

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

**CASE NO: 12994/21**

**ON THE ROLL: 24 and 25 NOVEMBER 2021**

In the matter between:

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

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**FOURTH AND FIFTH RESPONDENTS'  
AFFIDAVIT IN SUPPORT OF APPLICATION TO STRIKE OUT**

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I, the undersigned

**MARK NEVILLE OWEN**

do hereby make oath and say that:

1. I am a major male attorney duly admitted and practising in terms of the Legal Practice Act 28 of 2014 with the offices of the State Attorney at Liberty Life Centre, 5th Floor, 22 Long Street. I am the attorney of record of the Fourth and Fifth Respondents. I am authorised to depose to this affidavit on behalf of their behalf.
2. The facts deposed to herein are to the best of my knowledge true and correct, and they fall within my personal knowledge, unless stated to the contrary or otherwise apparent from the context.
3. This affidavit is filed in support of the Fourth and Fifth Respondents' application to strike certain material from the Applicants' replying papers on the grounds that they impermissibly introduce a new review ground in reply and/or introduce new material in reply.
4. In this application, the Fourth and Fifth respondents seek the striking out of from Mr Leslie London's replying affidavit, the following two paragraphs, namely:
  - 4.1. paragraph 31 (Record: Vol 7: page 2608), and
  - 4.2. paragraph 50 (Record: Vol 7: page 2615).

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5. In the Applicants' founding affidavit, two references are made to HWC's recommendation in its interim comment (Record: Vol 1: Annexure 'LL10': pages 142-152). The recommendation is to be found on the last page of HWC's interim comment in the following terms, namely:

*"Notwithstanding the unquestionable qualifications and heritage standing of both heritage practitioners who compiled the report, HWC is of the opinion that the HIA would benefit from input from a specialist consultant, with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area. This input would assist in focusing on, in particular, the strong sense of place and meaning of the site pertinent to the First Nation Representatives. It is a strong recommendation that a supplementary report from an expert in this field is incorporated into the HIA".*

6. In both instances at paragraphs 91 and 134 of the founding affidavit HWC's recommendation is mentioned in the context of describing the conclusion of HWC's interim comment.
7. After introducing HWC's recommendation, in paragraph 97 of the Applicant's heads of argument they contend that "[t]he 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)".
8. This contention was not put up in their founding papers as a ground of a failure of the Director, or the Minister on appeal, to comply with the first proviso of section 38(8) of the NHRA but was belatedly raised in two

paragraphs in their replying affidavit, namely paragraphs 31 and 50 which respectively provide that:

8.1. *“In any event, even if the Minister’s interpretation is preferred and this Court holds that HWC’s only function in terms of section 38(8) is to ‘specify its information requirements’, the NEMA authorities still failed demonstrably to ensure that HWC’s information requirements were met, because they condoned the LLPT’s failure to procure and submit a supplementary report from an expert in intangible heritage. This requirement went to the very heart of HWC’s objections - the heritage specialists’ failure to assess and articulate the true significance of the heritage resources on the River Club site in accordance with the NHRA”* (paragraph 31), and

8.2. *“The most obvious respect in which the LLPT has failed to comply with the HWC’s information requirements is in disregarding its request in its interim comment to submit a supplementary report prepared by a specialist on intangible heritage to remedy the shortcomings in the heritage specialists’ evaluation”* (paragraph 50).

9. The import of this belated emphasis on HWC’s recommendation was only apparent on receipt of the Applicants’ heads of argument as already indicated above. Accordingly, it was indicated in the Fourth and Fifth Respondents’ heads of argument that a striking out application would follow the filing of their heads of argument.

10. It is submitted that the Court should uphold the striking out application because had the Applicants wanted to rely on the failure to implement HWC's recommendation as a ground for alleging that the Director and the Minister did not comply with the first proviso of s 38(8) of the NHRA, this should have been put up in their founding papers.
11. There is no explanation why this new ground was not pleaded in the founding affidavit. HWC's interim comment is dated 13 September 2019 and was available to the Applicants in the preparation of their founding affidavit.
12. The Fourth and Fifth Respondents are prejudiced by the above-mentioned new material in the Applicants' replying affidavit.

### **CONCLUSION**

13. In the premises, the Fourth and Fifth Respondents pray for an order in terms of its notice of application to strike out.

  
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**MARK NEVILLE OWEN**

I certify that:

I the deponent acknowledged to me that:

- (a) he knows and understands the contents of this declaration;
- (b) he has no objection to taking the prescribed oath;

- (c) he considers the prescribed oath to be binding on his conscience;
- II the deponent thereafter uttered the words "I swear that the contents of this declaration are true, so help me God";
- III the deponent signed this declaration in my presence at the address set out hereunder on this the 16<sup>th</sup> day of NOVEMBER 2021.

  
**COMMISSIONER OF OATHS**

FULL NAMES:

CAPACITY:

ADDRESS:

TERTIA LIZETTE KRIEL  
KOMMISSARIS VAN EDE  
COMMISSIONER OF OATHS  
PRAKTISERENDE PROKUREUR (R.S.A.)  
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