however, the Court may want to satisfy itself that the Khoi-San are not just a minority but also an "indigenous people." As has already been noted, these principles have been fashioned in response to the dispossession and discrimination from which indigenous peoples have suffered for decades, and sometimes centuries; and in response to the fact that their survival as peoples is dependent on the survival of their culture.

28. The term "indigenous peoples" is not defined in either Covenant, the Charter or even UNDRIP, but there can be no doubt that it applies to the Khoi-San.

29. S. James Anaya was a UN Special Rapporteur on the Rights of Indigenous Peoples and is regarded as a world authority on indigenous rights. In one of the leading texts on the

subject he has argued that "indigenous" refers "*broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others*".[5]

30. This approach applies squarely to the Khoi-San. Many Khoi-San are acutely aware of their link to the first inhabitants of what is now South Africa; they make up one of the most vulnerable minorities in the country; and their current situation is the result of centuries of dispossession by successive waves of settlers.

31. The Constitution does not specifically identify the Khoi-San (or any other group) as an indigenous people, but the South African Human Rights Commission (**SAHRC**) effectively accorded them this status in a 2004 Report.[6] In the same year a Cabinet Memorandum proposed that the Khoi-San and San should be formally recognised as "*vulnerable indigenous communities.*" This proposal was finally implemented by the Traditional and Khoi-San-San Leadership Act 3 of 2019.

32. In a further report on the plight of the Khoi-San-San in 2016,[7] the SAHRC confirmed their status as indigenous peoples, and observed that notwithstanding their forced removal from their ancestral lands it remained the case that:

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[5] Anaya, S. James. *Indigenous Peoples in International Law*, p. 3. New York: Oxford University Press, 2004.

[6] Report of the South African Human Rights Commission National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa 25-26 November 2015; 9-10 December 2015; 18 January 2016; 11-12 & 14-15 April 2016 at page 8:

> "The Commission acknowledges that debates around the understanding of the term "indigenous peoples" continue to be controversial, particularly in the African context, and that both Khoi and San peoples as well as other African communities, including Nguni, Sotho ,Tswana, Venda and Tsonga-speakers may be considered to be indigenous. For the purpose of this Inquiry, however, the term "indigenous peoples" will refer to Khoi and San peoples specifically."

[7] Report of the South African Human Rights Commission: National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa 25-26 November 2015; 9-10 December 2015; 18 January 2016; 11-12 & 14-15 April 2016

> "The Khoi-San-San have unique cultures, traditions, languages and ways of life which form an essential component of their identity. The protection and promotion of this culture is therefore vital in ensuring the survival and dignity of the Khoi-San-San, while it also has a significant impact on the exercise of other rights such as the right to self-determination."

33. Accordingly, the Khoi-San qualify for the rights under IHRL.

CULTURE

34. The IHRL texts do not define "culture" either, but this term has been broadly construed. The attachment which the Khoi-San still bear towards the site because of the historic, spiritual and other associations described in Mr Tauriq Jenkins' supporting affidavit (**Jenkins Affidavit**) is clearly a cultural one.

35. For example, a seminal report to the UN Human Rights Commission in 1993, concluded that indigenous cultural heritage comprises—

> "everything that belongs to the distinct identity of a people [including] all those things which international law regards as the creative production of human thought and craftsmanship such as songs, stories, scientific knowledge and artworks. It also includes inheritance from the past." [8]

36. The ACHPR took a similar approach in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.[9] The Endorois, an indigenous community in Northern Kenya, claimed a cultural attachment to a lake in their traditional territory called Lake Bogoria,

[8] Erica Irene-Daes: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples (United Nations Sub-Commission E/CN.4/Sub.2/1993/28 at para 24

[9] *Communication 276 / 2003.*

and that their exclusion from it infringed their rights under article 17(2) of the Charter. The ACHPR agreed, and at para 241 construed "culture" to mean—

> "that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups."

37. The African Court on Human and Peoples Rights (**ACtHPR**) endorsed this approach in *ACHPR v Republic of Kenya*.[10] In that case, another indigenous community in Kenya called the Ogiek claimed that their exclusion from the Mau Forest was equally in breach of article 17(2). The Court upheld the claim, and at paras 179 and 184 respectively stated:

> "the protection of the right to culture requires respect for and protection of [the community's] cultural heritage essential to the group's identity. In this respect culture should be construed in its widest sense encompassing the total way of life of a particular group.
>
> . . .
>
> [Culture includes] invisible traditional values embedded in the community's self-identification and shared mentality [which] often remain unchanged."

