

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

Case No: 12994/2021

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

**GORINGHAICONA KHOI KHOIN
INDIGENOUS TRADITIONAL COUNCIL**

Second Applicant

and

**THE 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

**MEC 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

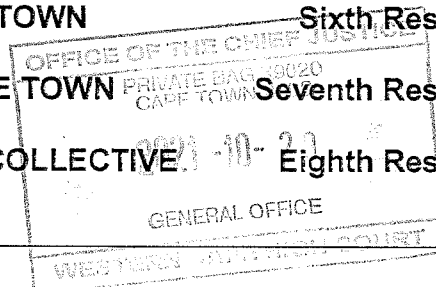
WESTERN CAPE FIRST NATIONS COLLECTIVE

Eighth Respondent

FILING NOTICE

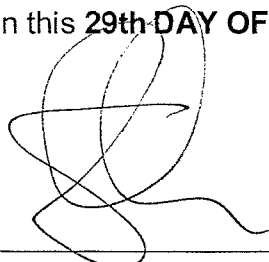
BE PLEASED TO TAKE NOTICE that the First Respondent files herewith:

Nicholas Smith Attorneys
Ref: Mr. N. Smith
Tel: 021 424 5826
Email: nicks@nsmithlaw.co.za



1. Notice of Application to Strike Out; and
2. supporting affidavit of Nicholas David Smith.

SIGNED AND DATED at **CAPE TOWN** on this **29th DAY OF OCTOBER 2021**



NICHOLAS SMITH ATTORNEYS
Attorneys for the First Respondent
2nd Floor
114 Bree Street
CAPE TOWN
Tel: 021 424 5826
Fax: 021 424 5825
(Ref.: Mr. N.D. Smith/L38-001)
Email: nicks@nsmithlaw.co.za

TO: THE REGISTRAR **BY HAND**
Western Cape High Court
CAPE TOWN

AND TO: CULLINAN AND ASSOCIATES **BY EMAIL**
Attorneys for the Applicants
18A Ascot Road
KENILWORTH
(Ref: Mr. Hercules Wessels)
Email: Hercules@greencounsel.co.za

AND TO: HERITAGE WESTERN CAPE **BY EMAIL**
Second Respondent
3rd Floor, Protea Assurance Building
Green Market Square
CAPE TOWN
(Ref: Ms. Penelope Meyer)
Email: Penelope.Meyer@westerncape.gov.za

- AND TO: **WEBBER WENTZEL** **BY EMAIL**
Attorneys for the Third, Sixth and Seventh Respondents
15th Floor, Convention Tower
Heerengracht Street
Foreshore
CAPE TOWN
(Ref: Ms. Sabrina De Freitas)
Email: sabrina.defreitas@webberwentzel.co.za
- AND TO: **OFFICE OF THE STATE ATTORNEY** **BY EMAIL**
Attorneys for the Fourth and Fifth Respondents
5th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
(Ref: Mr. Mark Owen/1873/21/P7)
Email: mowen@justice.gov.za
- AND TO: **BASSON AND PETERSEN ATTORNEYS** **BY EMAIL**
Attorneys for the Eighth Respondent
Suite No. 6A, Bellpark Building
De Lange Street
BELLVILLE
(Ref: Mr. Petersen)
Email: bpinc.law@gmail.com

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

Case No. 12994/21

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

FIRST RESPONDENT'S NOTICE OF APPLICATION TO STRIKE OUT

KINDLY TAKE NOTICE THAT at the hearing of this application, the First Respondent will apply for an order in the following terms:

1. Directing that the following paragraphs of the replying affidavit of Leslie London dated 17 September 2021, together with the annexures referred to in those paragraphs, be struck on the ground that they constitute new matter in reply:

Paragraph 48 (R: 2614) (the words: "which they simplistically understood to derive from a simple absence of meaningful consultation with the First Nations peoples"); **paragraphs 52.1 – 52.6**; **Paragraphs 86.1 and 86.3** (R: 2626 – 2627); **paragraphs 86.4 – 90** (R: 2627 – 2631); **paragraph 94** (R: 2623) "While it has evidently not been possible to agree on any conservation measures with the respondents, I point out that the heritage authorities are still actively considering the possibility of formally protecting the River Club site. This matter is common cause." (underlined words only); **paragraph 99** (R: 2634); **paragraphs 130 – 132** (R: 2645 – 2647); **paragraphs 134.1 – 134.3** (R: 2648) and **paragraphs 136 – 137** (R: R: 2649); paragraph 11.1 (the words: "as we have differences in professional ethos") (R: 2988).

2. Directing that the following paragraphs of the "expert replying affidavit" of Ms. O'Donoghue dated 17 September 2021, together with the annexures referred to in those paragraphs, be struck on the ground that they constitute new matter in reply:

Paragraph 11.1 (the words: "as we have differences in professional ethos") and **paragraph 12** (R: 2989).

3. Directing that the following paragraphs of the "expert replying affidavit" of Ms. Prins-Solani dated 17 September 2021, together with the annexures referred to in those paragraphs, be struck on the ground that they constitute new matter in reply:

Paragraph 7 (R: 3016) (only the words: "It is important to note that neither Townsend, Hart nor Arendse is an expert in assessing intangible heritage. HWC pointed this out in relation to Townsend and Hart and

indicated that such a specialist should be appointed. As I explain below in response to paragraph, 336.1 Mr. Arendse is not a specialist in intangible heritage.”); **paragraphs 11 – 45** (R: 3016); **paragraphs 47 – 51** (R: 3015 – 3034); and **paragraph 53** (R: 3037).

4. Directing that the entire affidavit of Derick Ambrose Henstra dated 14 September 2021 (R: 3040 – 3045), together with accompanying annexures, be struck on the ground that the contents constitute new matter in reply and are irrelevant.
5. Directing the Applicants to pay the costs of this application, including costs of two Counsel, in the event of opposition.
6. Further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the First Respondent will rely on the accompanying affidavit of Nicholas David Smith dated 29 October 2021 in support of this application.

DATED at CAPE TOWN on this the 29th day of OCTOBER 2021.



NICHOLAS SMITH ATTORNEYS
Attorneys for the First Respondent
2nd Floor
114 Bree Street
CAPE TOWN
Tel: 021 424 5826
Fax: 021 424 5825
(Ref.: Mr. N.D. Smith/L38-001)
Email: nicks@nsmithlaw.co.za

- TO: **THE REGISTRAR** **BY HAND**
Western Cape High Court
CAPE TOWN
- AND TO: **CULLINAN AND ASSOCIATES** **BY EMAIL**
Attorneys for the Applicants
18A Ascot Road
KENILWORTH
(Ref: Mr. Hercules Wessels)
Email: Hercules@greencounsel.co.za
- AND TO: **HERITAGE WESTERN CAPE** **BY EMAIL**
Second Respondent
3rd Floor, Protea Assurance Building
Green Market Square
CAPE TOWN
(Ref: Ms. Penelope Meyer)
Email: Penelope.Meyer@westerncape.gov.za
- AND TO: **WEBBER WENTZEL** **BY EMAIL**
Attorneys for the Third, Sixth and Seventh Respondents
15th Floor, Convention Tower
Heerengracht Street
Foreshore
CAPE TOWN
(Ref: Ms. Sabrina De Freitas)
Email: sabrina.defreitas@webberwentzel.co.za
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5th Floor, Liberty Life Centre
22 Long Street
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**IN THE HIGH COURT OF SOUTH AFRICA
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OBSERVATORY CIVIC ASSOCIATION First Applicant

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**TRUSTEES FOR THE TIME BEING OF
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TRIBUNAL OF THE CITY OF CAPE TOWN** Sixth Respondent

EXECUTIVE MAYOR, CITY OF CAPE TOWN Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE Eighth Respondent

AFFIDAVIT

I, the undersigned,

NICHOLAS DAVID SMITH,



do hereby make oath and declare as follows:

1. I am the first respondent's attorney of record and am duly authorised to depose to this affidavit on its behalf.
2. Unless the context indicates otherwise, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my belief, both true and accurate.
3. The purpose of this affidavit is to support the first respondent's application to strike out new and irrelevant matter in the applicants' replying papers. These allegations are prejudicial because they are mainly designed to question the expertise, *bona fides*, and impact assessment reports of the first respondent's heritage specialists in circumstances where the founding papers lacked the specific allegations now contained in reply. In the absence of specific allegations regarding the subject-matter contained for the first time in reply, the first respondent was denied a fair opportunity to present its defence.
4. The new and irrelevant matter is further designed to evoke unwarranted antipathy on the part of the Court towards the first respondent and its specialists.
5. Finally, having failed to put up adequately particularised allegations to substantiate a challenge of the development's hydrological and biodiversity impact assessments, the applicants now seek to do so for the first time in reply. Accordingly, the allegations have the potential to prevent a fair adjudication of this application.

