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

CASE NO: **12994/2021**

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 OF 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

CITY'S HEADS OF ARGUMENT: PART A

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OVERVIEW

1. The River Club site has a rich heritage, having been occupied by indigenous people, used as a grazing place for their livestock and serving various social, ecological and sacred functions, as well as being a focal point for various acts of resistance to colonialism.[1] The site's heritage resources are largely intangible: they do not have physical markers such as archaeological sites or human remains. Rather, they are the product of memory and historical association.[2]

2. A development is currently under construction on the site. It will incorporate features to protect and commemorate the site's heritage and to beneficially rehabilitate its natural environment.

3. The development was given an environmental authorisation by the fourth and fifth respondents ('**the Province**'), and municipal-planning approval by the City (the Municipal Planning Tribunal ('**the MPT**') and the seventh respondent ('**the Mayor**')).

4. When those decisions were taken, the site comprised golfing lawns, parking, offices, a conference centre and restaurants,[3] which did nothing to protect or commemorate heritage.[4]

5. The applicants wish to interdict the first respondent ('**the developer**') from undertaking construction pending the review of the environmental and planning authorisations by Province and the City under Part B of the notice of motion.[5]

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1 FA pp 25-26 paras 34-38. City's AA pp 1448-1449 para 52.
2 FA p 55 para 91. Jenkins supporting affidavit p 716 para 15. O'Donoghue supporting affidavit p 764 para 16. City's AA p 1449 para 53.
3 City's AA p 1432 para 5.
4 City's AA p 1450 para 54.
5 NOM p 2 prayer 2.1 (Part A). The applicants' heads no longer pursue prayer 2.2.

6. The applicants baldly claim that the development will harm the site's heritage resources, but cannot substantiate the claim.[6] In their founding affidavit, they claim that HWC shares their views.[7] However, in reply the applicants disclose that despite their attempts to persuade the HWC to support their case,[8] HWC told the applicants that it did not intend using its powers under the Heritage Act to take any enforcement action in respect of the development and would not institute proceedings to review the authorisation granted to the developer.[9]

7. For several reasons the applicants' request for an interdict is unfounded.

8. First, the applicants falsely attempt to paint the development as a heritage-harming endeavour. The undisputed evidence shows that to be demonstrably untrue.

    8.1. There is no disagreement that the operation of an exclusive golf club and conference facility had no resonance at all with the site's heritage. The applicants do not deny that the River Club's environmental resources are presently degraded and that there are currently no measures in place to signify or protect its heritage.[10] Any visitor to the River Club would be forgiven for being completely ignorant of the property's importance to South Africa's First Nations.[11]

    8.2. The development will dramatically improve the site's remaining physical features that are linked to its heritage: the Liesbeek River will be transformed from a polluted concrete canal into a naturalised river that supports biodiversity, while the open

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6 FA pp 15-16 para 13. In answer, the claim is contested by the respondents (City's AA p 1486 para 134; Province's AA p 2158 para 82; Developer's AA p 857 para 129), but the applicants are silent on the point in reply.
7 FA pp 15-16 para 13.
8 RA p 2603 para 20.7.
9 RA p 2605 para 20-21.
10 City's AA p 1432 para 6. This is not denied by the applicants in their replying papers.
11 City's AA p 1450 para 54. These allegations are not denied by the applicants.

space will be upgraded from exclusionary golf lawns and an asphalt parking lot to 49,000 m^2 of high-quality, pedestrian-friendly green corridor.[12]

8.3. In respect of the site's remaining heritage resources, by virtue of being intangible they cannot be adversely affected by the tangible changes brought about by the development.[13] Furthermore, while the use of the River Club as a golf club and conference facility left the site's storied heritage completely ignored, the developer has partnered with various First Nations groupings to ensure that that intangible heritage will be celebrated in the new development. The heritage initiatives include a cultural and heritage centre, an indigenous garden, an amphitheatre, an eco-trail and various commemoration initiatives.[14]

9. Second, the applicants so delayed in launching these proceedings, and then prosecuted the application in such a dilatory fashion, that it is now too late to interdict the developer '*from undertaking any construction, earthworks or other works*' on the property, as the notice of motion requests.[15]

9.1. The requested relief is both pointless and moot. Construction commenced on 26 July 2021,[16] more than five months after the Province's final environmental authorisation and more than three months after the Mayor's decision. By the time of the hearing on 24 November 2021, construction will have been ongoing for four

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12 City's AA p 1453 paras 55.4 and 55.5. These allegations are not denied by the applicants in their replying papers.
13 City's AA p 1531 para 304.
14 City's AA pp 1450-1452 paras 55.1-55.3.
15 NOM p 2 prayer 2.
16 FA p 20 para 23. Developer's AA p 857 para 128.

months. As the applicants admit, the development is already '*under construction at a very swift pace*'.[17]

9.2. By the time this Court hears the application, construction will already have changed the River Club site. The application must therefore be dismissed: an interdict cannot be granted in respect of past conduct,[18] and cannot be granted if the applicants' case has been overtaken by events.[19]

10. Third, the interdict application fails to take cognisance of the overwhelming public interest in the development:

10.1. It will create thousands of jobs, introduce billions of Rand in investment, facilitate critical transport infrastructure and build affordable housing, all while rehabilitating the Liesbeek River.[20]

10.2. Cape Town – like the rest of the country and much of the world – is experiencing an economic crisis and its residents are sorely in need of the many benefits that the development has to offer.[21] Those benefits cannot be postponed.

10.3. The applicants argue that these development's benefits should be foregone, all for the sake of an interdict that only harms the cause of heritage. That is unjustifiable.

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17 Applicants' heads para 13.

18 *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ('***OUTA***') at para 50.

19 *National Employers Association of South Africa v Metal and Engineering Industries Bargaining Council and Others* (2015) 36 ILJ 2032 (LAC) para 7: '*the mootness of this appeal is plain. The interdictory relief sought has been overtaken by events. The action which it was formulated to prevent has occurred. The relief which was sought is now perfectly academic.*'

20 City's AA pp 1461-1470 paras 77-96.

21 City's AA p 1470 para 97.

Considered holistically, granting the interdict will be disastrous for the site's heritage and for the residents of Cape Town.[22]

11. Fourth, the applicants believe that they are entitled to determine what happens at the River Club site. They are not.

11.1. The applicants have been afforded every opportunity to make comprehensive submissions to the various decision-makers, and utilised those opportunities in full.[23]

11.2. Their submissions, and those of other interested and affected parties, were considered by the various public authorities and were taken into account in shaping the parameters of the development and the approval conditions. This was an exemplar of participatory decision-making.

11.3. The applicants are not, however, entitled to veto the development on the basis that they disagree with it.

12. Fifth, the applicants have an alternative remedy to vindicate the rights they seek to assert: the review proceedings contemplated in Part B of their notice of motion. There is accordingly no need for them to be granted extraordinary relief in the form of an interim interdict.

13. Sixth, the case for the review of the Mayor's decision has fallen apart. The applicants have wisely abandoned the grounds of review set out in their founding affidavit, but then impermissibly sought to introduce new grounds of review in reply. Those new grounds disclose no reviewable irregularity and are so palpably weak and that they impugn the *bona fides* of the applicants' attempts to review the City's decisions. The applicants' heads do not argue for any

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22 City's AA pp 1474-1476 paras 107-113; pp 1474-1476.
23 City's AA p 1458 paras 68-71.

heritage-related review challenge to the City's decisions. They argue about how much '*weight*' the Mayor should have attached to some objections.[24] The applicants presumably maintain a façade of attempting to review the Mayor's authorisation to justify their delay in reviewing Province's earlier decision and to explain the self-created urgency of the interdict application.

14. Finally, the applicants contend that these proceedings are urgent, but they delayed bringing this application for five and a half months after being informed of the Province's reasons and for three and a half months after being informed of the Mayor's reasons. They afforded themselves filing periods in excess of what is ordinarily permitted for non-urgent applications and repeatedly breached their undertakings about when they would file, but held the respondents to a truncated timeline. The City has been prejudiced in its ability to put forward the necessary evidence and argument that would allow this Court to give full and proper consideration to the matter. This is a misuse of the judicial process for dealing with urgent matters.

15. The applicants ask this Court to interrupt the implementation of a complex, polycentric and policy-laden decision because they are unhappy with the extent to which two factors (heritage and the environment) were considered.

    15.1. Factually, their claims are baseless: The applicants are unable to point to a single consideration that the City failed to consider in its decision-making. They have had multiple opportunities, which they used, to raise heritage and environmental concerns. Furthermore, they are unable to show how preserving a golf course, a polluted canal and a parking lot would have protected heritage and the environment,

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[24] Applicants' heads para 137.

or how the development (with rehabilitated environmental resources and various celebrations of the First Nations) would harm heritage or the environment.

15.2. Legally, the applicants' claims are unsustainable: neither an aggrieved party nor a review court can quash a decision-maker's evaluation because it does not agree with the '*weight*' that was given to one or two factors in a complex decision based on the discretionary evaluation of numerous considerations, or because it might have evaluated the factors differently. That would breach the separation of powers.[25]

16. The applicants have failed to prove any of the four requirements for an interim interdict:[26]

16.1. there is no *prima facie* right, because preserving the River Club as a golf club and conference facility will not protect any heritage or environmental resources;

16.2. there is no reasonable apprehension of irreparable future harm, because if the development proceeds it will only benefit the site's heritage and environmental resources, because the golf course and parking lot were never conservation worthy, and because the site has already been changed by four months of construction;

16.3. the balance of convenience is overwhelmingly against the grant of the interdict, and in favour of the considerable public interest in the development going ahead coupled with the lack of harm that will accrue if the interdict is refused; and

16.4. Part B of the applicants' notice of motion already contains their alternative remedy: review proceedings.

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25 *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) ('***Clairison's***') paras 17-23.

26 *OUTA* n 18 above para 41.

17. The interdict should therefore be refused.

AN INTERDICT WILL HARM HERITAGE

18. Below, we show how the City's answering papers explain in detail how an interdict will harm the site's heritage. The applicants do not dispute that evidence. The applicants make vague claims that an interdict will protect heritage. But the claim is unsupported by any facts.[27] There is no description of what heritage will be harmed by the development or how an interdict will protect heritage. The applicants cite constitutional rights, such as equality, culture, and environment, but do not explain in practical terms how an interdict will protect them.

19. It is undisputed that the River Club site's heritage is largely intangible. It does not manifest as graveyards, buildings or battle remnants. Instead, it takes the form of memories of, and historical associations with, First Nations' social, cultural, spiritual, political and economic experiences, practices and beliefs.[28] The tangible elements of the site's heritage are its open space and the surrounding riverine system.[29]

20. The tangible heritage elements are, at present, markedly degraded. The Liesbeek River has been diverted into a concrete canal that is choked with pollution and devoid of ecological functioning.[30] At the time of the Mayor's decision, the open space comprised exclusive-use golfing greens and an asphalt parking lot.[31] That degradation runs completely contrary to the site's heritage: it does nothing at all to echo, respect or celebrate the First Nations' history and

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27 There are remarkably no references to the record in the parts of the applicants' heads which assert irreparable harm (para 158.2) and which claim an infringement of rights (paras 87-91) under the heading 'infringement of substantive protections afforded to cultural rights'.

