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

Case Number: 12994/2021

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

APPLICANTS' HEADS OF ARGUMENT

INTRODUCTION

1. This application concerns a substantial development ("the River Club development") presently under construction on a 14.7-hectare site in Observatory ("the development site"). The first respondent ("the LLPT") is the developer.

2. The applicants have instituted an application ("the review application") to be heard in due course for the review and setting aside of four decisions taken in connection with the River Club development, namely:

2.1. The decision taken by the fourth respondent ("the Director") on 20 August 2020 to grant environmental authorisation for the proposed development in terms of section 24 of the National Environmental Management Act, 107 of 1998 ("NEMA") ("the Director's decision").

2.2. The decision taken by the fifth respondent ("the Minister") on 22 February 2021 in terms of section 43(6) of NEMA to dismiss the appeals lodged against the Director's decision and to grant environmental authorisation for the proposed development ("the Minister's decision").

2.3. The decision taken by the City of Cape Town Municipal Planning Tribunal ("MPT") on 30 September 2020 to approve the proposed development application in terms of section 98 of the MPB ("the MPT's decision).

2.4. The decision taken by the seventh respondent ("the Mayor") on 18 April 2021 to dismiss various appeals against the MPT's decision in terms of section 108 of the MPB and to confirm the MPT's decision to approve the proposed development ("the Mayor's decision").

3. The relief at issue in this hearing is the interim relief sought in part A of the applicants' notice of motion, namely, an interim interdict restraining the LLPT from undertaking any further construction or earthworks on the development site pending the hearing and determination of the review application.

OVERVIEW

4. The River Club development has, since its conception in 2016, been very controversial. One of the main reasons for this is the historical significance of the development site. The site is significant due to its association with the Peninsula Khoekhoe and their early confrontations with the first Dutch settlers in the Cape (the genesis of colonialism in South Africa), as well as its location in a historic precinct with a high concentration of heritage resources.

5. The heritage impacts of a development on the scale of the River Club development must be assessed in terms of section 38 of the NHRA.

6. In the ordinary course, a developer is required to obtain approval from the provincial heritage resources authority in terms of section 38(4) of the NHRA, based on a heritage impact assessment incorporating the aspects set out in section 38(3).

7. An exception applies however in cases where the development is also subject to the requirement of environmental authorisation in terms of section 24 of NEMA. This situation is governed by section 38(8) of the NHRA.

8. The effect of section 38(8) is to exempt a developer from the requirement of approval in terms of section 38(4) of the NHRA, subject to a dual proviso: first, the competent environmental authority meets the requirements of the provincial

heritage resources authority (in this case the second respondent – "HWC") in terms of section 38(3) of the NHRA; second, the decision-maker in terms of NEMA must take into account the comments and recommendations of the relevant heritage resources authority prior to granting environmental authorisation.

9. The River Club development required environmental authorisation in terms of section 24 of NEMA and was therefore exempt from the requirement of heritage approval in terms of section 38(4). However, neither of the two provisos stipulated in section 38(8) were complied with. More particularly:

9.1. The heritage impact assessment prepared by the LLPT failed in fundamental respects to comply with section 38(3) of the NHRA and was not fit to serve as a basis for a decision on the heritage impacts of the development.

9.2. The LLPT declined to supplement the heritage impact assessment in line with the requirements of the HWC, and this lapse was unlawfully condoned and excused by the Director and the Minister without any reasoned basis for doing so.

9.3. The operative decision in respect of the environmental authorisation (the Minister's decision in terms of section 43(6) of NEMA) was based on an incoherent analysis of the heritage impact assessment, undertaken in terms of the wrong statutory framework. It is administrative irrationality in its purest form.

10. The upshot of this unlawful process it that a major development is being constructed on an historically significant site in the absence of a rational consideration of its impact on heritage resources.

11. We respectfully submit that the relief sought in these proceedings is justified in the circumstances of this application. We say so for the following reasons:

11.1. On the papers as they stand, the Director's and the Minister's decisions are unlawful. We stress that at this stage, the applicants do not have to prove a clear right[1] – a *prima facie* right, though open to some doubt suffices.[2]

11.2. The balance of convenience favours the granting of the application. LLPT should not be permitted to build itself into an impregnable position such that a review court is in due course confronted with a completed development. In these circumstances, the applicants would be denied effective relief.[3]

11.3. The LLPT's assertion that it will suffer disproportionate and unjustified hardship in the event that the interim relief is granted must be viewed in light of the fact that it is the author of its own predicament to the extent that it has bound itself to a reckless construction timetable. A party cannot breach the law and then tell a court that it should not be stopped because it would be inconvenienced by an interdict.

11.4. The Mayor's contentions regarding the economic ramifications and the public interest are speculative and belied by evidence that Amazon would commission an alternative development in Cape Town in the event that the River Club fails. The rule of law should not be sacrificed at the altar of speculative economic spinoffs.

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[1] See: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C.
[2] See: Webster v Mitchell 1948 (1) SA 1186 (W) at 1189; Gool v Minister of Justice & another 1955 (2) SA 682 (C) at 688C-F; Spur Steak Ranches Ltd & others v Saddles Steak Ranch, Claremont & another 1996 (3) SA 706 (C) at 714E-F.

11.5. The applicants have brought these proceedings with the maximum expedition that can reasonably be expected in the circumstances.

12. We address the following topics:

12.1. First, we deal with the urgent nature of this matter and the applicants conduct in bringing it before this court.

12.2. Second, we provide an overview of the statutory framework that governed the Director's and the Minister's decisions.

12.3. Third, we set out the relevant factual background.

12.4. Fourth, we briefly address the nature of the substantive rights in issue.

12.5. Fifth, we deal with the unlawfulness of the Director's and the Minister's decisions.

12.6. Fifth, we deal with the review that has been brought against the MPT's and the Mayor's decisions in part B;

12.7. Sixth, we set out some considerations relevant to the evaluation of the balance of convenience.

12.8. Seventh, we address the question of costs.

12.9. Eighth, we state why the applicants are entitled to an interdict.

URGENCY AND DELAY

13. This matter is urgent because the applicants seek to preserve the development site (which they contend will destroy the heritage value attaching the property),

whereas the River Club development is under construction at a very swift pace. The development is *prima facie* unlawful. It is unrealistic to wait until the development is completed and then ask whether it was lawful or not. By that stage – at completion – a court will be confronted with an argument about whether a demolition is just and equitable, which would be an untenable position for all. Indeed, it is in the interests of all parties that at least Part A of this dispute is timeously resolved.

14. We submit that the applicants have conducted part A of this application with the maximum expedition that can reasonably be expected of them in the circumstances.

15. The LLPT's stance is that the applicants should have proceeded to Court as soon as possible after the grant of the Minister's decision on 21 February 2021 (being the first of the two appeal decisions under review).[4] This is not realistic.

16. The Minister's decision was the conclusion of the first of two decision-making processes which the applicants seek to challenge, and it would have been both impractical and a waste of resources for the applicants to have brought separate reviews.

17. The applicants launched the application within seven days of the event that made construction of the River Club development a certainty, specifically, the decision of the Minister of Water and Sanitation lifting the suspension of the LLPT's water use licence during the appeals process. This occurred on 26 July 2021.[5]

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[4] Vol 3: LLPT's AA, para 10 (page 822 – 823).
[5] Vol 1: FA, para 24.7 (page 72).

18. The papers in this matter were issued on 2 August 2021. An electronic copy of the affidavits in support of the applicants' application was urgently sent to respondents on 2 August 2021, at 14:44 and a copy of the issued Notice of Motion was sent shortly thereafter to the respondents at 16:05, on the same day. The papers were served by the sheriff of the High Court on an urgent basis the following day, and most of the Respondents were served on 3 August 2021.[6] The applicants acceded to the respondents' request for a relaxation of the filing deadlines in the notice of motion.

19. Although this application is being heard some three months after its launch, the applicants have made every effort to secure the first available hearing date on which all parties counsel were available and have done so.