38. As these findings imply, no useful distinction is to be drawn between the tangible and intangible aspects of indigenous culture. It is not a distinction usually made by indigenous peoples themselves. The protection of indigenous cultural heritage requires that culture be seen as a single integrated whole.

[10] *African Commission on Human and Peoples Rights v Republic of Kenya* Application No 006/2012, Judgement 26 May 2017

39. The UN Expert Mechanism on the Rights of Indigenous Peoples addressed this issue in a 2015 report,[11] which stressed that the categorisation of heritage as "tangible", "intangible", and "natural" does not address the situation of indigenous peoples. On the contrary, their cultural heritage extends to—

> "all aspects of the environment resulting from the interaction between people and places through time [. . .] It is important to adopt a holistic approach to cultural heritage and acknowledge that [the distinction between tangible and intangible heritage] could be problematic for indigenous peoples."

40. In the present case, the importance of the site to the Khoi-San appears to reside in both its physical condition and in its historic and spiritual associations. Accordingly, if it is the case that the relevant authorities did not consider the "intangible" cultural aspects of the site, then those authorities would have failed to consider the culture of the Khoi-San.

DUTY TO PROTECT AND CONSULT

41. The duty to protect and consult imposes a positive obligation on the state to adequately consult communities before taking decisions or action that impact on their cultural rights. We first consider the law developed under the ICCPR and the ICESCR, and then the position under the African Charter.

The ICCPR and ICESCR

42. Under the ICCPR, despite the negative terms in which article 27 is couched ("*shall not be denied*"), a positive duty is imposed on the State to protect the cultural rights of

[11] *Promotion and Protection of the Rights of Indigenous Peoples with respect to their cultural heritage. A/HRC/30/53* at para 8.

indigenous peoples. Where a prospective development might impair the exercise of those rights the State must consult the affected community to ensure that it can "effectively participate" in the decision whether to allow the development to proceed.

43. The State cannot expect to protect the community against an apparent threat unless it first elicits their views as to the scope and extent of the threat and discusses with the community or its representatives how it can be averted or mitigated.

44. In General Comment 23 issued in 1994,[12] the UN Human Rights Committee (**HRC**) stated at para 5.1:

> Article 27 confers rights on persons belonging to minorities which 'exist' in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term 'exist' connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture.

45. At paragraph 6, the General Comment provides:

> Although Article 27 is expressed in negative terms, it does nevertheless recognise the existence of a 'right' and requires that it shall not be denied. Consequently, a State Party is under an obligation to ensure that the existence and the exercise of this right are protected. Positive measures of protection are, therefore, required not only against the acts of the State Party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.
>
> Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity

[12] *General Comment No. 23: Article 27 (Rights of Minorities)* CCPR/C/21/Rev.1/Add.5

of a minority and the rights of its members to enjoy and develop their culture … in community with the other members of the group.

46. At paragraph 7, the General Comment reads:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples [. . .] <u>The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.</u> (our emphasis)

47. The UN Economic Social and Cultural Rights Committee built on these principles in 2009, when it issued its General Comment 21 on article 15(1)(a) of the ICESCR.[13] This provision, it said, requires State Parties to—

47.1. refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life;[14]

47.2. respect the rights of indigenous peoples to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15(1)(a);[15] and

[13] General Comment No 21 on the right of everyone to take part in Cultural Life E/C12/21

[14] Ibid para 48.

[15] Ibid para 49.

47.3. regulate the responsibility incumbent upon the corporate sector and other non-State actors with regard to the respect for article 15(1)(a) rights.[16]

48. The combined effect of Articles 27 and 15(1)(a) as interpreted in the General Comments is that:

48.1. The Khoi-San people continue to "exist" as a minority, however dispersed the community may have become as a result of economic or other developments beyond its control

48.2. The Court should have regard to the impact of the proposed development of the site on the ability of the Khoi-San people as a whole to preserve their cultural heritage.

48.3. One of the many forms in which culture may "manifest itself" is through a community's association with land to which it has strong historical links.

48.4. If the development of the Site will weaken those links, the Khoi-San will have been denied their rights under articles 27 and 15(1)(a) if they have not been able to participate effectively in the decision whether and on what terms the development should proceed.

49. In addition to its general comment, the HRC has also considered the duties to protect and consult in communications submitted to it under the Optional Protocol to the ICCPR. As in the current proceedings, these communications have typically been cases

[16] Ibid para 73.

where the community has asserted cultural ties to land but no rights of property in it. We mention two.