28 FA p 55 para 91; Jenkins supporting affidavit p 716 para 15; O'Donoghue supporting affidavit p 764 para 16; City's AA p 1449 paras 52.8 and 53. Discussed in paragraph 122.2 below.

29 City's AA p 1449 para 53. RA p 2634 para 98.

30 City's AA pp 1432 and 1450 paras 6 and 54.

31 City's AA p 1450 para 54.

experiences on and around the River Club site. A golf course, parking lot and concrete, rubbish-strewn canal are the antithesis of how the First Nations used and experienced the site.[32]

21. The First Nations' memories of, associations with and experiences on and around the site are not signified at the River Club.[33] Any visitor to the golf club or conference facility would remain ignorant of its history and importance to the Cape's indigenous people. Simply put, the site's indigenous heritage is, at present, completely ignored. Indeed, the exclusivity, pollution and artificiality of the current uses run completely contrary to the indigenous use and experiences of the site.[34]

22. As the Mayor explained in his affidavit, '*the subject property fails the site's heritage. Nothing positive is gained from preserving the status quo.*'[35]

23. None of these features of the site's uses, and their negative impact on heritage resources, is disputed by the applicants.[36] It therefore cannot be contested that preserving the golf course and the parking lot would have ossified the River Club as '*an exclusive recreational facility… that completely ignores and contradicts the history and culture of the property on which it is built*'.[37]

24. It is also undisputed that the development will result in the following:

    24.1. The Liesbeek River will be transformed from a polluted concrete canal into a naturalised river-course with an indigenously planted landscape.[38]

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32 City's AA pp 1437 paras 15.2.
33 City's AA pp 1432, 1433 paras 6, 8.
34 City's AA p 1450 para 54.
35 City's AA p 1459 para 72.4.
36 City's AA p 1456 para 62.
37 City's AA p 1456 para 64.
38 City's AA p 1453 para 55.4.

24.2. The amount of open space will be increased.[39] and more than 49,000 m^2 of the site (approximately one third of the available land) will be devoted to high-quality, pedestrian-friendly, indigenously-planted green open space that interfaces with the heritage infrastructure and the revitalised river corridor.[40]

24.3. The establishment of a cultural, heritage and media centre.[41] The centre will be prominently located in the development, to capitalise on various views from the site. It will allow the First Nations' history to be recorded and taught on their own terms.[42]

24.4. The construction of an amphitheatre for cultural performances.[43]

24.5. The establishment of an indigenous garden.[44] The garden will be actively used and managed by the First Nations, and will allow their knowledge of food and medicine to be put into practice, and so preserved.[45]

24.6. The incorporation of various commemoration initiatives into the development, such as the use of indigenous names and symbols.[46]

24.7. The construction of a heritage eco-trail around the development.[47] This will align with the First Nations' deep appreciation of the site's ecology, and allow visitors and pedestrians to experience that ecology on foot.[48]

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39 LL28 pp 585-586 para 202.
40 City's AA p 1453 para 55.5.
41 City's AA p 1450 para 55.2.
42 City's AA p 1451 para 55.3.
43 City's AA p 1450 para 55.2.
44 City's AA p 1450 para 55.2.
45 City's AA p 1451 para 55.3.
46 City's AA p 1450 para 55.2.
47 City's AA p 1450 para 55.2.
48 City's AA p 1451 para 55.3.

25. These are uniformly positive aspects that protect, elevate and celebrate the site's heritage resources.[49] This is not contested by the applicants.

26. The applicants refer to the off-site heritage resources in the surrounding area.[50] Those were expressly considered and addressed by the Mayor in his reasons.[51] Appropriate conditions of approval were imposed to, for example, concentrate the development's building heights along the northern perimeter of the property, to minimise any impact on the heritage resources to the south and west of the River Club site (such as the South African Astronomical Observatory).[52]

27. The development will result in exclusively positively heritage developments. As the Mayor described in his answering affidavit:[53]

> '[T]he rehabilitation of the Liesbeek River will re-establish an indigenously planted watercourse, thus recalling the natural state and significance of the river. The cultural, heritage and media centre will allow members of the First Nations to record and pass on their history on their own terms. The indigenous garden will put the First Nations' historical knowledge of food and medicine into practical use. The heritage eco-trails will echo the First Nations' experience of the natural aspects of the site. And the various commemoration and naming initiatives will allow the heroes of the First Nations to be appropriately memorialised.'

28. In the few instances where there might be adverse impacts (i.e. in respect of heritage resources on surrounding properties), those impacts were assessed and mitigated. Furthermore, the intangible heritage resources, by virtue of their intangibility, are largely impervious to construction:[54] the developer aims to introduce public open space, housing facilities and commercial precincts at the River Club site.[55] The establishment of those features will not in any way harm the First Nations' memories of, and associations with, the site.

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49 City's AA p 1454 para 56.
50 Applicants' heads para 46.5.
51 City's AA p 1449 para 52.9.
52 City's AA p 1454 para 55.6.
53 City's AA p 1535 para 320.
54 City's AA p 1531 para 304.
55 City's AA p 1432 para 7.

29. Chief !Garu Zenzile Khoisan's representations to the City have extolled the development as a genuine instance of indigenous agency: members of the First Nations partnering with a commercial enterprise to ensure both sustainable development and the enhancement of the site's heritage resources:[56]

> 'Our support for the project does not come lightly, as the area under consideration for the proposed development is a most sensitive location both in terms of its ecology, as also its deep heritage significance. Our support for this project has been extensively pondered and is primarily a strategic act of indigenous cultural agency where we, as an integral part of the Khoi and San resurgence, act in our own interest to secure a legacy for us and for seven generations into the future for which we are responsible. We have arrived at this position after much consideration and consultation with many of the senior indigenous leaders and their councils in the Peninsula, as also with prominent national leaders of the Khoi and the San.'

30. While the applicants may not support the First Nations Collective, they cannot deny that the use of the River Club site as a golf course and parking lot does nothing to protect or advance the existing heritage resources, just as they cannot gainsay the development's positive heritage impacts as outlined in paragraph 24 above.

31. The interdict's justification is therefore illusory: it will not protect heritage, because the use of the River Club site as a golf course and parking lot does not protect heritage; it will stall, and likely terminate, the only workable solution for promoting, celebrating and enhancing the site's tangible and intangible heritage. Its net impact will therefore be exclusively harmful to the cause of heritage. For this reason alone, the interdict must be refused.

32. Significantly, even if the applicants were somehow able to show that the River Club's golf course and parking lot should be preserved for heritage or any other purposes, those uses have, in all likelihood, already terminated and been substantially altered by four months of

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[56] City's AA pp 1454-1456 paras 58-61.

construction.[57] The state of the affairs that the applicants seek to preserve by means of the interdict has already changed. A future-looking interdict is therefore not appropriate.

NO PRIMA FACIE RIGHT

No right will be harmed if the interdict is refused

33. In *OUTA*, the Constitutional Court explained that in an application for an interim interdict pending a review, it is insufficient for an applicant to prove that it has prospects of success in the forthcoming review. In other words, the '*prima facie* right' that is the first requirement for an interdict cannot be met by showing that the applicant has a *prima facie* basis for setting aside the impugned decision. Instead, the applicant must prove some separate right that will be harmed in the future if the relief is not granted:[58]

> 'Under the *Setlogelo* test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.'

34. The applicants do not even attempt to meet this requirement. Instead, they rely for their *prima facie* right on an alleged '*right to the review of the unlawful decision at issue*',[59] and '*the review relief sought in part B in due course*'.[60] That is precisely the sort of claim that the Constitutional Court says is insufficient to justify an interim interdict. As discussed, interdicting construction will not prevent harm to any heritage rights. Because the applicants attempt to rely on their right to litigate the review, an interdict is impermissible under the clear authority of *OUTA*.

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57 See para 9 above.
58 *OUTA* (n 18 above) paras 49-50.
59 FA p 101 para 203.
60 Applicants' heads para 158.1.

No reviewable irregularity against the City

35. If the Court accepts that the applicants have failed to prove that the interdict will prevent harm to a right '*quite apart from the right to review*', then the applicants' '*case for review of the planning decisions*' is irrelevant for purposes of deciding whether they have established a *prima facie* right.

36. Nonetheless, in what follows we show that there is in any event no reviewable irregularity established against the City, even on a *prima facie* basis. (These heads of argument do not deal with the merits of the attacks on the environmental authorisations issued by the Province.)

The City's decisions

37. On 30 September 2020, the City's MPT granted various municipal planning permissions under the City's Municipal Planning By-Law, 2015 ('**the By-Law**') to authorise the development.[61] Various parties (including the applicants and their legal representatives) submitted internal appeals against the MPT's decision. On 18 April 2021 the Mayor, as the appeal authority, upheld the authorisation of the development and varied the conditions of approval.[62]

38. In Part B of their application, the applicants challenge the decisions of both the MPT and the Mayor.[63] However, since the Mayor exercised full and wide appeal powers in respect of the MPT's approval, his authorisation is the operative decision.[64] The review of the City's authorisations must therefore stand or fall on the strength of the Mayor's decision.[65]

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61 City's AA p 1445 para 38.
62 City's AA p 1446 para 44.
63 NOM, Part B, p 4 para 3.
64 City's AA pp 1438 and 1521 paras 16.2 and 261. See section 108(7) of the By-Law.
65 See *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] 2 All SA 330 (SCA) ('***Bo-Kaap***') para 80.

The applicants' shifting and impermissible case against the City

39. In their founding papers, the applicants set out three attacks against the MPT's decisions: the first was based on a supposed failure by the MPT to take into account the possibility that HWC might recommend that the River Club site should be listed in the provincial resources register;[66] the second was based on the MPT's allegedly irrational deviation from the Table Bay District Plan and several City policies;[67] and the third was based on a provisional protection notice that, on its own terms, had expired on 19 April 2020, long before either the MPT or the Mayor made their decisions.[68] The case in the founding papers against the operative decision of the Mayor (incorrectly identified as '*the Minister*') is a threadbare, throwaway two lines.[69]

40. Those attacks were roundly refuted by the City in its answering affidavit.[70] Understandably, the applicants have now abandoned their case against the City in the founding papers: the applicants' heads make no reference to them.

41. Instead of withdrawing against the City, the applicants then sought to introduce new attacks in reply. That is impermissible: in motion proceedings, an applicant must make out their case in their founding affidavit and may not add new grounds of review in reply. This '*does not stem from an overly technical approach to pleading but concerns fundamental fairness*'.[71] The City asks the Court to strike out the new grounds of review in the applicants' replying papers.[72]

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66 FA pp 91-93 and 100 paras 180-188 and 200.1. The allegation was bewildering: at the time of the MPT's decision, HWC had not made any recommendation to list the site, which the applicants acknowledged.