20. We submit that the applicants have not been dilatory or unreasonable.

LEGAL FRAMEWORK

21. The departure point is the Constitution. Several constitutional rights are implicated.

21.1. Firstly, section 1(c) provides that South Africa is founded on the values of supremacy of the Constitution and the rule of law. This implies that "the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[7] It also means that the "exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of

[6] Vol 1: FA, para 17 (page 2601).
[7] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) at para 58.

legality which is part of that law."[8] This case is about whether administrative conduct which is *prima facie* inconsistent with the empowering provision should be allowed to be implemented while the challenge to its validity winds its way up the judicial system.

21.2. Secondly, section 9(1) provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." One of the grounds on which discrimination is outlawed in terms of section 9(3) is "culture". What this means is that the cultures of all racial, ethnic, and language groups are deserving of the equal protection and benefit of the law.

21.3. Thirdly, section 30 protects the right of everyone "to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

21.4. Fourthly, section 31(1) states that:

"(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society."

[8] *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South* 2000 2 SA 674 (CC) paras 19–20

21.5. Fifthly, section 33 provides for the right to "administrative action that is lawful, reasonable and procedurally fair." The provisions of the Promotion of Administrative Justice Act 3 of 2000 give effect to this right. Three of the grounds for review recognised in PAJA are where the decision is "influenced by an error of law" (Section 6(2)(d)) or where it is "otherwise unconstitutional or unlawful" (Section 6(2)(i)) or where the decision is inconsistent with an empowering provision (Section 6(2)(f)(i)).

21.6. Finally, section 24(2) provides that everyone has the right to have the environment protected through reasonable legislative and other measures. Section 24(b) specifically requires legislative and other measures to promote conservation.

22. Therefore, in construing any legislation, this Court is mandated by section 39(2) to promote the spirit, purport and object of the Bill of Rights. The trigger for the application of section 39(2) of the Constitution is whether a right in the Bill of Rights is affected. In those instances, there is a duty to apply section 39(2). This obligation is discussed in various cases of our appeal courts. In *Fraser v ABSA Bank Limited*[9] Froneman J described the import of section 39(2) as establishing *"a mandatory constitutional cannon of statutory interpretation*".[10] Therefore, *"courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation."*[11]

23. The National Heritage Resources Act, 25 of 1999 ("NHRA") was enacted *inter alia* to: introduce an integrated and interactive system for the management of

[9] 2007 (3) SA 484 (CC).
[10] *Fraser* at para 43.
[11] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 88.

national heritage resources; promote good governance at all levels; empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations; lay down general principles for governing heritage resources management throughout South Africa; and to provide for the protection of conservation-worthy places and areas by local authority. The overarching purpose of the Act is to ensure the preservation of South Africa's "national estate".

24. The scheme of the NHRA unambiguously provides for the recognition of "intangible heritage resources". The Act addresses itself directly to the constitutional protection of culture.

24.1. It defines "cultural significance" to mean "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance".

24.2. It also defines "living heritage" as the "intangible aspects of inherited culture", including cultural tradition, oral history, popular memory, ritual, indigenous knowledge systems.

25. These statutory provisions can be tracked to the Constitution, which in at least three sections, explicitly provides for the protection, promotion and preservation of culture, its artifacts, and its continuing provenance.

26. The national estate encompasses "*those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations*" (section 3(1)).

27. Heritage resources protected by the NHRA may take many forms including "*places, buildings and structures of cultural significance*" (section 3(2)(a)) and "*landscapes and natural features of cultural significance*" (section 3(2)(d)).

28. The criteria to be applied in determining whether a place or object has cultural significance or other special value such that it should form part of the national estate are those listed in section 3(3). Included amongst these criteria are:

"(a) its importance in the community, or pattern of South Africa's history; (b) its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage; (c) its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage; (d) its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects; (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group."

29. Responsibility for the management and conservation of heritage resources is vested primarily in the South African Heritage Resources Agency (SAHRA) and provincial heritage resources authorities.

30. A key way that the NHRA provides for heritage conservation is through a system of approvals for developments that have the potential to impact on heritage resources. The procedures laid down in the statute must be observed in order to safeguard the protections of culture that are in the Constitution.

31. Section 38(1) identifies various categories of development that must be notified to the responsible heritage resources authority, including: a development that changes the character of a site exceeding 5000 m² (section 38(1)(c)(i)); a

development that involves three or more existing erven or subdivisions thereof (section 38(1)(c)(ii)); and a development that entails the rezoning of a site exceeding 10 000 m² (section 38(1)(d)).

32. The responsible heritage resources authority must, if there is reason to believe that the development will impact on heritage resources, instruct the developer concerned to undertake a heritage impact assessment in terms of section 38(2). Section 38(2) provides:

(2) The responsible heritage resources authority must, within 14 days of receipt of a notification in terms of subsection (1)—

(a) if there is reason to believe that heritage resources will be affected by such development, notify the person who intends to undertake the development to submit an impact assessment report. Such report must be compiled at the cost of the person proposing the development, by a person or persons approved by the responsible heritage resources authority with relevant qualifications and experience and professional standing in heritage resources management; or

(b) notify the person concerned that this section does not apply.

33. The content and scope of the heritage impact assessment is determined in accordance with section 38(3), which provides:

"The responsible heritage resources authority must specify the information to be provided in a report required in terms of subsection (2)(a): Provided that the following must be included:

(a) The identification and mapping of all heritage resources in the area affected;

(b) an assessment of the significance of such resources in terms of the heritage assessment criteria set out in section 6(2) or prescribed under section 7;

(c) an assessment of the impact of the development on such heritage resources;

(d) an evaluation of the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development;

(e) the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources;

(f) if heritage resources will be adversely affected by the proposed development, the consideration of alternatives; and

(g) plans for mitigation of any adverse effects during and after the completion of the proposed development."

34. No pertinent assessment criteria have been promulgated in terms of sections 6(2) or 7 for purposes of the inquiry contemplated in section 38(3)(b). In the absence of such criteria, we submit that the sub-paragraph must be interpreted to require that "significance" be assessed in accordance with the criteria specified in section 3(3).

35. When determining an application for approval in terms of section 38(4), the heritage resources authority is empowered to decide that the development may not proceed, or to impose limitations and/or formal protections.

36. Section 38(8) creates an exemption from this process for developments that are subject to the requirement of an environmental authorisation in terms of section 24 of the NEMA. It provides:

"The provisions of this section do not apply to a development as described in subsection (1) if an evaluation of the impact of such development on heritage resources is required in terms of the Environment Conservation Act, 1989 (Act No. 73 of 1989), or the integrated environmental management guidelines issued by the Department of Environment Affairs and Tourism, or the Minerals Act, 1991 (Act No. 50 of 1991), or any other legislation: Provided that the consenting

authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent."

37. The effect of this provision is to transfer the power to consider and approve the heritage impacts of a development to the competent environmental authority, who must do so in terms of the framework of procedures and principles established by NEMA. This power is subject to the conditions stipulated in the proviso to section 38(8), namely, the competent environmental authority must ensure that the heritage impact assessment prepared for the development meets the requirement of the provincial heritage resources authority in terms of section 38(3) and must take account of the views of the provincial heritage resources authority in reaching its decision.

38. The assessment of listed activities in terms of NEMA is governed by chapter 5 of the Act together with the Environmental Impact Assessment Regulations 2014 ("the EIA Regulations").

39. Applicants for environmental authorisation must undertake one of two procedures prescribed in the EIA Regulations, a full scoping and environmental impact assessment process or a less intensive basic assessment process. The procedure to be followed depends on the particular activity or activities that have triggered the need for environmental authorisation. The procedure that is relevant in these proceedings is the basic assessment process.

40. Both processes entail an investigation of the potential impacts of the development proposal on the environment conducted by independent

specialists (where required) and coordinated by an independent environmental assessment practitioner.[12] Environment is defined broadly in section 1 of NEMA to encompass *inter alia* the aesthetic and cultural features of the affected area.

41. This process culminates in the preparation and submission to the competent authority of a report, which serves as the basis for his or her decision whether to grant environmental authorisation for the development.