50. First, in *Lansman et al v Finland*[17] the State was said to have violated the Sämis' cultural rights when it permitted stone quarrying in an area which did not belong to the Sämi but on which they had traditionally herded reindeer. The HRC ruled that Article 27 protects access to land where this is a base for cultural life. But it rejected the complaint because the permits affected only a small proportion of the herding lands available to the Sämi, and had been varied after the State had consulted Sämi bodies to accommodate their concerns. The State had therefore discharged its duty to consult.

51. The HRC went on, however, to observe at para 9:

> If mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

52. Second, in *Mahuika et al. v New Zealand*,[18] Maori claimants alleged that statutory restrictions imposed on their traditional fishing rights violated article 27 because they had not been effectively consulted before the restrictions were introduced. A memorandum of understanding signed by the majority but not by all Maori representatives, it was said, had not been adequately explained to the Maori themselves and this had tainted the decision-making process.

[17] CCPR/C/52/D/511/1992 (1994)

[18] CCPR/C/70/D/547/1993

53. The HRC confirmed that "*the acceptability of measures that affect or interfere with the culturally significant [. . .] activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures*". But it rejected the complaint at para 9.6:

> "the State party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims."

54. These decisions are relevant to the present case insofar as they confirm that the duty to protect may require the State to ensure that an indigenous community has adequate access to land of cultural significance to it, even if it claims no right in the land itself. They also shed light on the lengths to which the State is expected to go to discharge its duty to consult, and the measure of support it may be required to demonstrate for any given proposal.

55. The HRC has not, however, explained how the consultative process should be conducted. The Court may derive more assistance in this respect from the judgement of the Inter-American Court of Human Rights in *Saramaka People v. Suriname,*[19] which we discuss below.

[19] *Saramaka People v.Suriname. Judgment (Preliminary Objections, Merits, Reparations, and Costs).* Series C, No. 172. Inter-American Court of Human Rights, November 28, 2007

The African Charter

56. The ACHPR and the ACtHPR have adopted a similar approach to the duty to protect to that taken in the General Comments and the HRC communications.

57. In *Endorois*, the African Court held that the claimants' right "*to take part in the cultural life of their community*" obliged the State to ensure that they had proper access to Lake Bogoria. It held that the government of Kenya had failed in its duty when it "*denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artefacts closely linked to access to the Lake*".[20]

58. In the *Ogiek* case, the African Court held that "*article 17 of the Charter protects all forms of culture and places strict obligations on State Parties to protect and promote traditional values*".[21] It also held:

> The protection of the right to culture [. . .] requires respect for, and protection of, the cultural heritage essential to the group's identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group.[22]

59. The restrictions imposed on the Ogieks' access to the Mau Forest had "*greatly interfered*" with their ability to preserve their traditions and constituted a further breach of Kenya's obligations under Article 17(2).

60. These decisions, like *Lansman*, confirm that the State must protect access to culturally important land, even if the community has no other lawful claim to it.

[20] *Endorois* at para 250.

[21] *Ogiek* at para 178.

[22] Ibid at para 179.

61. Their relevance to the present case arises from the fact that, if the development proceeds, the Khoi-San will be permanently denied access to any part of the site that is built over or leased on an exclusive grant. Those parts are likely to represent a significant proportion of the whole. If they are culturally important to the Khoi-San, there will be a *prima facie* breach of article 17(2).

REPRESENTATION

62. The Court may form the view that no single body of persons or organisation was clearly authorised to "effectively participate" on behalf of the Khoi-San in the decision whether to permit the development. The IHRL texts cited above do not explicitly explain how the State should proceed in those circumstances. Nor do the HRC Communications or the *Endorois* or *Ogiek* decisions.

63. The issue was addressed, however, by an International Labour Organisation Tripartite Committee convened in 2001.[23] The Committee considered alleged breaches of the ILO Convention 169 on Indigenous and Tribal Peoples (**ILO Convention 169**). South Africa has not ratified ILO Convention 169, but this Court may derive some assistance from the Committee's analysis.

64. The case concerned an oil concession that the Government of Ecuador granted in traditional Shuar territory, on the basis that sub-surface rights were vested exclusively in the State. The Shuar alleged, in effect, that the grant contravened the duties of the

[23] *Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres.*

State under articles 7 and 13 of ILO Convention 169 to safeguard and respect Shuar culture and spiritual values; and that the State should have consulted the Shuar about the concession but had failed to do so. There were also allegations – perhaps echoed in the present case – that the oil company had tried to divide local organizations, and had created fictitious committees to coordinate their activities and to denigrate indigenous organisations in the eyes of the public.