67 FA pp 94-98 and 101 paras 189-195 and 200.3. The complaint was about the weight to be attached to the policies. That is not a review ground: City's AA p 1479-1480 para 125.

68 FA pp 60-61 and 100-101 paras 108-113 and 200.2. The attack was based on a misinterpretation of section 29 of the Heritage Act: City's AA p 1480-1484 para 126.

69 FA p 98 para 196. The applicants do not dispute that they seem not to have even read the Mayor's appeal decision (City AA p 1479 para 124.5: unanswered in reply).

70 City's AA p 1478-1485 paras 122-128.

71 *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA) ('***Esau***') paras 60-61.

72 The City has filed a strike out application regarding the impermissible new material in reply.

42. In their heads of argument, the applicants now present three new arguments against the City's decisions:[73] (i) the Mayor allegedly improperly dismissed flood risk concerns;[74] (ii) the Mayor allegedly dismissed all the '*considered and well-substantiated views by its own internal experts*' regarding biodiversity impact;[75] and (iii) it was allegedly '*procedurally irrational*' for the Mayor to prefer the assessments by the expert reports procured by the developer over the City's own environmental management department.[76]

43. Those new arguments are impermissible: First, the arguments are not pleaded in the founding affidavit.[77] Second, in the applicants' heads of argument the arguments are supported only with references to annexures. It is not open to a party to argue on the contents of an annexure, without that ground having been fully pleaded in its founding papers.[78]

44. Hence, the three new arguments cannot support a review case against the City. Binding Constitutional Court and Supreme Court of Appeal precedent requires their dismissal.

45. Notably, none of the arguments for the review of the City's decisions in the applicants' heads have anything to do with heritage: the applicants have abandoned any attempt to argue that the Mayor failed to properly consider heritage concerns.

46. Accordingly, the applicants make out no case for a review of the Mayor's decision.

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73 Applicants' heads paras 123-138, under the heading 'Case for the review of the planning decisions'.
74 Applicants' heads para 131. The ground regarding flood risks is raised first in reply: RA p 2627 para 86.
75 Applicants' heads para 134.1. The ground regarding biodiversity is raised first in reply: RA p 2629 para 86.5.
76 Applicants' heads para 137. This was not even pleaded in reply.
77 *Esau* n 71 above paras 60-61.
78 See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T), especially at 324F-H, approved in *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) para 35 note 35.

Merits of the review arguments regarding the Mayors' decision

47. For the reasons discussed above, we submit that in deciding whether the applicants have established a *prima facie* right, this Court does not reach a consideration of the merits of the review case now advanced against the City in the applicants' heads.

48. In the alternative, if this Court is minded to consider the merits of the new review case against the City, it dissolves on scrutiny and in light of the Mayor's comprehensive and careful appeal decision (annexure LL28).[79] That decision makes it clear that the Mayor duly considered all flood risk, biodiversity and other environmental concerns, and dealt with them rationally.

49. We have prepared full written submissions on the merits of the applicants' three new arguments for the review of the City's decisions and set those out in paragraphs 79 – 127 below. Since we submit that, for purposes of determining the interdict application, the Court does not reach the merits of the review case against the City, those arguments are in an appendix. In summary:

    49.1. The applicants have sought to disguise a weak appeal as a review: they cannot show that the Mayor failed to account relevant considerations, or acted irrationally based on the evidence before him. So, instead, they dispute the merits of his evaluations and argue that he should have given different '*weight*' to some factors and should have assessed other factors in a different manner.

    49.2. That, however, is impermissible. A court will not overturn the decision of an administrative decision-maker discharging a complex function which entails the evaluation and balancing of numerous interests simply because the court or a third

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79 LL28 pp 514-672.

party would have given more weight to some concerns. To hold otherwise would breach the separation of powers.[80]

49.3. Notwithstanding the applicants' failure to plead in their founding affidavit the review grounds on which they now rely, the evidence on record clearly establishes that, contrary to the applicants' claims, the Mayor considered each of the concerns regarding heritage, the environment, biodiversity and flood risks, and undertook a reasoned and thorough analysis of those concerns. That analysis included consideration of the objections filed, scrutiny of the numerous expert reports and input from the City's officials. The Mayor assessed the extent to which any adverse impacts could be avoided or mitigated through the imposition of conditions of approval. The Mayor's detailed analysis fed into his evaluation under section 99 of the By-Law of whether the development should be approved.

49.4. The Mayor had to consider a range of complex, policy-laden and interwoven factors. The applicants have failed to show that any relevant factor was omitted from consideration. The Mayor's extensive reasons indicate that he discharged his polycentric function and ultimately reached a rational, fair and reasonable equilibrium, taking into account the full basket of factors that he was mandated to consider. Ultimately, he reached the balance required by section 99 of the By-Law. His decision therefore cannot be set aside on review.[81]

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80 *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) ('***Tikly***') 590H-591A; *Internal Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) ('***SCAW***') para 95; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) ('***Pharmaceutical Manufacturers***') para 90; *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) ('***Scalabrini***') paras 57 and 59; and *Clairison's* n 25 above paras 17 – 22.

81 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2005 (4) SA 490 (CC) ('***Bato Star***') paras 45-50 and 54; *Bo-Kaap* n 65 above paras 79 – 81.

NO REASONABLE APPREHENSION OF IRREPARABLE FUTURE HARM

50. As explained, if the development proceeds it will only benefit the site's heritage and environmental resources. Since the golf course and parking lot were never conservation worthy, and because the site has been further changed by four months of construction, there is no reasonable apprehension that the refusal of an interdict will cause irreparable harm. Notably, aside from a bald, unsubstantiated allegation,[82] the applicants' heads do not argue otherwise.

BALANCE OF CONVENIENCE AND PUBLIC INTEREST FAVOUR THE DEVELOPMENT

51. If an applicant establishes a *prima facie* right, proof of a well-grounded apprehension of irreparable harm and the absence of an adequate ordinary remedy, a court has a discretion to grant an interim interdict to protect the right. That discretion must be exercised by considering all relevant facts, the applicant's prospects of success in the contemplated legal proceedings and the balance of convenience. The balance of convenience must not only consider the interests of the litigating parties, but the broader public interest.[83]

52. In dealing with balance of convenience, the applicants' heads of argument do not claim that there is any consideration favouring the grant of an interdict.[84] They do not deny that the refusal of an interdict will cause no prejudice.[85] That is understandable because there is none. The only two interests which the applicants submit are at stake are those of the developer and those of the state coupled with the public interest concerns advanced by the Minister and the Mayor.[86]

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82 Applicants' heads para 158.2.
83 *Cipla Medpro (Pty) Ltd v Aventis Pharma SA* 2013 (4) SA 579 (SCA) paras 40 and 46.
84 Applicants' heads paras 139-153.
85 City's AA p 1434 para 14: unanswered in reply (RA p 2663).
86 Applicants' heads para 140 read with para 150.

53. As set out above, the development will not harm any heritage or environmental rights, whereas the award of the interdict will prevent the realisation of heritage and environmental benefits. On that basis alone, the balance of convenience is strongly against the award of the interdict. The undisputed public-interest considerations are overwhelmingly in favour of the development and against the interdict:

53.1. The development will rehabilitate the currently degraded site, improve the site's biodiversity protection and benefit and protect the environment, including by transforming the Liesbeek River from a concrete canal into a naturalised river and an indigenously planted landscape.[87] Those benefits, which are undisputed,[88] will be lost if the development happens elsewhere as the applicants propose.

53.2. The development will commemorate the intangible heritage that has hitherto been ignored by giving effect to the indigenous agency of various First Nations groups and establishing, among other things, the heritage and cultural centre, the amphitheatre, the indigenous garden and the eco-trails, the naturalised riverine system and public open space.[89] The applicants likewise do not deny these benefits,[90] and they propose no alternative way to commemorate the site's heritage.

53.3. The development will give Cape Town a massive and desperately needed boost: R4,5 billion in direct investment; increase local economic output by R8,55 billion; create 5,239 construction jobs and 19,000 employment opportunities.[91] This is not

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87 City's AA p 1453 para 55.4.
88 The City's para 55.4 is not dealt with in reply: RA p 2663.
89 City's AA pp 1450-1454 paras 55-56.
90 The City's para 55 is not dealt with in reply: RA p 2663.
91 City's AA p 1461 para 77.1.

denied by the applicants, who acknowledge that '*the potential economic contribution of the development, especially the creation of jobs, is a weighty matter*'.[92]

53.4. The developer will finance transport infrastructure worth tens of millions of Rand: a bridge over the confluence of the Black and Liesbeek Rivers, and the connection of Ndabeni in the east to Salt River in the west. That infrastructure will service the metropolitan area generally, in addition to the development, and will alleviate pressure on existing roads and lead to more equitable, balanced and logical transport routes.[93] This is not denied by the applicants.

53.5. The development will include a significant residential component, of which one fifth will be set aside for integrated and affordable housing.[94] It represents an excellent example of the type of collaboration between the public and private sectors that is required to meet the City's ever increasing housing demand.[95] The residential opportunities – including the affordable units – will be integrated, well-located and close to numerous economic, educational and social opportunities.[96] None of this is denied by the applicants who merely '*acknowledge that there is pressure on the housing market in Cape Town.*'[97]

53.6. The development will signal to the market that public-private partnerships which provide affordable housing, open-market residential stock and commercial opportunities are viable in Cape Town.[98] This is not denied by the applicants.

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92 RA p 2635 para 102.
93 City's AA pp 1461 and 1469 paras 77.2 and 94.
94 City's AA pp 1461 and 1466-1467 paras 77.3 and 87-89.
95 City's AA p 1466 para 86.
96 City's AA p 1468 para 93.2.
97 RA p 2664 para 182.
98 City's AA p 1469 para 93.4.

53.7. The above benefits come at a critical juncture. Cape Town is in the midst of a fourfold economic crisis that has seen commercial activity plummet and unemployment soar. The immediate injection of the development's benefits into the local economy is essential to Cape Town's economic recovery.[99] Any delay in the realisation of these benefits will be an '*immense and irreparable setback*' to the recovery effort.[100] This is not denied by the applicants who merely admit that they are '*not qualified or in a position to comment on this economic analysis*.'[101]

53.8. There is the very real prospect that the interdict, if granted, will not merely delay the development (and its associated benefits) for a matter of months or years, but will cause the development to fail entirely.[102] In response, the applicants contend that while it is a '*self-evident fact that litigation can have negative financial impacts on a developer*', that does not mean that they should be '*deprived of their remedies*'.[103] But it is not the purpose of an interim interdict to protect a review application and besides, the applicants have failed to prove a *prima facie* entitlement to review relief.