42. Amongst other things, the basic assessment must:

> *"through the undertaking of an impact and risk assessment process… focused on determining the geographical, physical, biological, social, economic, heritage, and cultural sensitivity of the sites and locations within sites and the risk of impact of the proposed activity and technology alternatives on these aspects to determine- (i) the nature, significance, consequence, extent, duration, and probability of the impacts occurring to; and (ii) the degree to which these impacts- (aa) can be reversed; (bb) may cause irreplaceable loss of resources; and (cc) can be avoided, managed or mitigated;"*[13]

43. The factors that must be considered by the competent authority in deciding whether to grant environmental authorisation in terms of section 24 are wide-ranging. They include a list of broad principles set out in section 2 of NEMA, the general objectives of integrated environmental management set out in section 23 and general criteria provided in section 24O. Read together, these sections provide for a broad and discretionary determination of whether the impacts of the development proposal on the environment are justifiable in light of its benefits. In the case of developments subject to section 38(8), the

[12] EIA Regulations, regulation 12 read with 13(1).
[13] Environmental Impact Assessment Regulations, 2014, regulation 2(d)(i).

question of the justifiability of heritage impacts is subsumed within this broader inquiry.

FACTUAL BACKGROUND

44. We set out below the relevant facts, which are common cause, save where otherwise indicated.

The development site

45. The development site is located near to the confluence of the Black and Liesbeek Rivers. It is bordered to the west and north-west by a natural watercourse following the original course of the Liesbeek River, and by the Liesbeek Canal and the Black River to the east.[14]

46. The following aspects of the development site's history are established and accepted:[15]

46.1. The development site forms part of a broader area that was the dominion of the Gorinhaiqua (a section of the Peninsula Khoekhoe) in pre-colonial times.[16]

46.2. The development site is one of the last (relatively undeveloped) remnants of the land used by the Peninsula Khoekhoe, who were nomadic pastoralists, to graze their cattle during the summer months.[17]

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[14] Vol 3: LLPT's AA, para 30 (page 829).
[15] Based on the findings and conclusions of the heritage impact assessment commissioned by the LLPT (dated July 2019, authored by heritage specialists Stephen Hart and Timothy Townsend) with which all respondents have associated themselves.
[16] Vol 3: LLPT's AA, para 206 (page 881).
[17] Vol 3: LLPT's AA, para 218 (page 884).

46.3. From 1657 onwards the Peninsula Khoekhoe were gradually eliminated from their grazing lands by Dutch settlers who erected barriers to keep them out, as well as watch posts and small forts to monitor their movements. This so-called "frontier zone" probably extended along the length of the Liesbeek River Valley from approximately Salt River to Wynberg Hill. [18]

46.4. Although no narrative-defining event is specifically associated with the development site, it is located within the core of the contested landscape and for this reason has historical associations of great socio-political import.[19]

46.5. The development site is also located within an historic section of the Two Rivers Urban Park ("TRUP"), in the vicinity of a high concentration of heritage resources including the South African Astronomical Observatory, the Valkenberg Hospital, the Oude Molen-eco village, and Maitland Garden, which broader area has high cultural values of historical, social, aesthetic, architectural, scientific and environmental significance.[20]

47. In October 2016, a "baseline heritage study" was commissioned for the TRUP by the Western Cape Department of Transport and Public Works ("the TRUP heritage study"). The TRUP heritage study was *"…a broad overarching baseline study … to provide a framework for future heritage studies".*[21] The authors concluded that the entire TRUP site could be regarded as being of outstanding historical, symbolic scenic and amenity value, or a Grade 2 site ("Grade 2 site" is to the system provided in section 7 of the NHRA to "grade"

[18] Vol 1: FA, para 37 (pages 14 -15); Vol 6: AB9 (page 2472).
[19] Vol 1: FA, para 125 (page 64); Vol 6: AB9 (page 2481); Vol 3: LLPT's AA, para 220.2 (page 884).
[20] Vol 5: Minister's AA, para 10 (page 2117).
[21] Vol 1: FA, para 76 (page 44)

objects and places forming part of the estate. In terms of section 7(1)(b), a "grade 2 site is a "*heritage resource which, although forming part of the national estate, can be considered to have special qualities which make them significant within the context of a province or a region*"".

48. On 20 April 2018, the HWC declared the development site provisionally protected for a period of two years in terms of section 29(1) of the NHRA.[22]

49. The rationale cited in the relevant Gazette notice included that the "*"[t]he River Club forms part of the wider Two Rivers Urban Park (TRUP) and represents a microcosm of Cape history. It reflects the pattern of South Africa's social, architectural and political history spanning across the pre-colonial, colonial, apartheid and more recent history… The Two Rivers Urban Park landscape has high cultural values of historical, social, aesthetic, architectural, scientific and environmental significances. It contributes to an understanding of past attitudes, beliefs, uses, events, persons, periods, techniques and design. It has associated links with past events, persons, uses, community memory, identity and oral history. It possesses a strong sense of place."*

The development

50. The River Club development will be a substantial development, composed of clusters of multi-storey buildings arranged into 2 precincts, and offering 150 000² metres of floor space. It is reflected in plans and conceptual drawings as a large-scale, modern campus.[23]

[22] Vol 1: LL13 (pages 165 – 166).
[23] Vol 6: AB9 (pages 2499 – 2504) detailing the approved development concept.

51. The buildings comprising the proposed development will be allocated to a variety of uses including retail, hospitality, residential (including low-cost inclusionary housing) and office space.

52. Certain features have been introduced into the development concept to "commemorate the site's heritage,"[24] namely: an indigenous garden for medicinal plants used by the First Nations; a cultural, heritage and media centre, an eco-trail circling the site, an amphitheatre for cultural performances by First Nations groups and the general public; and a gateway feature inspired by symbols central to the First Nations narrative.[25]

53. The development concept also entails the rehabilitation of the Liesbeek Canal to function as a natural watercourse, with a 40-metre setback buffer (which will include riverine vegetation to allow faunal movement, grassed banks and walking and cycling trails);[26] and infilling the natural course of the Liesbeek River, treeing the infilled area and incorporating "pocket wetlands" to retain stormwater.[27]

The process

Phase one HIA and second HIA

54. The LLPT initiated a basic assessment process under NEMA in April 2016.[28]

[24] City's AA, para 54 (page 1450).
[25] Vol 3: LLPT's AA, para 36.1 (page 831).
[26] Vol 3: LLPT's AA; para 36.3 (page 832).
[27] Vol 3: LLPT's AA; para 36.4 (page 832).
[28] Vol 1: FA, para 67 (page 43); Vol 3: LLPT's AA, para 233 - 235 (page 888).

55. Mr. Michael Law of SRK Consulting (the environmental assessment practitioner appointed to manage the process) appointed Bridget O'Donoghue as the heritage specialist to conduct a "phase one" heritage impact assessment.

56. Phased heritage impact assessments are required by the heritage authorities in circumstances where a "large scale and/or long-term subdivisional development" or where "it is prudent to obtain HWC's comment on the assessment of heritage resources heritage indicators in order to strengthen a heritage argument for revised design proposals".[29]

57. Ms. O'Donoghue produced the final draft of her "phase one heritage impact assessment" ("the phase one HIA") in February 2017.[30]

58. The phase one HIA found that the development site *"is [located] within a precinct of high cultural significance"* and recommended, *"[t]here is no doubt that the site has high potential in terms of providing an improved recreational and public space, and this aspect should be explored, but not at the expense of reducing the cultural landscape significance of the TRUP."* [31]

59. Certain of the "heritage design indicators" proposed by Ms O'Donoghue might have precluded implementation of the River Club development in the form that it was ultimately approved.[32] The LLPT disputes that Ms O'Donoghue's heritage design indicators were prohibitive,[33] but Ms. O'Donoghue has deposed to an affidavit confirming her view that this is the case.[34]

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[29] This is in terms of an HWC guideline which is included in the record – Vol 5: AB2 (pages 2326 – 2329).
[30] Vol 1: FA, para 71 (page 34); Vol 3: LLPT's AA, para 238 (page 889).
[31] Vol 1: page 126.
[32] Vol 1: FA, para 72 (page 46); Vol 1: LL9 (pages 135 – 141).
[33] Vol 3: LLPT's AA, paras 238 – 245 (pages 889 – 892).
[34] Vol 8: Confirmatory affidavit of Bridget O'Donoghue, paras 8 – 10; (page 2987).