65. The Committee's recommendation to the ILO Governing Body (which was duly adopted) stated:

> The principle of representativity is a vital component of the obligation of consultation. The Committee is aware that it could be difficult in many circumstances to determine who represents any given community. However, if an appropriate consultation process is not developed with the indigenous and tribal institutions or organisations that is truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention (that States must consult project affected communities).[24]

66. Where indigenous organisations express divergent views, it is difficult to see that the State can perform its duty to consult in any other way. It can hardly decide to take account only of those views which happen to support its proposals, still less to abandon the attempt to establish a consensus because opinions are divided. Nor can a community forfeit its right to effectively participate because it happens not to have a "truly representative" organisation when the decision is due to be made. If the State still wants to proceed it must develop with the affected community "an appropriate consultation process."

[24] At para 44.

DUTY TO OBTAIN FPIC

67. General Comment 21 on Article 15(1)(a) of the ICESCRC expects State Parties to obtain the free and informed prior consent of indigenous peoples when the preservation of their cultural resource is at risk.[25]

68. This has been taken to refer to risks to the very survival of these resources. But in *Poma Poma v Peru*,[26] the HRC appeared to go further. In that case the HRC had to consider whether Peru had acted in breach of ICCPR article 27 when it permitted wells to be constructed on land where the indigenous Aymara community had traditionally grazed llamas and alpacas but failed to seek their prior consent.

69. The HRC recalled the need for "effective participation" identified in *Lansman* and *Mahuika* but went on to say:

> Participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.[27]

70. Some argue that this passage should be read literally, and that FPIC is now required for *any* decision that will adversely affect an indigenous community. But this appears to be at odds with:

[25] Paragraph 55.

[26] CCPR/C/95/D/1457/2006

[27] At para 7.6.

70.1. Paragraphs 49 and 55 of General Comment 21, which are quoted above.

70.2. UNDRIP Articles 19 and 32, which require States before approving administrative measures or projects that may affect indigenous communities or their territories only to "*consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions <u>in order to obtain</u> their free, prior and informed consent*".

70.3. The drafting history of UNDRIP indicates that the phrase "*in order to obtain*" means that States should consult communities *with a view* to obtaining their FPIC, but does not require them to actually obtain it. This is confirmed by the stricter language deployed in articles 10 and 29(2), which clearly imposes a mandatory FPIC requirement where they apply. Neither Article applies to cultural rights.

70.4. A 2009 report to the Human Rights Council,[28] in which the Special Rapporteur stated at paragraph 47:

> A significant direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent

70.5. International Law Association Resolution 5/12, as quoted above.

70.6. The view expressed in *Saramaka*[29] and adopted in *Endorois* that:

[28] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya ((A/HRC/12/34)

[29] *Saramaka* at para 134.

> in any development or investment projects that would have a major impact within [indigenous] territories, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[30]

71. The true position would therefore appear to be that IHRL requires the government to obtain the FPIC of the Khoi-San people to the development of the site if the development would substantially compromise its cultural integrity. Whether this obligation is triggered in this case may depend on the Court's assessment of paragraphs 27 to 29 and 30 to 39 of the Jenkins Affidavit.

III CONCLUSION

72. International law is relevant to this matter. It must be considered when interpreting the right in section 31(1) which the Applicants assert. This Court cannot decide whether the Applicants' rights have been infringed without considering how international has defined and given content to the right to enjoy one's culture.

73. It is a requirement of international law that the right to one's culture entails a right to be consulted, at least, before one's culture is infringed. Moreover, government must appropriately consider and weigh an indigenous people's culture before taking decisions that violate those people's right to enjoy that culture. If, in this case, there is a prima facie case that government officials have fallen short of these international legal standards, then the interim interdict should be granted.

[30] *Endorois* at para 291.

MICHAEL BISHOP

ESHED COHEN

Counsel for the FPP

Chambers, Cape Town

8 November 2021

Cape Town Office

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GB2

LRC
Legal Resources Centre

Your Ref:

Our Ref:

27 October 2021

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Dear Sirs,

OBSERVATORY CIVIC ASSOCIATION AND OTHERS // TRUSTEES FOR THE TIME BEING OF THE LIESBEEK PROPERTY TRUST (12994/2021) – REQUEST FOR CONSENT TO BE ADMITTED AS *AMICUS CURIAE*

1. The matter mentioned above refers.

2. We act on behalf Forest Peoples Programme (**FPP**).

3. We are writing to request your respective clients' consent to the admission of FPP as *amicus curiae* in Part A and Part B of the above matter.

4. FPP is a human rights organization that works with indigenous people and local communities across the globe to secure their rights to their lands and their livelihood. They have partnered with more than 60 organizations globally for their work with indigenous communities.

5. Our client has an extensive record in litigation and advocacy work that has focused on the realization and advancement of the rights of indigenous people. FPP has been instrumental in developing the international legal framework that aims at developing and protecting the rights of indigenous people, especially in relation to land. FPP was extensively involved in the campaigning for the adoption of the United Nation Declaration on the Rights of Indigenous People. Additionally, FPP has been instrumental in articulating and developing the principle of free, prior and informed consent (**FPIC**) as a standard in international law.

6. Our client has thus developed significant expertise on the rights of indigenous peoples in international law.

7. They have perused the papers filed thus far in the above matter. They note that, while it is common cause between the parties that the site in question has heritage significance for First Nation groupings, they disagree about the legal

implications of it. It is on this point that our clients are of the view that they will be able to make submissions to the Court that will be relevant to the determination of this matter and helpful to the Court.

8. Should our clients be admitted as amicus in this matter, they will advance submissions that will cover the following areas:
   a. The place of tangible and intangible heritage of indigenous peoples in the international law framework;
   b. The principles of consultation when the protection of indigenous peoples' rights is at stake; and
   c. The status of these international law principles and rights under the South African Constitution.

9. We request that you inform us by Friday, 29 October 2021 whether your clients object to our client's admission as amicus in this matter.

10. Should all your clients grant the consent for admission, our client shall file their heads of argument simultaneously with the respondents.

11. We trust that you will find this in order. We look forward to your response.

Yours sincerely

LEGAL RESOURCES CENTRE

CULLINAN & ASSOCIATES
Environmental and green business attorneys

GB3

TRANSMITTED BY EMAIL

		Date:	29 October 2021
TO:	Legal Resources Centre		
ATT:	Ms Lelethu Mgedezi	lelethu@lrc.org.za	
CC:	Ms Wilmien Wicomb	wilmien@lrc.org.za	
CC	Ms Priyanka Naidoo	priyanka@lrc.org.za	
FROM:	Hercules Wessels	hercules@greencounsel.co.za	
Total pages:	2	Our ref:	O 023-002

Dear Ms Mgedezi,

OBSERVATORY CIVIC ASSOCIATION AND ANOTHER // TRUSTEES FOR THE TIME BEING OF THE LIESBEEK PROPERTY TRUST (12994 / 2021) - REQUEST FOR CONSENT TO BE ADMITTED AS *AMICUS CURIAE*

1. We refer to the above matter and your letter of 28 October 2021.
2. As per paragraphs 3 of your letter, you have requested our clients' consent for your client, the Forest Peoples Programme ("FPP"), to join as *amicus curiae* in Part A and Part B of the above matter. Our clients do not have any objections to the FPP joining as an *amicus curiae*, and consent to your client joining as an *amicus curiae* in Part A and Part B in relation to the above matter.
3. We trust that you find the above in order.

Yours sincerely

CULLINAN & ASSOCIATES INC.
per: Hercules Wessels

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DATE: 29 OCTOBER 2021

ENQ: MARK OWEN
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bcook@justice.gov.za

OUR REF: 1873/21/P7
YOUR REF: FFP

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Dear Sir / Madam

RE: OCA AND OTHERS // TRUSTEES OF THE LIESBEEK PROPERTY TRUST AND OTHERS WCHC 12994/2021

1. We refer to the above matter and your correspondence dated 27 October 2021 and received on 28 October 2021.

2. We confirm that we act on behalf of the Fourth and Fifth Respondents herein.

3. We confirm our clients' instruction that should your client (**Forest Peoples Program**) bring an application to be admitted as an *amicus curie* herein, our clients will not oppose said application.