54. The applicants seek to dismiss the City's assessment of the public interest as '*speculative*'.[104] That is demonstrably untrue:

54.1. As the municipal planning regulator in Cape Town responsible for granting development authorisations, the City has extensive experience in property

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99 City's AA p 1470 para 97.
100 City's AA p 1470 para 97.
101 RA p 2664 para 183.
102 City's AA pp 1471-1474 paras 100-110.
103 RA p 2645 para 129.2.
104 Applicants' heads para 11.4.

development.[105] The City also has extensive direct experience of the consequences of litigation in respect of municipal planning authorisations.

54.2. The quantification of the development's economic impact is based on a socio-economic impact assessment undertaken by an independent consultant.[106]

54.3. The information about Cape Town's economic crises, the role of the development in the City's economic recovery and the value of the transport infrastructure was provided by the City's Director of Enterprise and Investment, who is directly responsible for new developments and economic growth in the City and has personal knowledge of this information based on this daily professional duties.[107] The Mayor, who deposed to the City's answer, did not '*speculate*' about his direct knowledge of the City's and the public's interests in a development which he authorised.

55. The applicants claim that there is no real problem in delaying the development or allowing it to take place on a different site.[108] Those claims, however, miss the point: Cape Town is in a serious economic crisis and cannot afford to delay the realisation of the development's manifold benefits. Furthermore, a development on a different site will forego the various benefits that are unique to the River Club site, including the development of critical public-transport infrastructure, the rehabilitation of the Liesbeek River, the establishment of the various heritage commemoration initiatives and the construction of affordable housing on a prime and well-located site.

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105 City's AA p 1436 para 14.7.
106 LL28 p 544 para 84.
107 Greyling supporting affidavit pp 2087-2100 paras 2-3, 12-32, 33-41 and 42.
108 RA pp 2645-2650 paras 129-141.

56. The possibility of developing another site is, in any event, irrelevant: a private developer has committed billions of Rand to developing the River Club site in a manner that will greatly benefit the public interest on several fronts.

57. Given the extent of the City's experience in planning authorisations and property development, and the developer's direct knowledge of its own financial affairs, compared to the applicants' undeniable ignorance on these issues, the applicants are in no position to contest the respondents' evidence of the likely harmful effects of the interdict being granted.

58. In summary: The applicants claim to be motivated by heritage and environmental concerns, yet they seek interdictory relief that will only cause prejudice to heritage and environmental interests. They seek to justify the interdict on the basis that the residents of Cape Town can afford to postpone the development's substantial socio-economic benefits, at a time of multiple economic crises and in circumstances where all the parties with actual and relevant knowledge are agreed that delay may prove fatal, but the residents of Cape Town and the public interest cannot afford to forego the undisputed benefits of the development.

59. The balance of convenience is therefore squarely against the grant of the interdict.

ALTERNATIVE REMEDY

60. The Mayor's answering affidavit explains that the applicants cannot be granted interdictory relief because they have a full and adequate legal remedy to protect the rights they seek to advance: the judicial review proceedings pursuant to Part B of their notice of motion.[109]

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[109] City's AA pp 1440 and 1485 paras 18 and 129-130.

61. Those allegations are not denied in the applicants' replying papers. Their heads of argument make the bald statement that they '*have no alternative remedy*',[110] but do not explain why review proceedings will be insufficient to protect their right to administrative justice.

62. In their replying papers, the applicants contend that the judicial review proceedings are not an adequate alternative because, by the time the review is determined, the environmental and municipal planning authorisations '*would almost certainly have been fully acted upon*'.[111] However, the authorisations have already been acted upon. And that is entirely the fault of the applicants, who elected to wait five and a half months before initiating a challenge to the environmental authorisation, three and a half months before seeking the review of the City's decision, and prosecuted these proceedings in a dilatory fashion. The applicants cannot claim extraordinary relief in the form of an interim interdict because they neglected to pursue the proper relief that was always available to them, *viz* an expedited review.

63. In any event, the applicants' argument is premised on the notion that maintaining the golf course and the parking lot is necessary to protect the site's heritage. As explained above, that is untrue. The applicants' core premise is false.

64. If the review court were to find that the applicants have proved that one of the impugned decisions should be set aside, it will be empowered to grant '*any order that is just and equitable*'.[112] That power is very wide, and allows the review court to issue any order that addresses the consequences of an invalid decision.[113] As the Chief Justice has explained, the courts have:

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110 Applicants' heads para 158.4.
111 RA p 2633 para 96.
112 Section 8(1) of the PAJA.
113 *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* 2021 JDR 1626 (WCC) paras 335, 336 and 363. See also *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 53.

> 'remedial powers so extensive that they ought to be able to craft an appropriate or just remedy, even for exceptional, complex or apparently irresoluble situations. And the operative words in this section are "any order that is just and equitable". This means that whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem.'[114]

65. Accordingly, if the applicants can prove that the impugned decisions must be set aside, the review court will be at large to take whatever steps are necessary to address the proven invalidities, including directing the developer to restore the status quo ante.

URGENCY, DELAY AND THE APPLICANTS' CONDUCT

66. At each stage of this litigation the applicants have prejudiced the respondents and the public interest by delaying and then imposing unreasonable timelines, while allowing themselves relatively extensive time to prepare their own papers and submissions. That is inherently prejudicial to the ability of the City (and the other respondents)[115] to defend their interests and those of the public and to the ability of the Court to give full and proper consideration to extensive issues.

67. The applicants' continued claim of urgency is baseless. While the applicants assert, without substantiation, that development will '*destroy*' the property's heritage value,[116] as mentioned, in fact no heritage resources are being harmed by construction.

68. Any urgency is self-created. The applicants' delay in bringing this application appears from the following key dates:

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114 *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) para 132.
115 Developer's AA pp 821-822 para 7.
116 Applicants' heads para 13.

68.1. Province's environmental authorisation decision was taken by the Director on 20 August 2020[117] and the related environmental appeal decision by the Minister on **22 February 2021**.[118]

68.2. The challenge against the City concerns the planning decision by the MPT on 30 September 2020 and the appeal decision by the Mayor on **18 April 2021**.[119]

68.3. On 12 May 2021 the developer made it clear that it would not provide the applicants with an undertaking to refrain from acting on the environmental and planning authorisations it had received.[120]

68.4. By 20 June 2021, the applicants admit that they '*noticed earthmoving vehicles moving onto the site and commencing earthworks*'.[121] By that stage they could have harboured no doubt that, if they wished to prevent the commencement of construction, they needed to institute legal proceedings immediately. And yet, they delayed for another month and a half.

68.5. The applicants served their interdict application only on **3 August 2021**.[122]

69. The applicants waited <u>more than five months</u> after the Minister's decision before instituting their application to review the environmental decision and to interdict its implementation. The applicants seek to justify that delay by saying that they were waiting for the City's planning decision, and:

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117 Province's AA p 2114 para 5.
118 Province's AA pp 2114-2115 para 6.
119 Applicants' heads paras 2.3 and 2.4.
120 RA p 2598 para 10.1.
121 RA p 2599 para 14.
122 Applicants' heads para 18. City's AA p 1446 para 46.

> 'it would have been both impractical and a waste of resources for the applicants to have brought separate reviews'.[123]

69.1. This is an astonishing admission by the applicants: They delayed deliberately. What's more is that conscious decision to delay was founded on strategy to review any unfavourable decision by the City – regardless of the merits.

69.2. That was an indefensible choice and a failed strategy because it is now clear from the collapse of their case against the City that there is no basis to review the Mayor's decision. Instead of withdrawing against the City, the applicants persist with a baseless attack of the Mayor's decision – presumably to try to justify their delay in reviewing Province's decision and to explain the self-created urgency of the interdict application. That lacks *bona fides* and is an abuse.

69.3. Without any *prima facie* review case against the City, the applicants must explain their more than five-month delay in reviewing Province's decision. They cannot.

69.4. In any event, the applicants took three and a half months after the City's decision to prepare their founding papers, in circumstances where they were always fully aware of the reasons for the City's decisions.

70. The applicants offer unacceptable excuses for their delay:

70.1. The applicants sought to attribute part of their delay to the time taken to raise funds to appoint legal representatives.[124] That claim appears to have been abandoned, and rightly so: the applicants' counsel act pro bono.[125]

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123 RA p 2601 para 19; applicants' heads paras 15-16.
124 RA p 2601 paras 18-19.
125 Applicants' letter to the Judge President dated 12 October 2021 para 6.

70.2. The applicants also sought to blame their delay on their junior counsel.[126] However, the applicants cannot rely on unexplained delays by their own legal representatives. Besides, on their own account, the applicants' attorneys waited until 9 June 2021 – more than three and half months after the Minister's decision – before instructing their counsel to start drafting the review applications.[127]

70.3. The applicants also say that they delayed launching these proceedings until the Minister of Water and Sanitation issued a water-licence decision.[128] That, however, is disingenuous: the Water Minister's decision has not been challenged in these proceedings. The applicants do not claim that they had any good grounds for an appeal.[129] Rather, in their own words, they did so purely to ensure that '*the proposed development could not proceed*'.[130] The applicants do not deny that that is an abuse.[131] Tellingly, the applicants also do not dispute that their water-licence appeal '*discloses [their] willingness to misuse legal processes to delay the development by any means necessary*'.[132]

70.4. The water-licence decision is quite irrelevant to the decisions that have been impugned. There is nothing in the Water Minister's decision that had any impact on the applicants' review in respect of the environmental and planning authorisations.

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126 RA pp 2604-2605 paras 20.9-20.15.
127 RA p 2604 para 20.11.
128 Applicants' heads para 17.
129 City's AA p 1501 para 182; undisputed in reply: RA p 2666 paras 187-188.
130 FA p 21 para 24.4; City's AA p 1501 para 182; undisputed in reply: RA p 2666 paras 187-188.
131 City's AA p 1501 para 182; undisputed in reply: RA p 2666 paras 187-188.
132 City's AA p 1501 para 182; undisputed in reply: RA p 2666 paras 187-188.

Their decision to delay until August is precisely the kind of self-created urgency that has been deprecated by the courts.[133]

70.5. The applicants blame the developer for creating urgency by successfully uplifting of the suspension of the water-use licence.[134] That submission is surprising given that the applicants do not dispute that their water-licence appeal is an abuse.[135]

71. Given that the applicants inexcusably delayed for five and a half months after the Minister's decision, they were under a duty to afford the respondents reasonable timeframes within which to file answering papers.[136]

71.1. Instead, the applicants launched the application as one of urgency and unreasonably sought to require the respondents to answer the 800-page application within five court days.[137] The applicants extended that deadline by ten court days, but maintained pressure on the respondents to file their answering affidavits under a truncated timeline (the City answered on 24 August 2021).[138] However, the applicants prepared their replying papers at a leisurely pace taking 18 court days (the applicants replied on 17 September 2021)[139] – almost double the ten court days ordinarily permitted for replying papers in non-urgent proceedings.[140]

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133 See *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Minister van Landbou en Andere* 1971 (1) PH F11 (T) at F11; and *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) para 33. City's AA p 1434 para 13.1.