60. The phase one HIA was subsequently withdrawn, and new heritage specialists appointed[35] at the behest of the LLPT.[36]

61. The new heritage specialists, Timothy Hart and Dr. Stephen Townsend, produced their final report in July 2018 ("the second HIA").[37]

62. The findings and conclusions of the second HIA do not lend themselves to a succinct statement. It is convenient to repeat the following pertinent passage of the LLPT's answering affidavit:

> *"It must be emphasised that the second HIA(as supplemented acknowledged the considerable politically-charged historical significance of the Liesbeek Riverine corridor for First Nations, of which the River Club site forms an important part. However, most of the corridor has been transformed and the cultural landscape has been broken up into different areas, each with their site-specific historical scientific, architectural and aesthetic significances. In the case of the River Club site itself, its history and usage most closely parallels with parts of the corridor adapted and used by different sporting codes.*
>
> *The second HIA(as supplemented) further detailed that, contrary to claims by the applicants, the River Club site (a reclaimed seasonal wetland) was not the site of any historic events… or a burial ground. No tangible heritage relics or resources occur on the site.*
>
> *Accordingly, the site has no obvious heritage significance. The question the heritage practitioners had to grapple with was how its historical, political and cultural significance could be meaningfully restored.*
>
> *This enquiry was informed by the heritage practitioner's assessment that the presence of the Liesbeek River (and its associated histories) was the most important characteristic establishing the River Club site's sense of place. For this reason the heritage practitioners contended that*

[35] Vol 1: FA, para 81 (page 50); Vol 3: LLPT's AA, para 252 (page 893).
[36] Vol 7: Confirmatory affidavit of Matthew Law, para 8 (page 2586).
[37] Vol 6: AB9 (page 2402 – 2521).

the historical significance of the site could be reclaimed through the proposed recovery of the riverine corridor."[38]

Conflicting evidence regarding the termination of Ms. O'Donoghue's mandate

63. There are conflicting statements regarding the basis for the termination of Ms O'Donoghue's mandate prior to the start of the phase two heritage impact assessment and specifically whether it was terminated by herself or by SRK. The evidence adduced in connection with this dispute is relevant to the issues in these proceedings because it bears upon the correctness of HWC's view (dealt with below) that the Second HIA was formulated to justify a pre-conceived development concept, which in turn bears upon the question whether the HWC's stance was irrational (the position adopted by the LLPT and the Minister).

64. The conflicting evidence on this point is the following:

64.1. The deponent to the LLPT's answering affidavit (Mr. Aufrichtig) states that he has been advised by SRK that Ms. O'Donoghue's mandate was terminated due to repeated missing of deadlines and failure to attend scheduled project meetings.[39]

64.2. This statement has been confirmed by Mr. Michael Law.[40]

64.3. Ms. O'Donoghue has deposed to an affidavit in which she provides a conflicting account of the sequence by which her mandate was terminated. She avers that she terminated her own mandate due to:

[38] Vol 3: LLPT's AA; paras 48 – 51 (pages 836 – 837).
[39] LLPT's AA, para 256 – 258 (pages 894 - 895).
[40] Vol 7: Confirmatory affidavit of Matthew Law, para 7 (page 2586).

64.3.1. her disclination to work with Dr Townsend (who the LLPT intended to appoint - or had appointed - to undertake a phase 2 heritage impact assessment) on account of differences in professional ethos; and

64.3.2. her view that the LLPT's preferred concept design was not guided by the findings of the phase one HIA and its heritage design guidelines and consequently there was a high probability that the anticipated phase two heritage impact assessment would result in unacceptably high negative impacts on the significant heritage resources associated with the site, site context and TRUP.

64.4. Ms. O'Donoghue's account is supported by an email exchange between Mr. Law and a journalist in which Mr. Law advised a journalist that "*Ms O'Donoghue was asked to collaborate on a revised HIA with the other heritage consultant, but indicated she was not available to do so."*[41]

64.5. Mr. Law's explanation provided to the journalist corrected an earlier statement (via email) in which he stated (as he has done in these proceedings) that Ms O'Donoghue's mandate was terminated due to the fact that she was "not always in a position" to meet deadlines.[42] The correction was issued upon the request of Ms. O'Donoghue.[43]

[41] Vol 8: Confirmatory affidavit of Bridget O'Donoghue, page 2992; Vol 8: BD3, (page 3008).
[42] Vol 8: Confirmatory affidavit of Bridget O'Donoghue, page 2990; Vol 8: BD4, (page 3011).
[43] Vol 8: BD4, (page 3007).

65. Although at this stage, no final determination needs to made about the resolution of conflicting versions, the evidence at least supports the version of Ms. O'Donoghue especially if one has regard to the contemporaneous email correspondence attached to Ms. O'Donoghue's affidavit.

The HWC's interim comment

66. The HWC furnished an interim comment on the second HIA on 13 September 2019 ("the interim comment").[44] It identified a number of defects in the HIA.

67. The HWC's broad concerns can be summarised as follows:

67.1. The second HIA appeared to be directed at post-rationalising a preconceived development concept. The significance of the site within the Broader TRUP was ignored.[45]

67.2. As a consequence, the second HIA reflected "tangibly based ecological values rather than cultural heritage values" and was therefore not in accordance with the criteria to be applied in terms of section 3(3) of the NHRA when determining whether a place is culturally significant or otherwise valuable.[46]

67.3. As a consequence of the error in approach, the assessment of impacts was flawed and, in particular, downplayed the irreversible impacts of transforming a green lung at the heart of the TRUP into a "mega project".[47]

[44] Vol 1: LL10 (page 142 – 152).
[45] Vol 1: FA, para 135.1 (page 70); LL10 (page 145).
[46] Vol 1: FA, para 135.2 (page 72); LL10 (page 147).
[47] Vol 1: FA, para 135.4 (page 74); L110 (page 48).

67.4. The economic benefit of the project is overemphasised and an evaluation of the impact on the wider TRUP cultural landscape is avoided, contrary to the assessment of its value by the HWC and in terms of previous reports. [48]

68. On the matter of the historical significance of the development site, the interim comment records:

> *"It ignores the significance of the site to a community that has a recognised and direct, deep and sacred linkage to the site through lineage and collective memory, and furthermore whilst acknowledging the historic importance of the site in South Africa's pre-colonial and colonial history, it makes no attempt to assess the significance of this as a site of conflict, that has direct relation to the trajectory of South Africa's Colonial history through the 20th century."*

69. The HWC concluded its report with a "strong recommendation" that a specialist consultant with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area should be engaged and a supplementary report from this consultant incorporated into the HIA.[49]

The December 2019 supplement

70. Townsend and Hart thereafter prepared and submitted to the HWC a supplementary report dated December 2019 ("the December 2019 supplement")[50] expanded upon the content of the second HIA under the following headings: engagement with first nations groupings, land-use planning in the Two Rivers area, identification and mapping of heritage resources, assessment of significance and alternatives and mitigation of impacts.

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[48] Vol 1: FA, para 135.4 (page 74).
[49] Vol 1: LL10, analysis at pages 152.
[50] Vol 3: JA9.1 (pages 1043 – 1073).

71. In the view of HWC, the December 2019 supplement simply re-stated the initial opinions expressed in the HIA.[51]

The AFMAS Report

72. The December 2019 supplement attached a report entitled "River Club First Nations Report" ("the AFMAS report") produced by a Mr. Rudewaan Arendse recording the outcome of consultations undertaken with members of the First Nations.[52]

73. This report is described in the December 2019 supplement as "an independent stand-alone report" detailing "the aspirations of the First Nations in respect of its proposals for the implementation of the strategies for actualising or realising the First Nations' narrative(s) in the planning and development of the River Club property" which produced a consensus on certain "indigenous place-making mechanisms" (subsequently incorporated into the authorised development proposal).[53]

74. The consultation process which was the subject of the report culminated in recommendations relating to the implementation of "indigenous place-making mechanisms" (those referred to in paragraph 51 above) and the implementation of an "institutional arrangement" to manage these features.[54]

75. The 8th respondent ("FNC") was constituted as this entity.

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[51] Expressed in a letter to the Minister dated 13 February 2021 – Vol 1: LL23 (page 303).
[52] Vol 3: JA9.2 (pages 1074 – 1197).
[53] Vol 3: JA9.1 (pages 1049); LLPT's AA, para 318.9 (page 915).
[54] Vol 3: JA9.1 (pages 1049); LLPT's AA, para 318.9 (page 915).