4. We trust that the above is in order.

Yours faithfully

_____

MR M OWEN

for STATE ATTORNEY

NICHOLAS SMITH ATTORNEYS
ENVIRONMENTAL LAW SPECIALISTS

Legal Resources Centre
Attention: Ms. Lelethu Mgedezi
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29 October 2021

Dear Ms. Mgedezi

***RE*: THE LEGAL RESOURCES CENTRE'S REQUEST FOR YOUR CLIENT, FOREST PEOPLES PROGRAMME ("FPP"), TO BE ADMITTED AS *AMICUS CURIAE* IN CASE NO. 12294/2021 IN THE WESTERN CAPE HIGH COURT**

1. We refer to the above and to your letter of the 27th *instant.*

2. Our client notes the contents of your letter and has instructed us to respond as set out below.

Nicholas Smith - BA (Hons) LLB ADL LLM (Marine & Environmental Law)

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3. Based on: (i) your description of your client's perusal of the papers filed of record to date in this matter; (ii) the submissions in your letter about your client's possible contribution relevant to the determination of the matter and helpful to the Court; and (iii) your statements about your client's areas of expertise, our clients do not believe that any meaningful purposes would be served by the FPP being admitted as an *amicus curiae* in the current application. In summary, and in our respectful submission, it appears from the contents of your letter under reply that the FPP can make no submissions in respect of the pending application that would be of any material assistance to the Court on the merits of the application (either Part A or Part B thereof).

4. We point out for that our internet research regarding the FPP and its areas and topics of interest shows no research or other programmes by the FPP in South (or southern) Africa. It appears that the FPP's primary interest on the continent pertains to equatorial forests and the people dependent on biomes of that type globally across equatorial forest regions.

5. FPP's laudable intentions notwithstanding, the present application is not concerned with securing land rights as described in your letter, and with reference to the FPP's stated vision and mission (set out on forestpeoples.org).

6. Part A of the present matter is an urgent application for an interim interdict which has been allocated for hearing on 24 and 25 November 2021. We specifically point out for present purposes that the FPP can make no objectively substantive contribution to that part of the application. Furthermore it is manifestly not in the interests of justice for the hearing of Part A either to be delayed or otherwise hampered by the efforts of a third party that has to date displayed no interest in the matter.

7. We reserve our client's rights to respond to your request in any further and necessary detail and as might be required in the event that your client persists with its request for admission as a friend of the court in the present application.

Yours faithfully,
NICHOLAS SMITH ATTORNEYS
Per:

NICHOLAS SMITH

WEBBER WENTZEL
in alliance with > Linklaters

Legal Resource Centre
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Your reference	Our reference	Date
	SDF/3049766	29 October 2021

Dear Madam

RE: OBSERVATORY CIVIC ASSOCIATION AND OTHERS // TRUSTEES FOR THE TIME BEING OF THE LIESBEEK PROPERTY TRUST (12994/2021) – REQUEST FOR CONSENT TO BE ADMITTED AS *AMICUS CURIAE*

1. We refer to your letter dated 27 October 2021 but received on 28 October 2021.

2. As you may be aware, we act on behalf of the third, sixth and seventh respondents.

3. We note that the LRC acted for the second applicant during the administrative decision-making processes at issue in this matter, including making oral submissions before the Planning Appeal Advisory Panel on 23 February 2021. You have therefore been aware of the administrative decisions, the reasons for the decisions and issues involved for at least eight months. Given this history, we are surprised by the timing of your letter on behalf Forest Peoples Programme seeking consent to intervene as an *amicus*. The timing is unexplained.

4. The applicants filed their founding papers on 2 August 2021, which is 86 days before your request.

5. Your delay in making the request precludes admission by consent. Rule 16A(2) of the Uniform Court Rules provides that a party to proceedings may consent to the admission of an *amicus* if the consent is given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised. The time for admission of an *amicus* by consent of the parties expired on 30 August 2021. Since your client's request for consent is out of time, under the rules of court, our client is unable to consent to your client's admission as an *amicus.*

6. We point out that Rule 16A(5) provides that if an interested party is unable to obtain the written consent as contemplated in Rule 16A(2), then they may apply to court for admission.

7. If the court were to grant an order admitting your client as *amicus* in either Part A or Part B, given that your client supports the applicants, we submit that your client must file its heads of argument no later than the date on which the applicants file their heads of argument. This is necessary to permit the respondents an opportunity to answer them. Since your request was sent after the applicants' heads of argument were due, it is now impractical for your client to be admitted to Part A without severely disrupting the orderly conduct of the matter.

8. Our clients' rights in this matter remain reserved.

Yours faithfully

WEBBER WENTZEL
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Letter sent electronically. A signed copy will be provided on request.