A handwritten signature in black ink, consisting of a stylized 'S' followed by a cursive flourish.

6. The replying papers contain substantial new matter in reply. These allegations can be summarised as follows:

6.1. Allegations of alleged irregularities, lack of independence, failure to follow specific protocols or other alleged conduct on the part of the first respondent's heritage specialists, which were either not contained in the founding papers, or alleged with inadequate specificity and precluded any meaningful response in the answering papers. In this regard, I refer to the following paragraphs:

6.1.1. Mr. London's replying affidavit: **Paragraph 52.3 – 52.4** (R: 2616);

6.1.2. In Ms. O'Donoghue's replying affidavit: **Paragraph 11.1** (the words: "as we have differences in professional ethos") (R: 2988); **paragraph 12** (R: 2989);

6.1.3. In Ms. Prins-Solani's replying affidavit: **Paragraph 7** (R: 3016) (only the words identified in the accompanying notice); **paragraphs 11 – 45** (R: 3015 - 3034); **paragraphs 47 – 51** (R: 3035 – 3037); and **paragraph 53** (R: 3037).

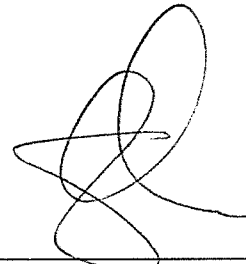
6.2. Allegations of alleged inadequacies in the methodology, subject-matter or approach of the heritage impact report (as supplemented), which were either not contained in the founding papers, or alleged with inadequate specificity and precluded any meaningful response in the answering papers. In this regard, I refer to the following paragraphs:



- 6.2.1. In Mr. London's replying affidavit: **Paragraph 48** (R: 2614) (the words: "which they simplistically understood to derive from a simple absence of meaningful consultation with the First Nations peoples"); **paragraphs 52.1 – 52.3 and 52.5** (R: 2616-7); and paragraph 99 (R: 2634); and
- 6.2.2. in Ms. Prins-Solani's replying affidavit: **Paragraph 7** (R: 3016) (only the words identified in the accompanying notice); **paragraphs 11 – 45** (R: 3015 - 3034); paragraphs **47 – 51** (R: 3035 – 3037); and **paragraph 53** (R: 3037).
- 6.3. Alleged inadequacies in the hydrological and biodiversity impact assessments and alleged failures by the local government decision-makers with reference to relevant policy documents and/or comments from City departments. In this regard, I refer to the following paragraphs in Mr. London's replying affidavit: **Paragraphs 86.1 and 86.3** (R: 2626 – 2627); and **paragraphs 86.4 – 90** (R: 2627 – 2631).
- 6.4. Allegations concerning interactions between the first and second respondents in terms of the engagement process set out in section 29 of the National Heritage Resources Act (NHRA) in **paragraph 94** (only the words identified in the accompanying notice) (R: 2623) of Mr. London's replying affidavit.
- 6.5. Allegations concerning Amazon's 2018 Request for Proposals and the nature and content of other development proposals. In this regard, I refer to the following paragraphs:



- 6.6. In Mr. London's affidavit: **Paragraphs 130 – 132** (R: 2645 – 2647); **paragraphs 134.1 – 134.3** (R: 2648) and **paragraphs 136 – 137** (R: 2649).
- 6.7. The entire contents of Mr. Henstra's supporting affidavit (R: 3040 – 3045).
7. Finally, I note that the applicants have provided no reasons, let alone any good reasons, why the aforesaid new matter was not included in their founding papers. Given the severe time constraints in this matter, I submit that it was not reasonably possible for the first respondent to file a supplementary answering affidavit in respect thereof. To do so would have undermined the first respondent's ability to file heads of argument timeously and to prepare for the hearing of Part A of the application.



NICHOLAS DAVID SMITH

I certify that:

The deponent acknowledged to me that:

1. He knows and understands the contents of this declaration;
2. He has no objection to taking the prescribed oath;
3. He considers the prescribed oath binding on his conscience.

The deponent thereafter uttered the words: "I swear that the contents of this declaration is true and correct, so help me God".

The deponent signed the declaration in my presence at the address set out hereunder on this the **29th** day of **OCTOBER 2021**.

LISA BRYONY JAMES
 COMMISSIONER OF OATHS
 IN TERMS OF ARTICLE 5 (1)
 OF ACT 16/1963
 5TH FLOOR, 42 BURG STREET
 CAPE TOWN

*practising
 attorney*



COMMISSIONER OF OATHS