The HWC's final comment

76. The HWC subsequently furnished a final comment on the second HIA (as supplemented by the December 2019 supplement) on 13 February 2020 in which it reiterated its views set out in the interim comment and declined to endorse the second HIA as compliant with its requirements ("the final comment").[55]

Further engagements

77. On 17 February 2020, the Director furnished a comment on the draft basic assessment report submitted on behalf of the LLPT, in which he noted the HWC's final comments and requested the LLPT to "revise the second HIA in order to adequately assess the potential impacts associated with the proposed development".[56]

78. A meeting was convened by the "Western Cape Economic War Room" on 4 March 2020 to be attended by officials from the Department of Environmental Affairs and Development Planning ("DEADP"), the LLPT's environmental assessment practitioner, Mr. Hart and the HWC committee responsible for the interim and final comments.[57]

79. In advance of this meeting, Hart and Townsend produced a 43-page matrix setting out responses to each of the issues raised in the interim and final comments,[58] and 6-page summary thereof.[59] These documents were

[55] Vol 1: LL17 (pages 270 – 280).
[56] Vol 6: AB4 (pages 2335 - 2339).
[57] Vol 3: LLPT's AA, para 276 (page 900). Vol 5: Minister's AA, para 28.1 (page 2127); Vol 6: AB4 (pages 2387 – 2388).
[58] Vol 6: AB5 (pages 2340 – 2380).
[59] Vol 6: AB6 (pages 2381 – 2386).

argumentative (as opposed to elucidating), as is evidenced by the use of such words as “refute” and “rebut” by the LLPT’s deponent in his description of them.[60]

80. According to the LLPT, the purpose of this meeting was to “seek clarity” on “HWC’s arguments that the second HIA (as supplemented) did not comply with section 38(3)”.[61]

81. The HWC representatives declined to attend this meeting.[62]

Director’s decision

82. The Director’s decision followed several months later on 20 August 2020.[63]

Appeals

83. The HWC was among the persons and bodies that submitted an appeal against the Director’s decision.[64]

84. Prior to determining the appeals, the Minister addressed a letter to the HWC requesting to know what additional information it would require in order to be satisfied with the process.[65] The HWC responded with a letter indicating that the further requirements were set out in its interim and final comments.

85. The Minister responded in a letter dated 26 January advising that he had reviewed the HWC’s comments, as well as the information provided in the

[60] Vol 3: LLPT’s AA, para 277 and subparagraphs (pages 899 – 890).
[61] Vol 3: LLPT’s AA, para 277.4 (page 900); Vol 5: Minister’s AA, para 28.2 (page 2128).
[62] Vol 3: LLPT’s AA, para 277.3 (page 900).
[63] Vol 1: LL24 (page 304 – 334).
[64] Vol 1: LL21 (pages 295 – 297)
[65] Vol 1: LL21 (pages 298 – 300)

second HIA and December 2019 supplement and was of the view that the issues raised had been addressed.[66]

86. The Minister dismissed the appeals against the Director's decision in a decision dated 21 February 2021.[67]

INFRINGEMENT OF SUBSTANTIVE PROTECTIONS AFFORDED TO CULTURAL RIGHTS

87. The second applicant's members are direct descendants of the tribes and clans of San and Khoi Peoples who inhabited the Cape Peninsula.[68] Mr. Tauriq Jenkins has deposed to an affidavit on their behalf explaining the high significance that they attach to the terrain of the development site and surrounds as the "epicentre" of their ancestral history and the collective memory of dispossession as a painful but important aspect of their identities.

88. The associative value attached to the development site by the applicants is recognised and protected by the NHRA as "living heritage" in the form of cultural tradition and living memory. These provisions of the Act give effect to the right to culture in section 31 of the Constitution.

89. These proceedings concern four administrative decisions which failed to uphold these substantive protections, by approving the River Club development in the face of consistent and well-reasoned objections by the HWC that the intangible heritage on the site had been disregarded in the heritage assessment process

[66] Vol 5: Minister's AA (page 2133)
[67] Vol 6: AB6 (pages 2198 – 2325).
[68] Vol 1: Affidavit of Tauriq Jenkins, para 19.1 (page 717).

conducted in terms of section 38(8) of the National Heritage Resources Act, 25 of 1999 ("the NHRA").

90. This failure also implicates the constitutional rights to equality in terms of section 9(1) of the Constitution, the right to the reasonable implementation of measures to protect the environment in terms of section 24(2)(b) and the right to lawful administrative action in terms of section 33.

91. The Constitution is relevant as the bedrock against which the NHRA must be construed and interpreted. When interpreting any legislation section 39(2) requires courts to "*prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees*".[69]

CASE FOR THE REVIEW OF THE NEMA DECISIONS

92. The applicants seek the review of the Director's and Minister's decisions on the grounds that they are unlawful for want of compliance with a material condition prescribed by an empowering provision; irrational and materially influenced by an error of law.

Failure to comply with the first proviso in section 38(8)

93. The Director's and Minister's decisions are in breach of the first proviso of section 38(8) – viz. that the competent environmental authority must ensure

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[69] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) at para 53.

that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3).

94. A heritage resources authority is empowered by section 38(3) of the NHRA to specify the information to be provided in the heritage impact assessment report contemplated in section 38(2)(1)(a).

95. In its interim comment, the HWC issued a “strong recommendation” that the LLPT supplement the second HIA with “input from a specialist consultant with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area”.

96. We submit that it was rational and competent for the HWC to do so because:

96.1. As the organ of state responsible for heritage conservation and protection in the Western Cape, it determined that the TRUP was a significant heritage resource (consistent with the TRUP heritage study) and that this significance flowed in part from its aesthetic and sense of place qualities.

96.2. Aesthetic and sense of place qualities are a recognised source of heritage significance by virtue of section 3(3) of the NHRA read with the definition of “cultural significance”).

96.3. The HWC perceived that Hart and Townsend’s HIA had discounted this source of heritage significance.

96.4. HWC is expressly empowered to approve (and therefore determine) the qualifications of the person appointed to carry out a heritage impact assessment.

97. The Director was bound by the first proviso in section 38(8) to accept and ensure compliance with the HWC's "strong recommendation" which, we submit, rose to the level of an information requirement contemplated in section 38(3).

98. We further submit, that the AFMAS Report is demonstrably not a report by an intangible heritage specialist. We say so because:

98.1. The report does not undertake, or attempt to undertake, any appraisal of heritage resources on the River Club Site. This is not the focus of the report.

98.2. The report assumes that development will proceed on the River Club site and seeks primarily to ascertain the "aspirations" of the First Nations informants in regard to the anticipated development on the basis of "precedents" that focus on "embodying and spatializing of intangible cultural heritage of First Nations".[70] Assessment and recommendations in relation to impact are therefore not a focus.

98.3. The report does not adhere to any disciplines that would ordinarily be required of a heritage impact assessment report. For example, it does not record the identities of the participants in the process or provide any record of the consultations undertaken aside from letters of support from Chief !Garu Zenzile Kohisan on behalf of the Gorinhaiqa Cultural Council and one Kai bi a Hennie van Wyk.[71]

98.4. The consultation process which was the subject of the report culminated in recommendations relating to the implementation of "indigenous place-

[70] Vol 3: page 1089.
[71] Vol 3: page 1131.

making mechanisms" and the establishment of a legal entity to manage these features.[72] This is consistent with a results-oriented process, not a detached investigation of heritage impacts.