134 RA p 2606 para 22.

135 City's AA p 1501 para 182; undisputed in reply: RA p 2666 paras 187-188.

136 See *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E-F.

137 NOM, p 3. The applicants have conceded that it is '*regrettable*' that the application has been brought '*on such abbreviated time periods, especially given the complexity of the available record and the length of the papers that have been filed*': FA pp 19-20 para 22.

138 Filing notice (notice bundle) p 30.

139 Filing notice (notice bundle) p 53.

140 Rule 6(5)(e) of the Uniform Rules of Court.

71.2. It was agreed between the parties that the respondents would have two weeks after the filing of the applicants' heads of argument to prepare their own heads, and that the hearing should be scheduled at least two weeks after the filing of the respondents' heads of argument, to allow the presiding officer sufficient time to work through a voluminous record with the benefit of the parties' written submissions.

71.3. However, the applicants unilaterally breached their undertaking and filed their heads almost a week late, affording themselves six and a half weeks to prepare their heads of argument, which they filed three weeks before the hearing. Because of the applicants conduct, this Court has been deprived of one week of preparatory time that the parties agreed would be appropriate.

72. The applicants complain that '*it is unrealistic to wait until the development is completed and then ask whether it was lawful or not.*'[141] No party is suggesting that. What the applicants were required to do was to launch proceedings as soon as the Province's decision – or at the very least the Mayor's decision – was published. In fact, a year ago, on 24 November 2020 the first applicant resolved to do exactly that: namely '*to institute review proceedings to prevent the proposed development from continuing*'.[142] Had they done so, a review could have been determined on reasonable timelines before construction commenced in late July 2021.

73. In summary, since the development is not harming any heritage resources there is no urgency. In any event, the applicant's delays are inexcusable, and any urgency is self-created. They have acted unreasonably by taking luxurious time for their papers and submissions but prejudicially

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141 Applicants' heads para 13.
142 RA p 2602 para 20.2.

squeezed the respondents. In the five and half months of deliberate delay by the applicants a review could have been dealt with without the need for the extraordinary relief of an interdict.

COSTS

74. The City indicated that it would seek costs against the applicants.[143] Such an order is justified: the applicants' reliance on *Biowatch* is misplaced because this is not public interest litigation. The interdict which they request would only harm the public interest. The applicants cannot show how an interdict would protect any heritage resource, the environment or any constitutional right.

75. The review case against the City is no different to the *Bo-Kaap* matter in which heritage concerns were used in an attempt to review the City's planning decision.[144] The Supreme Court of Appeal held the unsuccessful applicants must pay the City's costs because the mere labelling of litigation as '*constitutional*' is insufficient. For the *Biowatch* principle to apply, the case should raise genuine, substantive, constitutional considerations. The rule does not mean risk-free asserted constitutional litigation.[145]

76. Furthermore, the *Biowatch* principle does not apply where there is '*conduct on the part of the litigant that deserves censure*'.[146] As set out above, the applicants' delays, prejudicial timing and misuse of legal process warrants this Court's censure. The applicants should have withdrawn against the City on receipt of its answering papers. Instead, they persisted with an unmeritorious case against the City to excuse their tardiness.

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143 City's AA p 1547 para 372.
144 We discuss the similarities between this case and *Bo-Kaap* in paras 96-97.3 below.
145 *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] 2 All SA 330 (SCA) paras 83-86.
146 *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC) paras 22-23.

77. The City therefore asks for the applicants to pay its costs, including the costs of two counsel.

CONCLUSION

78. The application for relief in Part A of the notice of motion should be dismissed with costs, including those of two counsel.

RON PASCHKE SC
ASHLEY PILLAY
Counsel for the City

Chambers, Cape Town
16 November 2021

APPENDIX: MERITS OF THE REVIEW ARGUMENTS REGARDING THE MAYORS' DECISION

79. As discussed in paragraphs 48 and 49 above, this appendix deals with the merits of the review case against the City (although as discussed, we submit that in deciding the application for the interim interdict, the Court does not reach the merits of the review case against the City).

80. In this appendix, we discuss the limits of judicial review and section 99 of the By-Law. In explaining how the Mayor properly exercised his broad discretion, we deal with the three new grounds of review argued in the applicants' heads, namely (i) flood risk, (ii) biodiversity and (iii) alleged 'procedural irrationality'. Lastly, we show how the Mayor comprehensively considered and accommodated all the heritage issues and that there was no infringement of constitutional rights.

The limits of judicial review

81. The applicants confuse appeals and reviews, and attempt to dress up a weak appeal against the Mayor's decision as the judicial review thereof.[147] The Constitutional Court has cautioned that this must not be done.[148] The applicants' confusion is fatal: while a court may review an administrator's discretionary decision, it may not subject such a decision to an appeal – that would breach the separation of powers.

82. A review, on the other hand, is quite different: it is '*a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and*

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147 City's AA para 16.2; para 1438.
148 *Bato Star* n 81 above para 45.

properly'.[149] The same perspective was expressed by the Constitutional Court when considering the limits of judicial intervention:[150]

> 'Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric' [our emphasis].

83. In *Pharmaceutical Manufacturers*[151] the Constitutional Court held that a court cannot interfere with a decision '*simply because it disagrees with it or considers that the power was exercised inappropriately*'. Likewise, in *Scalabrini*[152] the Supreme Court of Appeal accepted that it is not the province of the courts –

> 'to make their own evaluation of the public good, or to substitute their personal assessment of the social and economic advantages of a decision… The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions which appropriate decision-making on social, economic, and political questions requires.'

84. In a similar vein, it concluded that '*decisions heavily influenced by policy generally belong in the domain of the executive*' and should be granted due deference by the courts.[153]

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149 *Tikly* n 80 above 590H-591A.

150 *SCAW* n 80 above para 95.

151 *Pharmaceutical Manufacturers* n 80 above para 90. Chaskalson P explained the rationality test as follows:

> 'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries... The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision' [our emphasis].

152 *Scalabrini* n 80 above para 59.

153 *Scalabrini* n 80 above para 57.

85. An incident of the distinction between appeal and review is the requirement that a court may not interfere in an administrator's discretion to decide the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue.

86. In *Clairison's*, which also concerned development authorisations, the appellant argued that the decision-maker had failed to take certain considerations into account. The Supreme Court of Appeal found that this was insupportable on the evidence: the record clearly referred to the considerations. The appellant's true complaint, so the Court found, was that the decision-maker granted certain weight to each of the considerations, whereas the appellant thought that they should be granted more or different weight.[154]

87. Nugent JA and Swain AJA dismissed both the appellant's complaints and the High Court's findings:[155]

> 'We think it apparent from the extracts from her judgment we have recited, and the judgment read as a whole, that the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more to ensure that the decision-maker has performed the function with which he was entrusted' [our emphasis].

88. The Supreme Court of Appeal explained the position as follows:[156]

> 'The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere.'

89. It concluded:[157]

> 'It is clear from the reasons given by the MEC that the factors on which he was taken to task were pertinently considered: they were the very justification he advanced for his decision … The case

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154 *Clairison's* n 25 above para 17.
155 *Clairison's* n 25 above paras 18-20.
156 *Clairison's* n 25 above para 22. See also *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA) para 27; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC) para 62; *JH v Health Professions Council of South Africa and Others* 2016 (2) SA 93 (WCC) para 23.
157 *Clairison's* n 25 above para 23.

> advanced by Clairisons was that the existing development, and the approvals of the former MEC, had set a precedent for urban development that the MEC ought to have adopted. That is no more than a difference of opinion. There has been no suggestion that the avoidance of urban sprawl was not a legitimate environmental concern upon which the MEC was entitled to found his decision. Whichever opinion might be thought to be the correct one, the law entrusts the decision to the MEC. Once having correctly identified the question for decision and applying his mind to deciding it – both of which he clearly did – then it is the view of the MEC that is required by law to prevail.' (Emphasis added.)

90. In the present case, the applicants are not entitled to impugn the City's decisions because they disagree with how some factors were evaluated, or because they think that the Mayor should have preferred their opinion, or because they argue that some objections should have been given more '*weight*'.[158] Instead, the law entrusts the decision to the Mayor.

Section 99 of the By-Law

91. When the Mayor considered the development, he exercised wide appeal powers: the parties made new submissions and the Mayor made a fresh determination on the merits of the matter. It was open to him to revisit each of the MPT's findings and come to a different conclusion if he saw fit.[159] Hence it is the Mayor's decision which is operative, not that of the MPT.[160]

92. The Mayor decided the appeals in terms of section 99 of the By-Law.[161] Subsection (1) sets out the '*minimum threshold requirements*' for a development application:

> '(a) the application must comply with the requirements of this By-Law;
> (b) the proposed land use must comply with or be consistent with the municipal spatial development framework, or if not, a deviation from the municipal spatial development framework must be permissible;
> (c) the proposed land use must be desirable as contemplated in subsection (3); and
> (d) in the case of an application for a departure to alter the development rules relating to permitted floor space or height, approval of the application would not have the effect of granting the property the development rules of the next subzone within a zone.'

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158 City's AA p 1479 para 125.1.
159 *Tikly* n 80 above at 590F-H; *Bo-Kaap* n 65 above para 80.
160 See para 38 above.
161 City's AA pp 1521 and 1526 paras 259 and 282.

93. The Municipal Spatial Development Framework ('**MSDF**'), the City's core forward-planning instrument,[162] is a lengthy document.[163] It numbers 280 pages, enshrines three overarching spatial strategies and prescribes 42 different spatial policies that must inform land-use and development decisions. Under section 99(1)(b), those strategies and policies must be taken into account when evaluating whether a development application meets the By-Law's threshold requirements.

94. Section 99(1)(c) of the By-Law establishes '*desirability*' as one of the controlling concepts for evaluating an application. Subsection (3) prescribes the following open list of desirability informants:

> '(a) socio-economic impact;
> (b) …
> (c) …
> (d) compatibility with surrounding uses;
> (e) impact on the external engineering services;
> (f) impact on safety, health and wellbeing of the surrounding community;
> (g) impact on heritage;
> (h) impact on the biophysical environment;
> (i) traffic impacts, parking, access and other transport related considerations; and
> (j) whether the imposition of conditions can mitigate an adverse impact of the proposed land use.'

95. Once the City has determined that a proposed development is desirable, and meets the other minimum threshold requirements (such as consistency with the MSDF), it must evaluate whether or not to approve the application. In so doing, section 99(2) of the By-Law requires that the City must '*consider all relevant considerations*', including:

> '(a) any applicable spatial development framework;
> (b) relevant criteria contemplated in the development management scheme;
> (c) any applicable policy or strategy approved by the City to guide decision making, which includes the Social Development Strategy and the Economic Growth Strategy;
> (d) the extent of desirability of the proposed land use as contemplated in subsection (3);
> (e) impact on existing rights (other than the right to be protected against trade competition);
> (f) in an application for the consolidation of land unit –
> (i) the scale and design of the development;

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162 City's AA p 1526 para 281.
163 City's AA p 1465 para 82.