98.5. Over and above this, the methodology employed in the report is unintelligible.[73]

99. In the premises, we submit that the Director failed to satisfy the first proviso in section 38(8) and the decision was therefore unlawful and falls to be set aside in terms of section 6(2)(b) of PAJA. This defect in the decision was perpetuated by the Minister on appeal and similarly vitiates his decision.

Irrationality

100. The Minister's decision runs to some 128 pages; 49 of these pages deal with appeal grounds grouped under the heading "*Insufficient consideration was given to heritage informants and the relevant heritage resource authority's comments and there was non-compliance with section 38(8) and section 38(3) of the NHRA*".[74]

101. These 49 pages convey almost nothing in the way of intelligible analysis. Much of this section is a random assemblage of quotes from the Second HIA and the Supplementary Report, which bear no relation to each other and no relation to the headings under which they are grouped, and which grow more incoherent

[72] Vol 3: 1049 – 1050.
[73] It must be read to be believed. See in particular the explanation of methodology described at Vol 3: 1105 – 1106.
[74] Vol 1: 347 – 301.

as they go on. Simply put, this section of the decision does not make any sense. Little would be achieved by attempting to analyse it.

102. The absent reasoning is most starkly illustrated by the Minister's conflation of the requirement in section 38(3)(b) to assess the significance of the heritage resources affected by a development with the requirement in item 2(d)(i) of Appendix 1 to the EIA Regulations to assess "the nature, significance, consequence, extent, duration, and probability of the impacts occurring".

103. In attempting to address (or perhaps cure) HWC's objection that the Second HIA did not properly assess the <u>significance</u> of the affected heritage resources, the Minister sets out his own evaluation of "significance" (constructed from the findings in the Second HIA). He does not evaluate the significance of the heritage resources themselves, but rather presents a convoluted assessment of the "significance" of each heritage related impact according to the methodology prescribed by the EIA Regulations.

104. His reasoning emerges from the following passage:

"5.28 As detailed above, section 3(3) of the NHRA outlines the criteria for the determination of the significance of a heritage resource. However, the 2014 EIA Regulations state that the potential impacts must be assessed and rated based on the methodology and rating criteria including the nature, significance consequences, extent, duration and probability of potential environmental impacts and risks associated with the proposed development and alternatives. Regulation 19(8) of the 2014 EIA Regulations states that: "A specialist report must contain all information set out in Appendix 6 to these Regulations or

comply with a protocol or minimum information requirement relevant to the application as identified and gazetted by the Minister in a government notice."[75]

105. The Minister then proceeded to mechanically assess the significance of each of the identified heritage impacts for the "construction" and "operational" phases of the development. It is hard to imagine a more irrational way of approaching the question of significance under the NHRA, which inquiry goes to the core of the determination whether the heritage impacts are acceptable.

106. The Minister's decision bears no rational connection to the purpose of the empowering provisions (section 38(8); section 38(3) and section 24 of NEMA) – viz to provide for an evaluation and determination of the significance of the heritage resources that might be affected by a proposed development.

107. In the premises, we submit that it falls to be set aside in terms of section 6(2)(f)(ii)(bb) of PAJA.

Failure to comply with the second proviso

108. The Director and the Minister likewise failed to comply with the second proviso in section 38(8), which requires the environmental authorities to take into account the HWC's comments and recommendations. It is clear that they did not do so.

109. The issue of heritage impacts is dealt with in a two-page section of the Director's decision. The substance of the HWC's views set out in their interim and final comments are noted (though not interrogated) in two short paragraphs of the

[75] Vol 1: 360.

Director's decision.[76] The remainder of the section simply recites the findings of the HIA, and the attempts at engagement with HWC after they issued their final comment.

110. The Minister similarly did not engage with (or even understand) the views of the HWC at the time that he issued his decision (this will be apparent from what is said above in regard to the irrationality of his decision). This is borne out by the fact that much of his affidavit is composed of verbatim quotes from his appeal decision, which is in turn composed of verbatim quotes from the second HIA and associated documents.

111. This conduct fell far short of the obligations upon the Director and the Minister in terms of section 38(8),

112. When the Director and the Minister acted in terms of section 38(8), they were exercising a discretion governed by the NHRA, in relation to heritage resources, of which the HWC is the statutory custodian.

113. The content of the obligation upon the Director and the Minister to consider the comments and recommendations of the HWC must necessarily be weightier than the general obligation to consider.

114. What section 38(8) demands is that the competent environmental authority properly interrogate the comments that it receives from the relevant heritage resources authority and depart from them only on a clear, reasoned and justified basis. Manifestly, this is not what occurred here.

[76] Vol 1: LL24, (pages 322 - 323).

115. Confronted with the opinion of HWC that the second HIA was formulated to justify a preconceived development proposal, of a significant scale, on a property that was recognised (including by Hart and Townsend) to embody high significance, one would have expected a full and thorough consideration of the merits of the view. However, neither the Director, nor the Minister even addressed the issue.

116. In the premises, we submit that the Director and the Minister failed to satisfy the second proviso in section 38(8) and the decisions were accordingly unlawful and fall to be set aside in terms of section 6(2)(b) of PAJA.

117. The decisions were in addition, we submit, not rationally connected to the information before the decision-makers and fall to be set aside in terms of section 6(2)(f)(ii)(cc) of PAJA.

Not authorised by the empowering provision

118. Properly understood in its statutory context, section 38(3)(b) required a heritage impact assessment addressing itself to both the tangible and intangible heritage associated with the development site.

119. The conceptual approach of Hart and Townsend discounted the heritage value occurring on the development site because it did not manifest in any "tangible form".

120. The result was that acknowledged and important intangible heritage resources were not accounted for and the second HIA did not comply with section 38(3)(b).

121. Notwithstanding this, the Director and the Minister evaluated the second HIA as adequate and based their decisions on it. They failed to ensure that the requirements of section 38(3)(b) had been complied with, as was required of them in terms of section 38(8).

122. In the premises, the Director's and the Minister's decisions were not authorised by the empowering provision and fall to be set aside in terms of section 6(2)(f)(i).

CASE FOR THE REVIEW OF THE PLANNING DECISIONS

123. In March 2018, the LLPT submitted an application for the permissions required in terms of the MPB to implement the proposed development ("the development application").[77]

124. The development application encompassed an application for rezoning of the site from Open Space 3: Private Open Space Zone to subdivisional area (comprising general business and open space zones); permission to enable retaining structures to be constructed to a height of more than the permitted 2.0 metres above the existing level of the ground; and deviation from certain policies of the City, including the Table Bay District Plan, which is the statutory spatial development framework applicable to the site.[78]

125. On 11 September 2020, the City's Environmental Management Department ("EMD") submitted an appeal against the Director's decision based on *inter alia* the following grounds:[79]

[77] Vol 4: City's AA, para 23 (page 144).
[78] Vol 4: City's AA, para 210 (page 1508).
[79] Vol 2: "LL30" (pages 679 – 707).

125.1. The decision does not align with relevant National and Provincial Legislation, Provincial and City Policy and Spatial Plans and the (Environmental Management Framework (EMF) approved by the Western Cape Government (WCG) MEC for Environmental Affairs & Development Planning (EA&DP).

125.2. Insufficient consideration was given to the City's comments regarding context, role of the site and desirability of the proposed development.

125.3. Insufficient consideration was given to heritage informants and the relevant heritage resources authority's comments and there was non-compliance with S38(8) and S38(3) of the National Heritage Resources Act, 25 of 1999 (NHRA).

125.4. The stormwater impacts, including flooding, are not sufficiently mitigated against, the decision-maker relied on outdated information and the City's Floodplain and River Corridor Management Policy appears to not have been considered.

125.5. The decision does not give due consideration to climate change impacts and resilience (and is contrary to the City's Climate Change Policy).

125.6. The decision does not appropriately describe, or mitigate, the loss of open space on site.

125.7. The decision does not appropriately describe or mitigate the high negative biodiversity impact or habitat loss of a high faunal sensitivity

proclaimed Protected Area and assumes a willingness on the City's part to relinquish such Protected Area.

126. The MPT gave notice of its decision to approve the development application on 30 September 2020.[80]

127. The MPT determined the development application in terms of the general empowering provision in section 98(1),[81] with reference to the criteria set out in section 99. Among the criteria that it was required to consider was the impact of the proposal on the biophysical environment; and the impact on safety, health and wellbeing of the surrounding community.[82] The Mayor, in taking his decision on appeal, was seized with the same inquiry.

128. Multiple appeals were submitted against the MPT's decision, and these were considered and determined by the Mayor on 18 April 2021 in terms of section 108 of the MPB.[83]

129. In disposing of the appeals against his decision, the Mayor addressed the appeal submitted by the EMD against the Director's decision.

130. The EMD regarded the proposal to construct in the flood plain as a significant unjustified risk and pointed out errors in Aurecon's approach in the hydrology report included in the final basic assessment report prepared pursuant to environmental authorisation. It stated in its appeal:[84]

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[80] Vol 4: City's AA, para 37 (page 1445).
[81] Section 98(1)(b) provides: "The City may in respect of an application… (b) approve the application …(i) in whole or in part.
[82] MPB, section 99(3)(g)
[83] Vol 4: City's AA, para 44 (page 1446).
[84] Vol 2: "LL30" (pages 685 – 686; 689).

"The Catchment, Stormwater and River Management Branch has noted that there are places where the Applicant's consultant's models show an increase in possible flood levels as a consequence of the development. The Applicant was therefore advised in the Land Use Application process, to get the approval of the affected property owners and/or indemnify the City against claims in this regard. The flooding report should have discussed errors and assumptions made and their effect on results in more detail. There is a predicted increase in floods on adjacent properties, especially for more frequent flood intervals. The increase is not "insignificant" as stated in the EA and the relevant property owners have voiced their objections to and concerns for the proposed development in the public participation process. This is particularly significant in the context of the known risks and future impacts of climate change…

[the EMD's comments on the BAR] also noted that key studies, namely the "Stormwater Infrastructure Asset Management Plan (phase 2A) Rainfall Analysis and High: Level Master Planning (SRK, 2012) and "Marine Inputs to Salt River Flood Model: 94 (PRDW, 2010) were 8 and 10 years old respectively. The comments noted that clarity on the risks of using data that is a decade old and what this means for the confidence levels in modelled outputs, and hence flood risk determinations, was required.

131. The Mayor cursorily dismissed all concerns relating to flood risk in a few short paragraphs in which he simply repeats the conclusion arrived at by Aurecon and points out that "*the hydrology report contained a range of recommendations that have informed the design proposal…"*.[85]

132. Given the uncertainty attendant on construction on a floodplain and the magnitude of the potential risk, this was completely unjustified.

[85] Vol 2: LL28 (page 598).

133. A further ground relied upon by the EMD was the following:[86]

The decision-maker failed to adequately consider various City of Cape Town Policies that recognise the biodiversity significance of the conservation area (Biodiversity Agreement site) on the City erven. This is despite attention drawn to the fact that this Biodiversity Agreement site is recognised under both Municipal and Provincial Government Policy, and in terms of National Environmental Legislation:

The EA Annexure 3 Reasons for Decision (under 3.8. Ecological and Freshwater Impacts on page 25 of 31) states that: "According to the Western Cape Biodiversity Spatial Plan, 2017, the unlined/natural channel of the Liesbeek River, the Liesbeek Canal, the Black River and the Raapenberg Wetlands are mapped as a Protected Area in terms of the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003)."

The Western Cape Biodiversity Spatial Plan incorporates the BioNet (Cape Town's fine-scale systematic biodiversity plan). The BioNet is adopted as City of Cape Town Policy in the Bioregional Plan 2015. The BioNet is also aligned with and adopted in other City Policy, most notably the Integrated Development Plan (IDP 2017-2022) and the Municipal Spatial Development Framework (MSDF 2017-2022). The IDP and MSDF recognise Cape Town's critical environmenta. assets and its globally important biodiversity. The MSDF's often misquoted "Consolidated Spatial Plan Concept" (also known as "The Blue Turtle" owing to the shape of the "Urban Inner Core") does not override the MSDF's Biodiversity Network as if development were more important than conserving biodiversity. The MSDF comprises 4 main maps, and notes that this is "A series of maps that collectively indicate a metropolitan-scale interpretation of the City's spatial vision, development directives, land use informants and investment priority areas."

This clearly shows that the MSDF is to be read as a collection of maps of equal standing, rather than the 'consolidated spatial plan concept' overriding all other layers of spatial informants.

[86] Vol 2: "LL30" (page 694)

134. As to the actual biodiversity impacts, the EMD made inter alia the following points:[87]

Reliance by the Decision-Maker on ill-conceived or flawed information relating to Biodiversity Impacts and Mitigation Measures, has led to an underestimation of the high negative impacts of permanent duration on the Liesbeek River Conservation Area:

The Faunal Specialist based the Faunal Importance Assessment ("FIA") score for mammals, reptile and amphibians on what was anticipated to occur on site not on-site evidence (see Faunal Impacts on page 23 of 31). Given the status of the conservation area, it is unacceptable that the Faunal Specialist relied on a desktop study and not on actual site assessments. This was raised in the City's comments on the BAR.

The Faunal Specialist assigned an FIA score of "moderate at a regional scale", but only applied "specific mitigation measures with respect to the Western Leopard Toad".

These mitigation measures fail to account for mitigation measures for other threatened species ….

134.1. Notwithstanding these considered and well-substantiated views by its own internal experts, the Mayor dismissed all of the biodiversity concerns raised by the EMD by reference to the very biodiversity impact assessment that was deemed inadequate.[88]

135. As regards the assumption that the City of Cape Town would simply amend its Biodiversity Agreement with CapeNature to exclude the Liesbeek River, the EMD stated:[89]

[87] Vol 2: "LL30" (pages 692 - 693).
[88] Vol 2: LL28 (pages 599 – 608).
[89] Vol 2: LL28 (page 695).

In the EA, the decision-maker has included one recommendation for City land (point 22 on page 9 of 31 of the EA): "the Holder will facilitate a discussion between the City of Cape Town and CapeNature in order to amend the current Biodiversity Agreement.

It is submitted that this recommendation is based on a misconception. The City does not intend to amend the current Biodiversity Agreement on [affected erven]. This Biodiversity Agreement was signed in 2014 between the City and CapeNature and is legally binding on both parties. The City's position regarding the biodiversity and conservation significance of the site remains unchanged."

136. The Mayor, having concluded that all of the EMD's concerns regarding biodiversity and other ecological impacts were unfounded, disposed of this concern as follows:[90]

"The environmental authorisation included a recommendation that the City and Cape Nature facilitate a discussion regarding the amendment of the viodiversity agreement to address the proposed changes to the Liesbeek canal, and channel. On appeal, the Provincial Minister imposed a condition requiring the formulation of a "rehabilitation/restoration plan" in respect of the Liesbeek in consultation with the City and Cape Nature. To the extent that any provisions of the biodiversity agreement need to be addressed (for example, to accommodate new road infrastructure and impacts on water resources), they can be addressed during or alongside these processes."

137. I respectfully submit that these well-reasoned objections originating as they do from the City department tasked with environmental management would have carried much weight with any reasonable decision-maker. Instead, they were dismissed by reference to the material submitted by the proponent of the application. To do so was procedurally irrational.[91]

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[90] Vol 2: LL28 (pages 614 – 615).
[91] Democratic Alliance v President of the Republic of South Africa 2013 (1) 248 SA (CC) at para 34.

138. In the premises, we submit that the decisions of the MPT and the Mayor decision fall to be set aside in terms of section (6)(2)(f)(ii)(cc) of PAJA.

CONSIDERATIONS RELATING TO THE BALANCE OF CONVENIENCE

139. The respondents all contend that the balance of convenience heavily favours the refusal of interim relief.

140. The nature and magnitude of the harm apprehended by the respondents falls to be evaluated in the context of the two different sets of interests at stake, namely, those of the LLPT on the one hand, and those of the State Respondents and the broader public, on the other. We deal with each of these in turn below.

LLPT

141. The LLPT claims that the commercial consequences for the LLPT of this Court granting the interim interdict will be catastrophic and will likely result in the River Club development not going ahead and the LLPT suffering sunk construction costs, penalties and liquidated damages in the order of hundreds of millions of rands.[92]

142. The financing for the River Club development is allegedly provided in terms of a development facility agreement ("the development facility") and an infrastructure facility agreement ("the infrastructure facility") entered into between the LLPT and Rand Merchant Bank ("RMB") ("alleged" because the LLPT has not produced this document).[93]

[92] Vol 3: LLPT's AA, paras 66 - 118 (pages 841 - 855).
[93] Vol 3: LLPT's AA, para 95 (pages 849).

143. The financing under the development facility and the infrastructure facility was, we are told, extended on the strength of a "development agreement" (and associated lease agreements) concluded between Amazon Development Centre (Pty) Ltd ("ADC") which ADC will be entitled to cancel if the LLPT has not completed construction of Precinct 2A of the development before 30 November 2022.[94]

144. RMB will be entitled to cancel the development agreement and the infrastructure agreement if an event of default occurs, which would include the granting of the interim relief and the cancellation of the development agreement.[95] The LLPT alleges that it would become liable to RMB for damages in an amount of R22 120 000 in respect of the development facility and R1 620 000 in respect of the infrastructure facility and other sundry costs totalling 12 727 295 in the event that the agreements terminates in this manner.[96]

145. The LLPT is precluded from any reliance, however, on its position in terms of the development and infrastructure facilities[97] as it failed to provide these documents when called upon to do so in terms of rule 35(12). Instead, it furnished a term sheet signed on 1 June 2021.[98] It is unclear what the status of this document is as it states in terms that "*this Term Sheet will be valid until 31 May 2021 after which it will expire".* This document also does not contain any provision regarding liquidated or other damages.

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[94] Vol 3: LLPT's AA, para 74 (page 844); para 81 (page 846).
[95] Vol 3: LLPT's AA, para 99 – 101 (pages 850 - 851).
[96] Vol 3: LLPT's AA, paras 102 – 103 (page 851).
[97] Vol 3: LLPT's AA, paras 95 – 104 (page 851).
[98] Vol 7: LL38 (2825 – 2832).

146. In any event, it is clear that the LLPT is the author of its own predicament, and we submit that the weight accorded to its interests falls to be reduced accordingly. We say so for the following reasons:

146.1. The LLPT on 6 July 2020 bound itself to a construction timetable that would require it to complete a 313-day construction programme for precinct 2A[99] of the River Club development within the following 20 months. It did so before the MPT's decision (i.e. the first instance decision on its application in terms of the Municipal Planning By-law) and before the Minister had determined the appeals against its environmental authorisation.

146.2. The relevant undertakings were made in terms of the development agreement, which provides for a variable "practical completion date" set in relation to a variable "lease commencement date" (i.e. the date on which ADC would take up occupation of Precinct 2A as a tenant). The development agreement allowed the parties to set the lease commencement date on a day between 1 January 2023 and 30 June 2023. The practical completion date was to be a day not less than 15 months before the lease commencement date (i.e. at the latest, 30 March 2022).[100] This would have required the LLPT to commence construction by 21 May 2021 at the latest if it was to meet its contractual obligations.[101]

147. It is clear from the terms of the development agreement that both parties understood that there was considerable uncertainty attendant upon the

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[99] Vol 3: JA18 (page 1224).
[100] Clause 10.3 read with the definitions provided for "anticipated practical completion date"; "lease commencement date"; "anticipated lease commencement date". Vol 7: LL35 (pages 2696; 2711).
[101] We note that the LLPT states that 30 November 2022 is the practical completion date, but this is inconsistent with the development agreement. Vol 3: LLPT's AA; para 74 (page 844).

contemplated timetable, and they structured their agreement accordingly. As such, the agreement affords a degree of latitude in the agreed completion date and provided for two junctures at which the LLPT could assess the viability of the contractual timetable and exit the agreement without incurring any penalties, namely 31 August 2020[102] and 31 December 2020.[103] Evidently, the LLPT elected not to do so, notwithstanding that it seems to have been aware that the first applicant was contemplating litigation in November 2020.

147.1. A reasonable developer in the position of the trustees of the LLPT would have appreciated that there would almost certainly be appeals lodged against the MPT's decision and that the statutory time limit for the appeals process in terms of section 109 of the MPB was 270 days. In the event, the MPT took its decision on 18 September 2020, the various appeals against it were timeously determined on 21 April 2021, the LLPT was granted its water use license on 8 June 2021 (which decision is now the subject of multiple appeals). This was an entirely predictable sequence of regulatory occurrences.

148. It appears that the LLPT has sought to conceal the truth of its situation by failing to attach the development agreement and omitting the relevant dates in the affidavit deposed to by Mr. Aufrichtig.

149. We submit this Court should refuse to countenance the LLPT's attempt to shift the consequences of its reckless attitude to the applicants.

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[102] Clause 10.6. Vol 7: LL35 (page 2712).
[103] Clauses 10.7 and 10.8. Vol 7: LL35 (page 2712).

The broader public interest

150. The Minister and particularly the Mayor have strongly emphasised that unless this Court refuses the interim relief in Part A the local economy will be deprived of the revenue and jobs associated with the establishment of a regional headquarters for Amazon in Cape Town.

151. This cannot just be accepted. A balanced approach to the evidence shows that there is a high probability that Amazon will establish its headquarters in Cape Town regardless of the outcome of these proceedings in light of the following:

151.1. In 2018 a request for proposals ("RFP") from Amazon was circulated to developers inviting them to submit a proposal for the development of a new regional headquarters to accommodate most of Amazon's current employees in Cape Town as well as additional employees that it intended to recruit in Cape Town.[104]

152. The RFP indicates that:

152.1. In 2018 Amazon employed approximately 3,000 staff in Cape Town, spread across several sites and multiple buildings and had initiated what it referred to as "Project Zola" to consolidate these employees into one or two campuses, and also provide expansion space for between 5,000 and 7,500 staff over the next 7 years.

[104] Vol 8: Supporting affidavit of Derrick Henstra, para 4 (page 301).

153. Press reports confirm that Amazon is continuing to expand its operations in Cape Town and is planning to hire 3,000 new customer service employees in South Africa, including remote and flexible work-from-home positions.[105]

COSTS

154. The claim for costs on behalf of the Third, Sixth and Seventh Respondents is at odds with the principle laid down in *Biowatch*[106] that constitutional litigation against organs of States should not attract adverse costs orders.

155. This principle would apply particularly in these proceedings in which the State Respondents have gone far beyond the requirements of defending their administrative decisions and made common cause with a private developer in the defence of its interests in opposing this interim relief.

156. Furthermore, these are proceedings directed at the protection of the environment as contemplated in section 32 of NEMA, which empower a Court to decide not to award costs against unsuccessful litigants who seek to secure relief in terms of legislation aimed at the protection of the environment, including the City's Municipal Planning Bylaw.

157. We submit that it would be appropriate in the circumstances for this Court to absolve the Applicants from any liability for the City's costs.

[105] Vol 8: LL40 (page 2483 – 2485).
[106] 2009 (6) SA 232 (CC)

ENTITLEMENT TO AN INTERDICT

158. We submit that the applicants have made out a case for the interim relief sought in Part A of the notice of motion:

158.1. The object of this review in Part B is the protection of substantive constitutional rights and the review grounds advanced in respect of the four impugned decisions are, we submit, a sufficient basis on which to obtain the review relief sought in part B in due course.

158.2. The applicants will suffer irreparable harm if the interdict is not granted. The intangible heritage that the applicants seek to protect will not survive the construction of the River Club development. The applicants' prospects of effective relief will diminish as the LLPT builds itself into an impregnable position.

158.3. The balance of convenience does not favour the respondents. The LLPT is the author of its own predicament and should not be permitted to rely upon financial prejudice precipitated by its own reckless conduct. We submit that the overriding public interest in the circumstances is the vindication of the rule of law.

158.4. The applicants have no alternative remedy.

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J BLOMKAMP

CHAMBERS, CAPE TOWN AND JOHANNESBURG

1 November 2021