(ii) the impact of the building massing;
(iii) the impact on surrounding properties; and

(g) other considerations prescribed in relevant national or provincial legislation, which includes the development principles as contained in section 7 of the Spatial Planning and Land Use Management Act, 2013 (Act no. 16 of 2013).'

96. Hence under section 99, 'heritage' and 'biophysical environment' are two among this list of open-ended desirability considerations, and desirability is one of several relevant considerations which must be considered.

97. The case of *Bo-Kaap*[164] – which also concerned a challenge to the Mayor's authorisation of a development under section 99 of the By-Law – is instructive.

97.1. The proposed development was in the centre of Cape Town and had attracted more than 1,000 objections.[165] The City's heritage officials opposed the developer's proposal due to its '*sheer size*' and their concerns about negative impacts on heritage resources.[166] Heritage Western Cape ('**HWC**') was also opposed to the development proposal.[167]

97.2. The objectors alleged that the Mayor, in authorising the development under section 99 of the By-Law, had failed to have due regard to heritage concerns.[168] They also alleged that the City had ignored its own policies.[169]

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164 *Bo-Kaap* n 65 above.
165 *Bo-Kaap* n 65 above para 12.
166 *Bo-Kaap* n 65 above paras 13-16 and 18.
167 *Bo-Kaap* n 65 above para 19.
168 *Bo-Kaap* n 65 above paras 1 and 27. The '*nub of the appellants' case, whether by reference specifically to the by-law or to the labyrinth of policies, strategies and statutory provisions, was that heritage considerations were ignored or downplayed and that the decisions by the City and the Mayor were therefore unreasonable, irrational or tainted by the City's mistaken position in relation to base zoning rights*' (para 65).
169 *Bo-Kaap* n 65 above paras 31-34.

97.3. Navsa JA, for a unanimous Supreme Court of Appeal, dismissed the objectors' claims:

97.3.1. The '*mass of documentation*' produced was '*a clear indication that the full range of countervailing interests were seriously and extensively engaged with*'.[170]

97.3.2. The Mayor's decision could not be reviewed simply because '*it was not the best decision that could have been made.*'[171] In appeal proceedings, the decision-maker is concerned with the merits of the decision and must ask the question: is the decision correct? In review proceedings, on the other hand, the court is concerned with the decision's legality: '*is it within the limits of the powers granted?*'[172]

97.3.3. The Supreme Court of Appeal held that whatever the Court or the appellants may have thought of the conclusions reached by the City, their views were irrelevant. Because the City had had regard to heritage concerns, along with all other section 99 concerns, the approvals could not be impugned:[173]

> '[T]he City's officials, the MPT and the MAP, despite the use of somewhat opaque language, in fact had regard to heritage concerns. They all engaged with the developer and objectors on that aspect. In truth, the balance envisaged by section 99 was achieved. The City's experts and those who served on the MPT and MAP were undoubtedly qualified to deal with the subject matter, as was the Mayor's technical advisor. It is not for the Court to second-guess these experts, save where they committed a reviewable irregularity. This is not to imply judicial timidity but rather to ensure that when judicial intervention occurs it is based on principle and within the bounds of the law, including observing the doctrine of the separation of powers' [our emphasis].

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170 *Bo-Kaap* n 65 above para 70.
171 *Bo-Kaap* n 65 above.
172 *Bo-Kaap* n 65 above paras 71-72.
173 *Bo-Kaap* n 65 above para 79.

97.3.4. The Supreme Court of Appeal also concluded that, whatever defects may have been present in the MPT's decision were cured by the Mayor on appeal:[174]

> '[T]he Mayor's reasons for arriving at her decision … undoubtedly reveal that she considered the base zoning as well as all the other aspects she was obliged to take into account. In particular, she took into account heritage concerns especially those raised by the [heritage officials]. She had all the expert advice she required in order to enable her to reach a balanced decision in terms of section 99.'

97.3.5. Navsa JA concluded that the Mayor had set out a reasoned basis for disagreeing with both the City's heritage officials and HWC, and that her decision therefore could not be impugned.[175]

The Mayor properly exercised his broad discretion

98. The applicants review case is that the Mayor's reasoning is '*inadequate and reveals a determination… to approve the development application despite reasoned positions adopted by experts within his own administration.*'[176] They allege that the Mayor '*cursorily dismissed all concerns relating to flood risk*'[177] and dismissed the environmental officials' '*considered and well-substantiated views*' regarding biodiversity concerns.[178]

99. The applicants do not even allege, let alone establish, that the Mayor failed to consider those factors or that his consideration was unreasonable or any other reviewable ground. Understandably so: his decision is sound and discloses no grounds of review. Instead, the high-

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174 *Bo-Kaap* n 65 above para 81.
175 *Bo-Kaap* n 65 above paras 59 and 81.
176 RA pp 2625-2626 para 85.
177 Applicants' heads para 131.
178 Applicants' heads para 134.1.

water mark of the attack is that the views of some of his officials about flooding and biodiversity should have '*carried much weight*'.

100. Their grounds of review therefore fall foul of *Bo-Kaap* and *Clairison's*: an administrative decision cannot be set aside simply because the Court is of the view that someone's view should have carried more '*weight*' or that a different or better decision could have been reached.

101. The City is required to show that, in accordance with section 99 of the By-Law, flooding and biodiversity concerns were taken into account.[179] That the Mayor did so is evident from his answering affidavit:

101.1. As part of assessing whether the development would be sustainable, the Mayor '*evaluated the development's ecological costs and environmental impacts, with due regard to several thorough investigations and assessments undertaken by experts, as well as input from the City's environmental officials*'. The core of his environmental analysis was set out in almost 70 paragraphs of his reasons. Among other things, he considered '*flood risks*' and '*biodiversity impacts*'.[180]

101.2. Those allegations are not denied by the applicants.

101.3. In order to address flooding concerns, the Mayor imposed conditions mandating the implementation of flood-attenuation measures as recommended in the expert hydrology report (conditions 29 and 35-39).[181]

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179 *Bo-Kaap* n 65 above paras 79-81.
180 City's AA pp 1462 and 1527-1528 paras 77.4 and 288-289.
181 City's AA pp 1462 and 1488 para 77.6 and 143. The conditions are in DP2 pp 1568-1569.

101.4. Neither the imposition of the conditions, nor their sufficiency to address the flood-risk concerns, is disputed by the applicants.

101.5. The Mayor was satisfied that the development would have net ecological benefits because, among other things, it included '*various initiatives favouring biodiversity, including a range of interventions to support the endangered Western Leopard Toad and other local fauna.*'[182] Part of the Mayor's environmental analysis included an assessment of the ecological and biodiversity functionality of the Raapenberg Wetlands, which lie adjacent to the River Club site and have important linkages with it,[183] and the Black and Liesbeek River corridors.[184]

101.6. Again, none of those allegations is denied by the applicants.

102. The above explanations were offered by the Mayor in his answering affidavit. The founding affidavit had not impugned his consideration of environmental factors generally, or flood-risk or biodiversity concerns in particular, so the Mayor did not elaborate further.

103. Had the new grounds of review impermissibly introduced in the applicants' replying affidavit and their heads of argument been pleaded in their founding affidavit, then the Mayor would have been able to explain his detailed consideration of environmental considerations, flood risks and biodiversity impacts. He would have done so with reference to the detailed reasons that he issued for his decision.[185] We set below the relevant parts of those reasons in relation to the three new grounds of review related to (i) flood risk, (ii) biodiversity and (iii) alleged 'procedural irrationality'. (While the reasons which follow are set out in an annexure to the

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182 City's AA p 1462 para 77.5.
183 City's AA pp 1502-1503 para 188.
184 City's AA p 1527 para 288.
185 LL28 pp 514-672.

papers, the City is still prejudiced by not having had a chance to address them in answering papers and where necessary to provide additional evidence.)

(i) Flood risk

104. In his appeal decision, the Mayor says the following in respect of the flood risk:

104.1. The subject property's location on a floodplain was one of the headline issues that the Mayor flagged at the beginning of his reasons.[186] Furthermore, he noted that express approvals were sought in order to '*mitigate flooding concerns*'.[187]

104.2. In explaining the further plans that would be required in order for the development to be implemented, the Mayor indicated that the conditions of approval required, among other things, engineering reports on flood resilience.[188]

104.3. The Mayor was at pains to ensure that any development on the floodplain was carefully managed in accordance with the MSDF. He considered, among other things, the expert studies that had been commissioned, the mitigation steps that would be implemented and the public misconceptions regarding the flood risks.[189]

104.4. The Mayor considered and, where appropriate, imposed several conditions which legally binds the developer to implement mitigation strategies. These include: raising the surface level of buildings;[190] conditions in respect of engineering services;[191]

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186 LL28 p 517 para 9.
187 LL28 pp 516 and 517 paras 2.2 and 5.
188 LL28 p 522 para 37.3.
189 LL28 pp 538-539 para 72.
190 LL28 pp 543 and 554 paras 79.4 and 124.
191 LL28 p 551 para 112.

geographical and physical constraints;[192] the use of natural flood-management resources;[193] buffering the riparian areas, as insisted upon by the City's stormwater officials;[194] mandating the developer to safeguard surrounding properties and mitigate any impacts;[195] the registration of servitudes to protect floodplains and ecological buffers;[196] stormwater attenuation measures in the landscaping plan; the development and implementation of a stormwater management plan; and complying with the measures recommended in the expert hydrology assessment.[197]

104.5. The Mayor noted that the City's stormwater officials were of the view that the proposed development would not significantly increase local flood risk and that it would be preferable to impose mitigation measures rather than prohibit the development outright.[198]

104.6. The Mayor expressly addressed the objectors' flooding concerns[199] and incorporated a detailed analysis that was dedicated to those concerns.[200] He also set out a thorough evaluation of the requirements of the City's Floodplain and River Corridor Management Policy and was ultimately satisfied both that the policy's overarching objectives would be achieved and that, where there were deviations from the policy's guidelines, those were reasonable and appropriate.[201] That evaluation was followed

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192 LL28 p 554 para 125.1.
193 LL28 p 555 paras 128-129.
194 LL28 p 556 para 135.
195 LL28 p 558 para 143.1.
196 LL28 pp 636-637 para 326.
197 LL28 p 555 para 127. See also p 653 para 414.
198 LL28 pp 554-555 para 126.
199 See, for example LL28 p 554-625 paras 125, 143, 280 and 284.
200 LL28 pp 598-599 paras 232-236.
201 LL28 pp 649-650 paras 391-398.

by a further detailed consideration of the requirements of the City's Management of Urban Stormwater Impacts Policy.[202]

104.7. Although the environmental officials expressed concerns about the expert hydrology assessments, the stormwater officials with the necessary expertise were of the opinion '*that the City should be guided by the expert studies and reports procured by the developer*'.[203] Furthermore, the Mayor expressly considered the environmental officials' concerns, but was satisfied with '*the various assessments undertaken by the specialised department i.e. Catchment and Stormwater Management*'.[204]

104.8. On appeal to the Mayor, the developer indicated that it would comply with various flood-risk policy objectives, such as the 24-hour detention requirement in respect of certain storm events.[205] That obviated the need for the Mayor to consider deviating from the policy.

(ii) Biodiversity

105. In his appeal decision, the Mayor says the following in respect of biodiversity:

105.1. The Mayor analysed which portions of the River Club site fall within the '*Critical Natural Asset*' designation and was satisfied that the necessary green open spaces would be retained on those portions to protect biodiversity.[206] He was also satisfied

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202 LL28 pp 650-652 paras 399-410.
203 LL28 p 556 para 136.
204 LL28 p 556 para 137.
205 LL28 p 556 para 136.
206 LL28 p 537 paras 71.2 and 71.3.

that the development met the requirements of the MSDF's Biodiversity Network by, for example, improving the ecological functioning of the riverine corridor.[207]

105.2. The Mayor was satisfied, based on expert analysis, that the proposed development's net ecological effect would be positive.[208] In reaching his conclusion, the Mayor engaged thoroughly with, among other things, an '*extensive biodiversity study*'[209] which was, in turn, informed by input from various specialists, including a freshwater ecologist, a faunal specialist, a botanical specialist, an avifaunal specialist and a groundwater specialist.[210] Among other things, the Mayor considered: the surrounding river catchment system; the Raapenberg Wetlands; habitat usage by birds (including waterfowl and Giant Kingfishers), the Western Leopard Toad, the Cape Galaxias (a fish), the African Clawless Otter and the Cape Dwarf Chameleon; the number of mammals, amphibians and reptiles on the River Club site; the considerations and interventions required to protect faunal habitats; and prevailing pollution levels and historical interventions (including canalisation).[211]

105.3. The Mayor also evaluated various development components that could have biodiversity impacts and that could be incorporated to support floral and faunal habitats.[212] The biodiversity assessment also proposed various mitigation measures to limit environmental damage.[213]

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207 LL28 pp 539-540 para 73.
208 LL28 p 538 para 72.1.
209 LL28 pp 538-539 para 72.5.
210 LL28 p 599 para 237.
211 LL28 pp 599-603 para 238.
212 LL28 pp 603-606 paras 239-240.
213 LL28 pp 606-607 para 241-243.

105.4. As explained below, the Mayor devoted significant attention to concerns that an environmental official ('**the Acting Director**') had with the biodiversity impact assessment. In many instances, the concerns were wrong – they were not '*considered*' or '*well-substantiated*', as alleged by the applicants.[214] For example:

105.4.1. The Acting Director was concerned about '*infilling the Liesbeek River*'. However, he had misunderstood the development concept, which would transform the western Liesbeek channel into a stormwater swale with habitable wetland spaces for the site's fauna. The Liesbeek River itself flows on the opposite (eastern) side of the property and will not be infilled. Instead, the Liesbeek River will be rehabilitated from a polluted concrete canal into a natural watercourse.[215] Furthermore, the riverine rehabilitation would be ensured through enforceable conditions of approval.[216]

105.4.2. The Acting Director was of the view that a 35-metre watercourse buffer was required. The development proposal had been updated and the buffer requirement had been exceeded: a 40-metre buffer will be provided.[217]

105.4.3. The Acting Director was concerned that the development would result in the loss of open space. The Mayor disagreed: the development would see 4% more open space.[218] Moreover:

> 'the development will substantially improve the quality of open space from both ecological and heritage perspectives. Rather than an inaccessible, private golf course with its alien lawns, straddled by an artificial canal which is hostile to indigenous fauna and flora, the transformed habitat will be accessible,

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214 Applicants' heads, para 134.1.
215 LL28 p 610 paras 250.4 and 250.5.
216 LL28 p 611 para 253.
217 LL28 p 610 para 251.
218 LL28 pp 585-586 para 202.

> environmentally harmonious, and undoubtedly more reflective of, and consistent with, the site 's heritage'.[219]

105.4.4. The Acting Director was concerned that the biodiversity assessment had not been based on on-site evidence. However, he was incorrect: the specialists had conducted multiple site visits, and had conducted their studies in accordance with best practice and the precautionary principle.[220]

105.5. The Mayor also dealt with climate change's implications for the development,[221] as well as the various biodiversity and other environmental concerns raised by objectors.[222] Each of the concerns was considered and responded to.

105.6. The Mayor considered biodiversity in the context of the Table Bay District Plan,[223] the City's Environmental Strategy[224] and the City's Bioregional Plan.[225]

105.7. The Mayor imposed various conditions to protect biodiversity, including in respect of: planting initiatives to replace alien vegetation with indigenous flora;[226] the transformation of the Liesbeek River to substantially improve riverine functionality;[227] and the establishment of appropriate faunal corridors and habitats.[228]

105.8. Having taken into account all relevant considerations, the Mayor was satisfied that the development would '*have a substantial and positive effect on the biophysical*

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219 LL28 pp 611-612 para 254.
220 LL28 p 613 para 255.2.
221 LL28 pp 615-621 paras 259-273.
222 LL28 pp 621-627 paras 274-291.
223 LL28 p 634 paras 317-318.
224 LL28 p 648 paras 386 - 389.
225 LL28 p 647 paras 384-385.
226 LL28 p 623 para 280.2.
227 LL28 p 623 paras 281.1-281.2.
228 LL28 pp 623-624 para 281.3.

environment' and would further '*represent an admirable example of sustainable development.*'[229] He concluded as follows:

> 'The proposed development will see the subject property transformed from a golf course with a large parking lot into a mixed-use facility with a significant area dedicated to high-quality green open space that has been intentionally designed to maximise ecological functionality, with particular regard for watercourse functioning, indigenous flora and supporting bird life, the endangered Western Leopard Toad and various other forms of fauna.'[230]

106. Notwithstanding the applicants' failure to plead the grounds of review relied on in their heads of argument, the evidence before this Court makes it clear that the environmental, flood-risk and biodiversity concerns were given extensive consideration, which consideration, among other things, was informed by numerous expert assessments and resulted in the imposition of various conditions of approval that will, among other things, protect the environment and biodiversity and adequately mitigate flood risks.

107. The notion that the Mayor failed to properly consideration to those concerns is unsustainable.

108. The applicants refer to the City's Biodiversity Agreement with CapeNature.[231] However, it is not apparent what their ground of review is: they do not explain what is wrong with the agreement, or how it posed an obstacle to the Mayor's decision.

109. In his reasons, the Mayor explained that the development was consistent with the terms of the agreement and that, if any changes were required, they could be addressed through engagements with CapeNature.[232] There is nothing unlawful or irregular about that.

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229 LL28 p 627 para 292.
230 LL28 pp 627-628 para 293.
231 Applicants' heads paras 135 and 136.
232 LL28 pp 614-615 para 256.

110. The nub of the applicants' complaint is that they are unhappy that the Mayor disagreed with the objections in the Acting Director's internal appeal grounds in respect of the fourth respondent's decision to grant an environmental authorisation.[233]

111. That, however, is insufficient to establish a ground of review, let alone a basis upon which to grant interdictory relief:

111.1. Province's decision-making process under the National Environmental Management Act, No 107 of 1998 ('**NEMA**') is distinct from the City's decision-making process under the By-Law. The submissions made by a City official in a NEMA process cannot bind the Mayor when he makes an independent determination in terms of section 99 of the By-Law. The Mayor would have acted unlawfully if he had regarded himself bound.[234]

111.2. The applicants admit that '*the Mayor addressed the appeal submitted by the EMD*' in his reasons.[235] The fact that they thought the Mayor's engagement could have been more comprehensive or reached a different conclusion is neither here nor there – in accordance with *Clairison's* and *Bo-Kaap*, once the Mayor applied his mind to the concerns raised by the Acting Director, it is not open to the applicants to argue that he should have given them more '*weight*'.

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233 Applicants' heads paras 129-130 and 133-135.

234 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) paras 84-97. See also *Clairison's* n 25 above para 23: the fact that an official previously expressed a particular view on a particular topic cannot bind a different decision-maker exercising a different function.

235 Applicants' heads para 129.

111.3. In any event, the record is clear that the Mayor addressed the Acting Director's concerns.[236] An entire section of the Mayor's decision (six pages) was devoted to considering and addressing the concerns in detail.[237]

111.4. Among other things, the Mayor considered Province's reasons for dismissing the various appeals against the environmental authorisation. That included the reasons for dismissing the City's environmental official's appeal.[238]

112. The Mayor considered each concern that was raised in respect of heritage, the environment, biodiversity and flood risks (whether by the Acting Director or otherwise). He addressed them, and recorded his reasons. Those reasons formed part of the desirability analysis, alongside the six other desirability factors that had to be considered in terms of section 99(3) of the By-Law. The development's desirability, in turn, was one among a range of elements that the Mayor considered in deciding whether to authorise the development, including consistency with the MSDF (with its three spatial strategies and 42 spatial policies), the City's panoply of land-use policies (referred to by the Supreme Court of Appeal as a '*labyrinth of policies [and] strategies*')[239] and the five spatial development principles prescribed by national and provincial legislation.[240]

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236 City's AA p 1529 para 293.
237 LL28 pp 609-615 paras 248-248.
238 City's AA p 1445 para 41.
239 *Bo-Kaap* n 65 above para 65.
240 Section 99(2)(g) of the By-Law. In *Bo-Kaap*, the High Court concluded that '*heritage concerns could not be considered to be the pre-eminent or sole criteria in deciding applications such as those in the present case. The Court found that it is but one of a basket of factors to be balanced in order to arrive at a decision*' (above n 65 para 58, as summarised by the Supreme Court of Appeal).

113. The Mayor had to consider a range of complex, policy-laden and interwoven factors. His extensive reasons indicate that he discharged that function and ultimately reached a rational, fair and reasonable equilibrium. His decision therefore cannot be set aside on review.

(iii) There was no 'procedural irrationality'

114. The applicants contend that it was '*procedurally irrational*' for the Mayor to dismiss the City's environmental officials' objections by referring to the expert reports submitted by the developer.[241]

115. The applicants are wrong:

115.1. As the Supreme Court of Appeal explained in *Bo-Kaap*, the Mayor, in making a decision under section 99 of the By-Law, is not bound by the assessments of either the City's heritage and environmental officials or HWC. Provided that the Mayor takes their evaluations into account, and comes to a reasoned conclusion of his own, (which he indisputably did), his decision is unimpeachable.[242]

115.2. When a decision-maker is faced with competing opinions from his department's officials and third-party specialists, the decision-maker is entitled to consider both opinions and decide which to grant greater weight.[243]

115.3. The City's own specialists – from its Stormwater Department – advised the Mayor to follow the expert reports submitted by the developer rather than the advice of the

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241 Applicants' heads para 137.
242 *Bo-Kaap* n 65 above para 81.
243 *Clairison's* n 25 above para 25.

City's environmental officials.[244] That can hardly be said to be '*irrational*'. The Mayor, having considered the input from the experts and the submissions from the City's specialised stormwater and environmental officials, made a decision that reflected all that input and so reached a reasonable equilibrium.

115.4. By the time the Mayor decided the appeal, the City's own environmental officials were satisfied with the manner in which the Province had addressed the various concerns raised by the Acting Director.[245] This was another consideration that the Mayor took into account.

115.5. There is not a single expert report on environmental considerations that goes against the development.[246] On the other hand, a range of specialist studies have been commissioned that informed the parameters of the development, to ensure that it was implemented in a sustainable fashion.[247] Those resulted in numerous conditions being imposed to facilitate, among other things, the rehabilitation of the Liesbeek River and the maximisation of ecological functionality.[248] In those circumstances, it was not '*procedurally irrational*' for the Mayor to rely on the specialist studies in making his decision.

115.6. The evidence on record reveals that the Mayor did not ignore the Acting Director's concerns, or dismiss them out of hand. Instead, he independently considered each of the Acting Director's appeal grounds (even though they had been raised in the NEMA process). He engaged with the concerns in a fair and even-handed manner,

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244 LL28 p 556 para 136.
245 LL28 p 627 para 288.2.
246 LL28 pp 621-622 para 274.
247 City's AA p 1462 para 77.4.
248 City's AA p 1462 paras 77.4 and 77.5.

and ultimately reached a reasonable equilibrium regarding whether, and on what terms, the development should be approved.[249]

No infringement of any constitutional rights

116. The applicants argue that, in authorising development on the River Club site, the Mayor's decision infringed sections 31, 9(1), 24(2)(b) and 33 of the Constitution, *viz* the rights to culture, equality before the law, environmental protection[250] and just administrative action.[251]

117. It is not open to the applicants to rely directly on those constitutional rights. Instead, under the principle of subsidiarity, they must rely on the statutory provisions that have been enacted to give effect to those rights. In the context of the Mayor's decision, that is the By-Law.

117.1. Where a lawmaker has legislated statutory mechanisms for securing constitutional rights, those mechanisms must be used, unless they are constitutionally objectionable, in which case the legislation in question must be challenged as invalid.[252]

117.2. The City has the exclusive competence for deciding municipal planning matters such as the authorisation of new developments.[253] To regulate the exercise of this exclusive competence, the City adopted the By-Law. The By-Law is intended to

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249 City's AA p 1529 para 293.

250 We assume the applicants intended to refer to section 24(b) of the Constitution: the environmental right in the Bill of Rights does not have a subsection (2).

251 Applicants' heads paras 87-91.

252 *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA) para 9; *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) paras 160-180.

253 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) paras 12-14.

'*cover the field*' in municipal-planning manners, and does so by comprehensively regulating the development authorisations that the City may issue.[254]

117.3. The By-Law has been enacted to give effect to the rights that the applicants wish to assert: sections 99(1)(c) and 99(3)(g) give effect to cultural and heritage rights; sections 99(1)(c) and 99(3)(h) give effect to environmental rights; and the various provisions that allow interested and affected parties to be notified of applications, make submissions, access information and have their input taken into account give effect to the rights to equality before the law and just administrative action.[255]

117.4. In the present case, there is no hint of a challenge by the applicants that the By-Law is unconstitutional. It must therefore be accepted as the law that gives effect to the rights to culture, the environment, equality and just administrative action in the context of municipal-planning decisions.

117.5. In *Bo-Kaap*, the appellants were adamant that their constitutional right to environmental protection and their statutory right to culture and heritage had been infringed.[256] The Supreme Court of Appeal approved of the High Court's finding that, under the principle of constitutional subsidiarity, direct reliance could not be placed on constitutional rights – the appellants' claims had to be determined within the four corners of the By-Law.[257]

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254 See *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) paras 100-101; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) paras 95-96.

255 See, for example, sections 79-83, 89-91, 94-95, 97(1) and 108-109 of the By-Law.

256 *Bo-Kaap* above n 65 para 27.

257 *Bo-Kaap* above n para 61. The High Court's reasoning is in *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2018] 4 All SA 93 (WCC) paras 144-147.

118. This Court has held that to vindicate the constitutional rights to environment, heritage and culture, the Mayor was required to consider environmental and heritage factors amongst the '*basket of factors*' prescribed by section 99 of the By-Law.[258] The evidence before this Court shows that the Mayor did precisely that.

119. The extent of the Mayor's consideration of environmental concerns has been addressed above.

The Mayor comprehensively considered heritage

120. There can be no doubt that the Mayor diligently considered all the information and concerns regarding heritage that were placed before him, including an array of expert reports and studies. The applicants cannot identify a single heritage resource that he failed to take into consideration or a single heritage argument that he ignored. Indeed, their heads of argument now focus exclusively on alleging that the Mayor's reasoning on environmental issues was flawed – there is not one heritage-related argument under the heading '*Case for the review of the planning decisions*' and paragraphs 123-138 of the applicants' heads.

121. Thus, in discussing the merits of the applicants' case for review of the planning decisions, it is not strictly necessary for the City to explain how the Mayor dealt with heritage. Nonetheless we do so below to assure the Court that the Mayor fully and properly considered heritage.

122. The Mayor explained his comprehensive consideration of heritage concerns in his answering affidavit:

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[258] The High Court in *Bo-Kaap*, above n 240.

122.1. Heritage considerations were of '*critical importance*' and were given '*close and careful consideration*' in 39 pages of analysis in the Mayor's reasons.[259]

122.2. Among other things, the Mayor considered: indigenous cosmology and the site's role in indigenous spirituality; the Liesbeek River, the Black River and the confluence point of the two – their role as landscape features and as sites with cultural and political significance; the context of the wider area; the presence and land-uses of indigenous groups before they were driven off by European settlers; acts of historical violence and dispossession towards the indigenous people, including by the Dutch and the Portuguese; the eradication of sacred animals by European settlers; the introduction of colonialism; the link between the site's open space and topography and its intangible heritage; and the location of other heritage resources in the area, including the South African Astronomical Observatory.[260]

122.3. The site's heritage was connected with the physical aspects of the open space and the river corridors. Otherwise, the heritage was largely intangible i.e. associated with history and memory.[261]

122.4. Having considered the various inputs and conducted his own site inspection, the Mayor was satisfied that the '*River Club at present abjectly fails the site's heritage*': the open spaces were converted into golf lawns or parking lots, the rivers were polluted and canalised and there was not a single indicator of the site's importance in indigenous history.[262]

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259 City's AA pp 1447-1448 paras 50-51.
260 City's AA pp 1448-1449 para 52.
261 City's AA p 1449 para 53.
262 City's AA p 1450 para 54.

122.5. The First Nations Collective, an association of indigenous groups and leaders, had entered into a '*commendable partnership*' with the developer to formulate initiatives for commemorating the site's heritage. Those included a cultural and media centre; an amphitheatre for cultural performances; an indigenous garden; and a heritage eco-trail. The Mayor made those heritage commemoration features legally-enforceable conditions of approval.[263]

122.6. The Mayor was also satisfied that the development will undo the neglect of the site's physical heritage, by rehabilitating the Liesbeek River and establishing more than 49,000 m^2 of indigenously-planted and pedestrian-friendly green open space.[264] Various other mitigation measures were put in place, including the concentration of new building heights away from sensitive areas and the mandatory submission of site development and landscaping plans.[265]

123. The Mayor was alive to the differences between the applicants, on the one hand, and the First Nations Collective, on the other hand.[266] However, it was also apparent that none of the interested and affected parties could genuinely contend that '*golfing greens and an asphalt parking lot are adequate or appropriate ways to protect, enhance and celebrate the subject property's heritage resources.*'[267]

124. Interested parties, including the applicants, had multiple opportunities to make representations to the City regarding the development and its heritage impact. They fully utilised those opportunities and their submissions were given detailed consideration. Furthermore, public

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263 City's AA pp 1450-1452 paras 55.1-55.3. DP2 p 1567 conditions 20 and 21.
264 City's AA p 1453 para 55.4-55.4.
265 City's AA p 1454 paras 55.6 and 55.7.
266 City's AA p 1454 para 57.
267 City's AA p 1456 para 62.

input regarding heritage considerations resulted in material changes to the development and the imposition of a raft of conditions of approval: as with environmental considerations, the heritage input materially shaped the parameters of the development. In addition, the conditions of approval expressly require further engagement with interested parties (including the second applicant) on heritage issues.[268]

125. As part of the section 99 desirability enquiry, the Mayor made reasonable and informed determinations in respect of each concern raised, and was ultimately satisfied that the proposed development would make a significant net positive contributions in respect of both heritage and environmental resources. Those determinations were placed into the '*basket of factors*' that he weighed up in deciding to approve the development subject to numerous conditions.

126. Once again, the Mayor ultimately reached a rational, fair and reasonable equilibrium in respect of the host of considerations he was required to evaluate. His decision therefore cannot be set aside on review.

Conclusion: reviewability of the City's decisions

127. The applicants have failed, even *prima facie*, to establish a single ground of review in respect of the City's decisions. Those decisions reflect a thorough, fair and well-balanced consideration of numerous interweaving and complex policy factors, which ultimately saw the Mayor make a polycentric discretionary decision and reach a reasonable equilibrium based on the public interest. That being so, his decision cannot be interfered with in review proceedings.[269] The applicants have no prospects of having the Mayor's decision reviewed and set aside.

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268 City's AA p 1458 paras 68-71. DP2 p 1567 condition 21.
269 See *Bato Star* above n 81 paras 45-50 and 54.

LIST OF AUTHORITIES

1. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2005 (4) SA 490 (CC)
2. *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2018] 4 All SA 93 (WCC)
3. *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] 2 All SA 330 (SCA)
4. *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* 2021 JDR 1626 (WCC)
5. *Cipla Medpro (Pty) Ltd v Aventis Pharma SA* 2013 (4) SA 579 (SCA)
6. *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC)
7. *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* 2021 (3) SA 593 (SCA)
8. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC)
9. *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC)
10. *Hotz and Others v University of Cape Town* 2018 (1) SA 369 (CC)
11. *Internal Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC)
12. *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* 2004 (2) SA 611 (SCA)
13. *JH v Health Professions Council of South Africa and Others* 2016 (2) SA 93 (WCC)
14. *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W)
15. *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA)
16. *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC)
17. *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA)
18. *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC)
19. *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC)
20. *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC)
21. *National Employers Association of South Africa v Metal and Engineering Industries Bargaining Council and Others* (2015) 36 ILJ 2032 (LAC)
22. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC)
23. *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE)

24. *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC)
25. *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Minister van Landbou en Andere* 1971 (1) PH F11 (T)
26. *South African National Roads Agency Ltd v Toll Collect Consortium* 2013 (6) SA 356 (SCA)
27. *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC)
28. *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)
29. *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T)
30. *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC)