IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 12994/21

In the matter between:

OBSERVATORY CIVIC ASSOCIATION	First Applicant
GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL	Second Applicant

and

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

APPLICANTS' NOTES FOR ORAL ARGUMENT

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Structure of argument

1 We will make framing submissions to situate this matter in its historical, constitutional and litigious framework.

2 We will then deal with the applicable statutory framework.

3 We will then deal with the review grounds in respect of the decisions of the provincial and municipal parties respectively. We focus on the provincial parties, because if those decisions stand to be set aside, that is sufficient to establish a prima facie right, and that the construction under way is therefore prima facie unlawful, regardless of the reviewability of municipal parties' decisions.

4 We will seek to demonstrate that the applicant has established a prima facie right as against the provincial authorities that is at the strongest end of the spectrum, leaving little if any role for the balance of convenience to play any role.

5 We will then deal with the remaining requirements in relation to an interim interdict.

6 Finally, we will deal with the strike-out applications.

Framing submissions

7 Our country is built upon a centuries-long, shameful brutality towards first nation and indigenous people.

8 That brutality has been enabled by entrenched colonial attitudes that viewed first nation and indigenous people as less than human, as not forming part of humanity and therefore not having any claim to humane treatment and compassion.

9 That brutality has also been enabled by the fact that first nation and indigenous people have lived on the earth with a light touch. This is because, since time immemorial, they have had a deep knowledge and understanding of what it takes to live on earth in a way that is sustainable, so that its resources are available for all future generations. They have an understanding of property that is based on a completely different conception of the land and nature and how human beings should interact with those.

10 The result is that, absent colonisation, the planet would have been left intact for future generations. It also means that colonising forces, with a very different attitude towards land and nature, have been able to ride roughshod over the land, displace first nations people and leave their markers everywhere, including some that receive status as tangible heritage resources. By contrast, the very nature of the sustainable use of the land and nature by first nations people, means that their heritage resources will predominantly be intangible ones associated with the land.

11 This places a very special duty on all organs of State to treat the intangible heritage resources and related claims of first nations people with particular care and understanding. Despite this, the intangible nature of the heritage resources sought to be protected by the applicants have been treated as second class, less significant and such that because they are not tangible they must give way to the demands of further development.

12 The brutality towards first nation and indigenous people has also been enabled by centuries-long prejudices towards them that resulted in their being rendered voiceless, being regarded as not being worthy of being heard in the decision-making processes in society, including those that impact directly on them.

13 These phenomena have allowed the peoples colonising Southern Africa to sweep them aside, to marginalise them and to take vast swathes of their land and the natural resources upon which they relied to exist, without recompense. Most importantly for this case, the brutality towards first nation and indigenous people has been aimed at dispossessing them of their identity and dignity.

14 All of this has been in the quest for development and exploitation of the country's resources, a quest over time aimed at enriching and privileging one racial grouping at the expense of all others.

15 Our country is also built upon a colonial and apartheid history of oppressing and suppressing rather than welcoming and providing a voice and role for civil society. As someone who lived and worked as a lawyer in CT during the 1980s

and 1990s, one carries painful memories of the brutality of the apartheid state towards civil society and the activists who gave it vibrancy.

16 Brutality towards, and the oppression of, first nation and indigenous people, as well as civil society, has also been achieved in the colonial and apartheid eras through pervasive and destructive stratagems over the centuries to sow division amongst and thereby divide and rule first nation and indigenous people.

17 That cruel history forms the stark backdrop to this case. It also forms the backdrop to the adoption of our democratic Constitution. It is a constitution that announces in its preamble that -

> We, the people of South Africa,
>
> Recognise the injustices of our past.
>
> Honour those who suffered for justice and freedom in our land;
>
> Believe that South Africa belongs to all who live in it, united in our diversity.

18 It also records that the Constitution is adopted as the supreme law of the Republic, inter alia, to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

19 There are further observations that must be made about the Constitution which are important for the adjudication of this case.

1.1 Ours constitutional democracy is based on founding values of human dignity, the achievement of equality, the supremacy of the Constitution and the rule of law.

1.2 The seriousness with which our legal system takes the rule of law has been demonstrated by the judgments of the Constitution Court dealing with the contempt for the legal system demonstrated by its former president.

1.3 A further observation is that the Khoi and the San were overlooked in a very important component of the Constitution-making process. Section 25(7) only provides a remedy for those dispossessed of land after 19 June 1913. Generally-speaking the San and the Khoi were dispossessed before 1913, with the important exception of the Nama of Namaqualand in respect of their land on the west coast. They are thus permanently deprived of their land, which as historical pastoralists and hunter-gatherers, is so central to their sense of identity. For their survival as Khoi or San communities, they can therefore only look to sections 30 and 31 of the Constitution as the focused constitutional platforms for the protection and retention of their dignity and sense of identity.

1.4 That is why this case is so important. It is common cause that it concerns living heritage associated with a natural cultural landscape, constituted by the site in question. And it is also common cause that it is a site of central importance in this regard.

20 This matter presents a real stress-test as to whether the Constitution makes good on its promises. It calls for answers to these questions amongst others:

1.5 Is the Constitution something that works for the most vulnerable and marginalised in our society, or will it side with the wealthy and the well-resourced? There is no claim as I understand it that the developers themselves in this case are in any respect made up of historically disadvantaged persons?

1.6 Will the Constitution allow the applicants to be heard and to exercise their section 33 right of review and their section 34 right to a fair hearing to its fullest?

1.7 Will the Constitution acknowledge the very substantial difficulties and disadvantages that under-resourced public interest litigants face when seeking to vindicate not only their constitutional rights but also the rights of those that are similarly situated?

1.8 Will the Constitution allow the voices of the “almost all commentators” from civil society that opposed the development in question, to be heard through the applicants in this litigation?

1.9 Will the Constitution allow living heritage, as it is defined in the NHRA, to continue to live and to have its rightful place under the stars?

1.10 Which must prevail in a contest between the Constitution and concrete - the rule of law or the rule of concrete?

1.11 Does the Constitution expect regulators working under it to act as neutral umpires between developers and the citizens affected by development, or are they permitted to side with developers and bring their substantial public resources to bare against affected citizens?

21 The reaction of the respondents to the applicants' exercise of their fundamental constitutional rights in this case has in various ways created a risk of a serious constitutional failure on all of these questions.

1.12 Despite being well-aware of the impending reviews, and despite repeated written requests by the applicants to hold off development while they exercised their fundamental right of judicial review of administrative action in section 33(3)(a) of the Constitution and their right to a fair hearing in section 34, and despite being aware of the sensitivity of the living heritage issues involved, the first respondent has unilaterally forged ahead with excavation and construction. It does so in an attempt, literally, to cement its position, regardless of what the Constitution and the law require, and the manifest unlawfulness of, particularly, the provincial decision-making process.

1.13 The State respondents as regulators have sided unashamedly with the developer against the interest of first nation groups and representatives of civil society represented by the applicants. There is no hint of neutrality. This includes unquestioning support for the first respondent in stealing a march on this Court by pouring concrete apace while the litigation is pending.

1.14 While the concrete pours, the applicants are faced with a barrage of unwarranted technical points, pursued in a united front by the developer and the State respondents and the eighth respondent. These are aimed in the first instance at depriving the applicants of a hearing altogether. If that fails, they seek to ensure that important components of applicants' case go unheard, with three wide ranging strike-out applications in respect of their replying affidavits. The City has in this respect shown the greatest enthusiasm for silencing the applicants.

1.15 The combined strategy to prevent a hearing of the applicants' case on its merits includes unwarranted and over-blown criticism of the applicants and their conduct of their case in the answering affidavits and the heads of argument. This is aimed at whipping up sentiment against the applicants and preventing a hearing on its merits. In addition, the case the applicant seeks to advance is in certain respects mischaracterised in the heads of argument filed by the respondents. We would respectfully ask the Court to have regard to what we argue today and to the heads of argument alone in establishing what the applicants' case is.

1.16 Sadly, the eighth respondent resorts to naked racism directed at the second applicant and egregious vilification of its representative, Mr Jenkins, as its contribution to this chorus. The upshot of the development application process is that the first nations groupings

have successfully been divided and their fate is now left in the hands of the developers, not their own hands.

1.17 The final stratagem employed by the respondents is their calls on this court to ignore the *Biowatch* judgment of the Constitutional Court, to ignore the favourable costs provisions of section 32(2) of NEMA, and to mulct the applicants in costs. This is no doubt to ensure that they are silenced in perpetuity, and that similar litigants who might consider following in their steps in future public interest cases, are discouraged from doing so.

22 These attempts at drowning out the applicants, vilifying them, dividing them and seeking to prevent them from being heard, resonate with the treatment of first nation and indigenous people during the five centuries before constitutional democracy and the treatment of civil society under colonialism and apartheid. If the respondents are allowed to prevail in their attempts to prevent the applicants from being heard in this court, it will amount to a serious failure of the Constitution and the legal system. All the more so where prominent organs of State are leading the charge, notwithstanding their enhanced duty to uphold the Constitution.

23 With respect, this cannot be allowed to happen. Fortunately, there is strong authority emanating from this court that stands in the way of any injustice being done on the costs issue. We refer in this regard to the judgment of your ladyship in Mineral Sands Resources.[1]

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[1] Mineral Sands Resources (Pty) Ltd and Another v Redell and Others and two related cases 2021 (4) SA 268 (WCC).

A prima facie right

The statutory framework

24 The statutory framework is set out in detail in our heads of argument at pages 12 to 21. I intend only to highlight certain features of it.

Subsidiarity

25 Before doing that I would like to dispose of one argument presented by the respondents and particularly the first respondent. That is the assertion that the applicants have failed to plead or make out any case that their rights under ss 9, 24(2), 30 or 31 have been irreparably harmed.

1.18 in terms of the principle of subsidiarity, the applicants were required before founding a case directly on the provisions of the Bill of Rights, to explore whether Parliament has passed legislation which gave effect to their fundamental rights insofar as they were affected in the particular case.

1.19 the applicants have honoured this obligation and have pleaded their case with reference to the relevant legislation, which in this case is primarily the NHRA and secondarily NEMA and the regulations made under it, and the Municipal Planning Bylaw.

1.20 by thus correctly pleading their case, the applicants automatically call in aid the fundamental rights underlying the legislation passed by Parliament. This is borne out by the NHRA itself, which provides in

section 5(3)(c) that laws, procedures and administrative practices must … give further content to the fundamental rights set out in the Constitution."

1.21 moreover, the effect of the passing of the legislation is that, over and above the underlying constitutional rights, the applicants also enjoy rights arising specifically under the legislation. Central to the present matter is the right not to have development take place that impacts on living heritage in which a party has an interest, without -

1.21.1 a statutorily compliant heritage impact assessment having been conducted by a practitioner whose qualifications are compliant with the NHRA, the MPB and NEMA; and

1.21.2 statutorily compliant authorisation by the appropriate provincial and local authorities under those statutes.

1.22 Absent either of those, there is a breach of the applicants' rights, not only under sections 9, 24, 30 and 31, but also under the specific statute. It is not just a right to approach a court for review that has been demonstrated.

General provisions

26 Turning to the NHRA, Part 1 of Chapter 1 sets out General Principles. The starting point is section 3(1), which defines the ambit of the Act with reference to heritage resources. The heritage resources are together described as the "national estate", which includes "those heritage resources which are of cultural

significance or other special value for future generations". If a resource falls in that category, it "falls within the sphere of operations of heritage resources authorities".

27 Section 3(2), without purporting to be exhaustive, includes a range of specific heritage resources that may be considered as forming part of the national estate. Important for present purposes are -

1.23 Para (a) - places … of cultural significance;

1.24 Para (b), which is particularly relevant, reads "places to which oral traditions are attached or which are associated with living heritage"

1.25 Para (d) - "landscapes and natural features of cultural significance".

28 Living heritage is defined as - "the intangible aspects of inherited culture, and may include cultural traditions, oral history, popular memory; indigenous knowledge systems; and the holistic approach to nature, society and social relationships.

29 Section 3(3) lays down criteria for determining whether a place has cultural significance or other special value. These include:

1.26 Para (a) - "its importance in the community, or pattern of South Africa's history";

1.27 Para (b) - "its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage";

1.28 Para (e) “its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group”

1.29 Para (g) is particularly important in the present context and reads “its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons”.

30 Section 4(1)(a) lays down that the chapter’s system for management of heritage resources also applies to the actions of the State and a local authority.

31 Section 5 lays down general principles for heritage resources management, which expressly bind “all authorities, bodies and persons performing functions and exercising powers in terms of this Act”. They include, amongst others -

1.30 In para 5(1)(a) - “Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival”;

1.31 In para 5(1)(b) “every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;

1.32 In para 5(1)(c) “heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African identity”

1.33 In ss 5(5) “Heritage resources contribute significantly to research, education and tourism and they must be developed and presented for these purposes in a way that ensures dignity and respect for cultural values.”

1.34 In ss 5(7) - “The identification, assessment and management of the heritage resources of South Africa must-

(a) take account of all relevant cultural values and indigenous knowledge systems;

(b) take account of material or cultural heritage value and involve the least possible alteration or loss of it;

(c) promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;

(d) contribute to social and economic development;

(e) safeguard the options of present and future generations.”

32 It is not in dispute that we are here concerned with living heritage as defined in section 2 of the Act, that forms part of the national estate. As a result, all of these provisions bound both the consultants in performing the heritage impact assessments and the four different authorities making decisions on the basis of them. This includes an obligation to apply the general principles in section 5. Yet, unless there is an aspect that I have overlooked, I see no express

reference by any of the consultants or the authorities in their written decisions in this matter, to these statutory principles.

33 Given that these principles ought to have guided the HIA consultants and the authorities, this Court will also have close regard to these principles in judicially reviewing the conduct of the consultants and the decision-making authorities under the NHRA.

Section 38

34 What must be considered next is the provisions that define the particular roles and responsibilities of both the heritage assessment consultants and the provincial authorities. For this we must look to section 38.

35 Section 38 falls within part 2 (“General protections”) of chapter 2 of the NHRA. Section 38 deals specifically with “heritage resources management”.

36 Ss (1) of section 38 identifies developments of a defined scale, each of which attract a duty to notify the responsible heritage resources authority. It is common cause that this was such a development and that notice was duly given.

37 Ss (2) of section 38 requires the responsible heritage resources authority to call for a heritage impact report if there is reason to believe that heritage resources will be affected by the development. The report is to be prepared by an appropriately qualified person.

38 Ss (3) of section 38 requires the responsible heritage resources authority to "specify the information to be provided" in such a report.

39 The wording indicates that this is a broad discretion that is conferred upon the heritage resources authority as to the information it may require to be provided. We say this because it goes on in a proviso to lay out the minimum information that must be called for. In other words, at least the following, minimum information is required to be included in the heritage impact assessment report:

> "(a) The identification and mapping of all heritage resources in the area affected;
>
> (b) an assessment of the significance of such resources in terms of the heritage assessment criteria set out in section 6 (2) or prescribed under section 7;
>
> (c) an assessment of the impact of the development on such heritage resources;
>
> (d) an evaluation of the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development;
>
> (e) the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources;
>
> (f) if heritage resources will be adversely affected by the proposed development, the consideration of alternatives; and
>
> (g) plans for mitigation of any adverse effects during and after the completion of the proposed development."

40 With reference to the requirement in paragraph (b), no principles have been promulgated in terms of section 6(2), and no criteria have been published in terms of either section 7(1) or (2), nationally or provincially.

41 However it does not appear to be in dispute that assessment of the significance of the heritage resources identified and mapped in terms of paragraph (a), must still be done in terms of paragraph (b). The absence of principles under section 6(2) and criteria under section 7 does not preclude such an assessment, as the consultant performing the assessment would still be bound by those of the criteria in section 3(3) and those of the principles in section 5 that are relevant to the assessment.

42 Section 38 is however subject to an exception which is relevant to this case. It is set out in ss (8) of section 38. It applies if an evaluation of impact on heritage resources is required for the relevant development under other legislation. As pointed out in our heads of argument, subsection (8) applies here because an evaluation of the impact of the developments concerned, on heritage resources is required under the Environmental Impact Assessment Regulations, 2014, made in terms of NEMA. Section 38(8) then leaves it to the decision-making authority under that other legislation to authorise the development or to decline to do so, based on that assessment.

43 Section 38(8) does however retain a very important role for the heritage resources authority in these circumstances. It is subject to a proviso that reads, (and I have broken it up using bullet points) -

> "Provided that the consenting authority [here the fourth respondent] must ensure that -
>
> - the evaluation [of the heritage impact] fulfils the requirements of the relevant heritage resources authority in terms of subsection (3); and

- any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent."

44 The following observations are made in relation to this provision:

1.35 It is in peremptory terms, using the word "must".

1.36 It is in peremptory terms because the legislation acknowledges the expertise of the statutory heritage authority and wants it to play out in the assessment as to whether or not the development should proceed.

1.37 Because it is in peremptory terms, any non-compliance will result in nullity of the affected process.

1.38 It creates two distinct obligations. The first binds both the heritage assessment practitioners and the decision-making authority. In other words, the practitioners must comply with the requirements stipulated by the heritage resources authority under section 38(3) and the decision-making authority must ensure that the practitioners do so.

1.39 Important here is that section 38(3) also includes its own mandatory component, which would apply and bind the heritage practitioners and the decision-maker, regardless of what the heritage authority requires. It says that the information stipulated in paragraphs (a) to (g) "must be included", again using peremptory wording.

1.40 The first part of the proviso does not include any words that confer any form of residual discretion on the authority deciding whether or

not to allow the development, to determine the extent to which the duty is to be fulfilled. It does not read "the consenting authority must ensure that, in his or her opinion, the evaluation fulfils the requirements of the relevant heritage resources authority".

1.41 The wording of the first part of the proviso is thus objective, not subjective, and therefore administrative action under it is fully justiciable by this Court on review. In other words the court may, and is with respect constitutionally bound to, decide whether or not the heritage impact assessment complied with section 38(3)(a) to (g) and the requirements of HWC.

45 In making these observations, we do not suggest that it is the heritage resources authority that, in the final analysis, decides whether or not the requirements have been complied with. We agree with the respondents that that decision must ultimately be made by the NEMA decision-maker, here the fourth respondent and the fifth respondent on administrative appeal. But this is subject, first, to a fixed duty to ensure compliance with the requirements of HWC and section 38(3), and, second, to an objectively justiciable judicial review at the instance of an interested party.

46 Accordingly -

1.42 The environment assessment practitioner must fulfil all of the requirements stipulated by the heritage resources authority in terms of subsection (3), and must comply with paragraphs (a) to (g)

regardless of the stipulation by HWC - he or she has no choice in the matter;

1.43 The NEMA decision-maker must then get this aspect right. They must correctly assess whether or not the heritage impact assessment has fulfilled the requirements of the heritage resources authority in terms of subsection (3), and of the provisions of paras (a) to (g) themselves, by providing the required information. If not, they must ask the assessment practitioner to provide what is missing. That way the NEMA decision-maker can ensure that the impact assessment is compliant with the first of the two requirements.

1.44 Next the NEMA decision-maker must ensure that the comments and recommendations of the heritage resources authority are taken into account by him or her. The American Heritage dictionary defines these words together as “take into consideration, allow for”. Considering the first part of the proviso, it would seem that the second part of the proviso would require considering comments and recommendations that are distinguishable from information provision requirements. This would seem to require in the main taking into account HWC’s overall assessment of the heritage resources impacted and the desirability of allowing the project to proceed.

1.45 Next the NEMA decision-maker must make his or her decision on whether or not to allow the development. In making his or her decision on the basis of the compliant heritage impact assessment, it is the NEMA decision-maker that determines how the information,

comments and recommendations in the compliant heritage impact assessment are weighed. That is within his or her discretionary remit, but subject to -

1.45.1 compliance with the general principles in section 5 of the NHRA;

1.45.2 the clear message inherent in the legislation that the requirements, comments and recommendations of the heritage authority are to be given considerable weight, having regard to their statutorily recognised expertise; and

1.45.3 his or her acting in compliance with the precice wording of the legislation, procedurally fairly, reasonably and rationally.

47 The difficulty for the respondents in this matter is that the director, as well as the Minister on appeal, were faced with a non-compliant, defective heritage impact assessment. Instead of insisting that the developer correct and supplement the heritage impact assessment so as to render it compliant with section 38(3) and (8), they proceeded to approve the development on the basis of a non-compliant heritage impact assessment. What is more is that they did so after the director had recognised that there was non-compliance and had called upon the developer in terms of the first part of the proviso to remedy the deficiencies in the HIA. This rendered their decisions unlawful and void.

The EIA regulations

48 As pointed out above, section 38(8) was activated because an assessment process was required for the development under NEMA and the EIA regulations made under it.

49 This need not be traversed in any detail as it is common cause between the parties that environmental impact assessment in this case was to take the form of a basic assessment report in terms of regulation 19 and appendix 1 of the EIA regulations.

50 There is however one aspect of the EIA regulations that does require emphasis here. There are three potential outcomes to a development application. It may be refused. It may be granted. Or it may be granted subject to conditions.

51 The function of an EAP or a specialist is to provide a report which forms the main source of information and professional guidance for the decision-making authority to decide between these three options.

52 This is borne out by item 3(1)(p) of Appendix 1 and item 1(1)(n) of Appendix 6 to the EIA regulations. Those provisions require an EAP and a specialist reporting on impact assessments, amongst other things, to provide, in the wording of Appendix 1 and as one of the concluding items, “a reasoned opinion as to whether the proposed activity should or should not be authorised, and if the opinion is that it should be authorised, any conditions that should be made in respect of that authorisation”.

53 What is apparent from this is that it is one of the duties of the consultant preparing an impact assessment to give very careful and serious consideration and advice to the decision-making authority on, a refusal of the development application as one of the potential outcomes of the impact assessment.

54 This is obviously an outcome that is not going to be welcomed by the client who is appointing and paying the consultant for his or her services. Conducting an impact assessment and reporting on it, requires a fiercely independent mindset on the part of the consultant. This is borne out by regulation 13(1)(a) of the EIA regulations, which expressly requires that "an EAP and a specialist, appointed in terms of regulation 12(1) or (2) must be independent". The term "independent" is then defined as follows:

> "**'independent'**, in relation to an EAP, a specialist or the person responsible for the preparation of an environmental audit report, means-
>
> *(a)* that such EAP, specialist or person has no business, financial, personal or other interest in the activity or application in respect of which that EAP, specialist or person is appointed in terms of these Regulations; or
>
> *(b)* that there are no circumstances that may compromise the objectivity of that EAP, specialist or person in performing such work;
>
> excluding-
>
> (i) normal remuneration for a specialist permanently employed by the EAP; or
>
> (ii) fair remuneration for work performed in connection with that activity, application or environmental audit".

The requirements of HWC under section 38(8)

55 What then were the requirements of HWC in terms of the proviso in section 38(8)?

56 These are apparent from the letter addressed by the CEO of Heritage Western Cape to the first respondent dated 13 September 2019, annexure LL10 commencing at vol 1 p 142. This was its response to what is described in the papers as the developer's second HIA, dated 2 July 2019, which was prepared by Messrs Hart and Townsend after reliance on Ms Donoghue's report by the first respondent had been dispensed with.

57 The letter is helpful in that it crystallises HWC's requirements in direct response to the listed items of information in terms of section 38(3), as required by section 38(8). It is these information requirements that the HIA had to comply with in terms of the first part of the proviso to section 38(8) - see the words "must ensure".

58 The section 38(3) information requirements of HWC emanating from the letter are summarised at paragraphs 133 to 135.7 of the founding affidavit, pages 70-75 of vol 1. **Refer**

59 The first part of the proviso to section 38(8) required that each and every one of these requirements were to be fulfilled and placed a duty on the decision-makers, fourth and fifth respondents, to ensure that this was done.

60 A theme that runs through HWC's requirements arises from the complaint that the exercise conducted by the consultants was tailored to justify a preconceived development concept. The letter complains repeatedly in this regard about what it terms post-rationalisation by the consultants. Central to this complaint is the downplaying of the intangible heritage significance of the floodplain area where the development is to take place.

61 HWC's requirement that flows from this is that the HIA had to commence with a fulsome acknowledgement, identification and mapping of all the heritage resources, taking into account the incontrovertible fact that the entire site had significance to "a community that has a recognised and direct, deep and sacred linkage to the site through lineage and collective memory". Off that foundation, the consultants had to fulfil the information provision requirements of paragraphs (b) to (g) of section 38(3). This included a fair, objective and independent assessment of the significance of the site and a fair, objective and independent assessment of the impact of the development on the heritage resources identified, without any particular outcome in mind.

62 This requirement of section 38(8) read with 38(3) is bolstered by the independence requirement under the EIA regulations. These require the retention through the assessment process of an objective and independent mindset with a view, at the end of assessment process to provide an objective opinion evaluating each of the three possible outcomes.

63 In order to assess whether the requirements of HWC were fulfilled in the HIA, the primary documents to consider are -

1.46 The supplement to the HIA, annexure LL15, starting at vol 1 page 225; and

1.47 the First Nations or First Nations report, annexure LL16, starting at vol 1 page 256.

64 However, before going there, in relation to the post-rationalisation complaint, it is worth looking at what the evidence is on the papers in relation to the consultants' mindset. In this regard we refer to the preface to Hart and Townsends HIA dated 2 July 2019, that HWC were responding to. The preface begins at vol 6 p2420 and we refer to the second page on p2421 where they describe their professional role as follows:

> "our professional role is to undertake an investigation that enables (a) the articulation of the heritage-related significances associated with the site and its environs and (b) the identification of heritage, both tangible heritage resources and intangible practices and beliefs that are associated with the site and its environs, and (c) that also enables us to advise and assist the owners to propose development that responds to and respects the articulated significances, mitigates recognised potential damage to heritage both tangible and intangible and, ideally, that enables the recovery and even enhancement of heritage resources."

65 They then go on to say at the bottom of the page, still in the preface -

> "We note that most of the commentators (the First Peoples groups excepted) seem, implicitly at least, to accept that some form of development should/will proceed but most also argue that the current proposal is simply too great: we think that this, from a heritage management perspective, is contradictory; and we think this because any development of the subject property, even single storey row-houses like those in nearby Observatory would transform the site and the floodplain affecting the wider environs in the same way (from a heritage management

> perspective); but importantly, a lesser development would not generate adequate funds for the great public good that we argue for, the restoration of the Liesbeek riverine corridor. In other words, we think the choice is stark but clear: accept the currently proposed Riverine Corridor Alternative with what we think are very considerable public benefits or accept that the River Club property will remain as it is."

66 This is compelling evidence of post-rationalisation of a preconceived development concept and the abandonment of any semblance of independence. And this in the preface before the HIA process even gets underway. Paragraph (c) of the description of their professional role is particularly revealing. It is not the function of the EAP and specialists to advise and assist developers to propose a development that mitigates damage to heritage. It is their function, objectively, fairly and independently to assess all heritage impacts of all alternatives, including -

1.48 the tread-lightly development option; and

1.49 the no-go option; and

1.50 glaringly obviously, the option of declaring the entire area as a protected heritage site under the NHRA and rehabilitating it accordingly. That was not an as-is option. The State has the power in terms of section 46 of the NHRA to expropriate land for the purposes of heritage conservation, on the advice of SAHRA.

67 Instead, with reference to the paragraph at the bottom of the page, they made their preconceived mindset abundantly clear - accept the developer's proposal with its bulk or accept that the site remains as is. Framed in this way, it is not

even a binary choice. The HIA was approached on the basis that the only viable alternative was the developers' proposal.

68 We will come to how the consultants responded to HWC's requirement in terms of section 38(3) that this problem of a pre-conceived development concept, be addressed. But it is clear that a major, serious flaw in the HIA had been exposed by HWC. That triggered an obligation upon the fourth and fifth respondents in terms of the proviso to section 38(8), to ensure that the flaw was properly addressed. Again we will come to whether or not they did so.

The supplement to the HIA

69 We start with an examination of the supplement, annexure LL15 at vol 1 p225. An appropriate starting point is the contents page at p226. If we compare this with the list of minimum information requirements in section 38(3)(a)-(g), we see that there are already worrying signs. There is a promise of identification and mapping (para (a)); there is a promise of assessment of significance (para (b)); there is a promise of consultation with communities (para (e). But we see a void when it comes to assessment of impact (para (c)) and when it comes to evaluation of impact against sustainable socio-economic benefits (para (d), and when it comes to alternatives to avoid impact on heritage (para (f).

70 The contents page includes two anomalous and similarly worrying topics. The insertion of a revised development proposal, at the point where a logical sequence would anticipate the statutorily-required impact assessments. And the inclusion in item 8 of a promised attack on the rationality of the document

that sets out the section 38(3) requirements that they are required to comply with, as laid down by the appointed statutory body.

71 If we then move to the introduction, things do not get better. On page 228 the consultants say the following:

> "While the Interim Comment contains a great number of statements and arguments (with one apparently central and reiterated argument) rationalising the comment as "interim", it seems to us that the matter is rather simpler. Indeed, it seems to us that there are just two issues which could reasonably be cited as reasons for the HIA to be deemed to be "inadequate" or "incomplete". These are: first, an incomplete engagement with and representation of First Nations' interests and views; and, second, the contradictions and inconsistencies of the land-use planning development frameworks and policies for the wider environs."

72 Quite apart from the breath-taking arrogance of this comment, it again evidences a deeply problematic mindset. The consultants clearly regard themselves, not HWC, as the appointed persons to dictate what statutory compliance requires. And whilst HWC carefully articulated its requirements with reference to all seven of paragraphs (a) to (g) of section 38(3), they make clear that they only take seriously two of its many requirements.

73 What is particularly worrying about this again-prefatory comment is that, HWC had accurately pointed out a serious mindset problem in relation to post-rationalisation (and, by extension, independence), and required that this be addressed. As pointed out above, the evidence of that mindset was patently clear in the July 2019 HIA. What one would have expected in the introduction was an acknowledgement of this error, perhaps an apology, and a clear

indication of how the problem was now going to be addressed afresh with an independent and objective mindset. Yet of this we see nothing.

74 With reference to section 2 of the supplement, engagement with First Nations groupings, the question whether this complied with HWC'S (and the statute's requirements) must in the main be assessed with reference to the First Nations report of Mr Arendse. However, what is worrying from an independence point of view, is that there is no attempt independently and critically to evaluate the soundness of Mr Arendse's consultation process. It is unquestioningly taken on board, lock, stock and barrel. This is apparent from the concluding paragraph of section 2 at the top of p 233, which reads as follows:

> "While it is apparent that there are some First Nations groupings who do not share this view, this First Nations Collective is authoritative; and Arendse's report is persuasive in its method, its argument and in its conclusions; and we hope and trust that Arendse's report and the incorporation of its conclusions/recommendations here in this Supplement to the HIA and in the revised development proposal will satisfy HWC at least insofar as there has been 'meaningful engagement' with First Nations groupings. Indeed, we think that the interactions have been more than 'meaningful'."

75 In particular, there is no attempt to consider seriously whether it is a problem that some First Nations groupings do not share the Collective' and Mr Arendse's views about the development.

76 Also of significance is the fact that there is no suggestion or claim that Mr Arendse was appointed in the capacity of specialist consultant on indigenous heritage. This is understandable, because this is in effect rejected by the

consultants at the beginning of the supplement where they recognise only two requirements of HWC as requiring attention. Although the fourth and fifth respondents belatedly in the heads of argument rely on such an appointment being a recommendation rather than a requirement, we contend that, properly construed, it was a requirement that had to be complied with.

77 With reference to section 3 of the supplement, commencing at p233, we have clear evidence that the consultants have failed to take on board the complaint in relation to post-rationalisation of a pre-conceived development. Instead of objective, independent evaluation against each of the various planning instruments, we are presented with one-sided arguments as to why planning instruments that do not support the developer's proposal should be disregarded, and those that might do, should be applied.

78 With reference to section 4, identification and mapping (commencing at p236), the focus is on addressing the mapping shortfall. HWC had criticised the mapping on the basis that section 10.8 of the main HIA showed two diagrams of riverine photography (Vol 6 pp2518-2519) and nothing more by way of mapping of the heritage resources.

79 To address this problem, the consultants included in the supplement at pages 236 to 238, three diagrams, a City Council grading map, a diagram by Atwell and Jacobs and a diagram by Cindy Postlethwaite. These do not address the mapping shortfall for the following reasons:

1.51 First, they are not dedicated to the River Club site;

1.52 Second, to the extent that they cover the River Club site, with an oval denoting the site, none seem to reflect any heritage resources whatsoever; and

1.53 Third, the consultants in each case explain why the diagrams are not helpful and were omitted from the 2 July 2019 HIA.

80 This leaves the mapping problem unaddressed.

81 With reference to section 5 of the supplement, dealing with "assessment of significances" (from page 239), instead of taking on board the statutory requirements of HWC, the consultants take on HWC. Using the words "argue" or "argument" eleven times in five pages, they simply reiterate their "arguments" as set out in the 2 July 2019 HIA. And they do so in language that again reflects arrogance and disdain for HWC. These arguments are epitomised by the following statement by the consultants:

> "it seems that HWC has not recognized (or they disagree with) the essential underpinning logic or argument of the HIA regarding or assigning relatively low current significances and/or value of the lower reaches of the Liesbeek floodplain (and of the site in particular) and the two reiver courses (stormwater ditch and canalized river) as place and/or as a (tangible) heritage resources despite the high *historical* significance of the immediate and wider environs and … in this last respect, it seems that HWC has an incomplete grasp of the relationship between 'significance' and 'authenticity'…".

82 The difficulties with this section of the supplement are as follows:

1.54 Reliance on the assessment in the July 2019 HIA is misplaced because it was based on demonstrable post-rationalisation of a pre-conceived development and lack of independence.

1.55 Central to addressing that problem would have been, at a minimum, reassessment afresh of the significance of heritage resources and reassessment afresh of impact of the development on those resources, based on an objective, independent approach. The consultants instead doubled down and stubbornly refused to do so.

1.56 The assessment of the flood plain and the two river courses as having low significance is out of kilter with the respondents' general acceptance in their answering affidavits and heads of argument of the high significance of the site, as explained in the affidavit of Mr Jenkins, which is not really disputed in this regard.

1.57 A revealing example of their post-rationalisation of a preconceived development is the analysis of the significance of the variation over time of the course of rivers in the floodplain at vol 1 p241. For the consultants, this means recognising the canalised path of the river as the sole legitimate feature for protection and rehabilitation, is justified. Yet logically, if the consultants acknowledge the importance of rivers as a form of cultural heritage, this phenomenon would <u>enhance</u> the significance of the entire floodplain.

83 Section 6 dealing with the revised development proposal (starting at p244), once again evidences, strongly, post-rationalisation of a pre-conceived

development. The consultants discard any semblance of independent, objective assessment and go out to bat strongly for the latest version of the development.

84 Most unfortunately, at the top of page 250, vol 1, instead of addressing the problem of post-rationalisation, the consultants repeat the point that they made in the preface to the July 2019 HIA, about the illogicality of objections to the height and scale of the development. The lack of logic lies at the door of the consultants. The height of the development is massive, with a number of 10 storey buildings, coming on top of the raising of the site to deal with floods, including at the sacred confluence of the rivers. We **refer to** vol 5 p2072. Of course height and scale make a very substantial difference to impact, particularly on the sense of place and the possibility for reflecting on the site's living, intangible heritage.

85 What should have come in this section of the supplement was a fresh, independent, objective assessment of the impacts on heritage resources of the high-rise, high-volume development, in its new form. Instead we are presented in section 6 with what amount to the planning equivalent of heads of argument in favour of the development.

86 Section 7, dealing with alternatives (from p250), suffers from the same, post-rationalising problem as the rest of the supplement and its predecessor. It says in more expanded form that the proposed development is the only realistic outcome.

87 It pays lip service to the no-go option, but dismisses it in a single sentence at the bottom of page 251, vol 1. A proper consideration of the no-go alternative would have taken into account the possibilities of according formal heritage status to the area, provincially, nationally or internationally, and the use of public or international funding to rehabilitate the site in a manner that truly respected the acknowledged heritage significance of the area.

88 Once again, the consultants can't help themselves from having another go at HWC. They assert that HWC's opinions regarding alternatives and mitigations "are not sustained by rational argument" and that "in the sixteen years that HWC has been operating, it has seldom required that alternatives be assessed". The stance in these last two paragraphs of section 7 is inimical to the peremptory requirement regarding consideration of alternatives in section 38(3)(f) of the NHRA.

89 As if the attacks on and disdain for HWC to that point of the supplement were not enough, the consultants, extraordinarily, then dedicate an entire section 8 at pages 252-253 to challenging the rationality of the HWC's requirements. This attack is based in the first part on the uncontroversial and logical statement by HWC that "if the grading of the significance is wrong, then the conclusions will certainly be wrong".

90 Surprisingly, what follows does not dispute that the consultants got the grading of significance wrong. This on its own is fatal for the validity of the supplementary HIA.

91 Instead they build an argument around the assertion, again laced with problematic innuendo, that “the real world of complexities in play here cannot be understood through linear equations of this sort”.

92 On page 253, the complaint in relation to post-rationalising a preconceived development concept is eventually addressed directly. Instead of acknowledgement and correction by the consultants, we have combative rebuttal, asserting that the claim is fallacious. The main thrust of the rebuttal is that “a development proposal must precede a study of its impacts” and that “the Act intends that the compilation of an HIA is to have an internal effect on the design of the proposed development.” The NHRA says no such thing.

93 That a development proposal may change during the course of an assessment, goes without saying. But once a final proposal is settled upon, the job of the consultant is fairly, objectively and independently, to assess the significance of every one of the heritage resources and to assess the impact of the development on those resources, along with compliance with all of the requirements of the heritage authority and section 38(3) and (8) of the Act. It is not the role of the consultant to go out to bat for the development.

94 Notwithstanding the claims in the conclusion to the supplement, the end result of the supplement is that, before we even get onto the First Nation or First Nations report, there is a failure to comply with <u>any</u> of paragraphs (a) to (d), (f) and (g) of section 38(3). That translates into a failure to comply with the first part of the proviso to section 38(8), because “the evaluation did not fulfil the requirements of the relevant heritage resources authority” as it had to do.

The First Nations report

95 The full version of the FN report is at pages 1074-1191 vol 3.

96 We first consider whether the FN report satisfied the requirement of meaningful consultation and then whether it satisfies the requirement of appointment of a specialist in intangible heritage.

Meaningful consultation

97 Before considering the report, it is appropriate to make certain legal observations:

1.58 Section 38(3)(e) calls for "the results of consultations with communities affected by the proposed development on heritage resources";

1.59 Consistent with this, what HWC called for with reference to paragraph (e) was "meaningful consultation with the First Nations groups";

1.60 What both of these suggest is that as far as reasonably possible, all First Nations groups had to be consulted with, that the consultation had to be meaningful and genuine and that the diverse views of all such groupings had to be heard in the process;

1.61 In *Scalabrini Centre*,[2] Rogers J said the following, on the basis of a survey of both local and foreign authority:

[2] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others v 2013 (6) SA 421 (WCC) at par 70 (authorities omitted). The principles in this passage were expressly approved by the SCA on appeal, although they parted with Rogers J on the facts.

> "There are two points to emphasize from the cases: [a] At a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice. …. Consultation is not to be treated perfunctorily or as a mere formality… This means inter alia that engagement after the decision-maker has already reached his decision or once his mind has already become 'unduly fixed' is not compatible with true consultation … At the procedural level, consultation may be conducted in any appropriate way determined by the decision-maker unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered ..."

98 The FN report is deeply flawed in a number of respects.

99 At an early point in the report, section H of the introduction, Mr Arendse asserts that the First Nations Collective comprises "the majority of senior indigenous Khoi and SAN leaders and their councils in the Peninsula" and goes on to say the following:

> "The First Nations Collective through Chief Zenzile Khoisan explained to Mr Tauriq Jenkins, Supreme High Commissioner of the Goringhaicona Khoi Khoin Indigenous Traditional Council and spokesperson for Paramount Chief Delrique Dextery Aran …, the position taken by the Collective and invited the Goringhaicona to participate and join the Collective. Cautioning the Goringhaicona that refusing to formally engage, would constitute a voluntary extrication from the consultation process akin to a self-imposed exile."

100 It is clear from this extract that it was a precondition for consultation that the Goringhaicona joined the First Nations Collective and that failing to do so would

give rise to “self-imposed exile”. This is an extraordinary basis for the commencement of a consultation process that Mr Arendse, not the First Nations Collective or Chief Khoisan, was meant to be conducting and leading in an impartial, inclusive, open and receptive way. Such a consultation, which the statute requires, did not get out of the starting blocks on Mr Arendse’s own version.

101 Additionally, the Constitutional Court has made it clear[3] that freedom of association in terms of section 18 of the Constitution includes the freedom not to associate. Imposing joining the First Nations Collective as a precondition for being consulted, was unconstitutional and vitiated any consultation process purportedly engaged in by Mr Arendse from the outset.

102 As the report develops, any pretence of objectivity, independence and inclusiveness is discarded. Instead, he goes on the offensive against the Goringhaicona, the second applicant. At pages 1108-1109 Vol 3, whilst acknowledging that “there was also the Goringhaicona”, he goes on to refer to Jan van Riebeek’s diary in which he makes statements, such as that “the Goringhaiconas … are strandlopers, or fishers, who are, exclusive of women and children, not above 18 men in number, supporting themselves without the least livestock of any description, by fishing from the rocks along the coast”, that “the Goringhaicona subsist in a great measure by begging and stealing”, that “among this ugly Hottentoo race, there is yet another sort called Goringhaiconas”, that “they were at first, on my arrival, not more than 30 in

[3] New Nation Movement NPC and Others v President of the Republic of South Africa and Others 2020 (6) SA 257 (CC) at para 58.

number, but they have since procured some addition to their numbers from similar rabble out of the interior, and they now constitute again, including women and children, of 70, 80, or more", that "they make shift for themselves by night close by in little hovels in the sand hills, you may see some of the sluggards … helping to scour, wash, chop wood, fetch water or herd sheep for our burgers, boiling a pot of rice for some of the soldiers; but they will never set hand to any work, or put one foot before the other, until you have promised to give them a good quantity of tobacco or food or drink … Others of the lazy crew (who are much worse still, and are not to be induced to perform any work whatever), live by begging, or seek a subsistence by stealing and robbing on the common highways."

103 The denigration of the Goringhaicona, the second applicant in these proceedings, through Mr Arendse's adoption of this archival material, amounts to gross racism and is the clearest evidence that the report can in no way be relied upon and could never, on the decided authorities, amount to statutorily and constitutionally compliant consultation.

104 Extraordinarily, he goes on to compound this by referring at page 1127 Vol 3 to legitimate concerns raised by Mr Jenkins that: "This is a battle of restorative justice. [It] has deep historical roots. It is important for all the stakeholders to take note. This is a very sacred ground" and discounting this on the basis that:

> "First Nations [Collective] made it clear that they, and only they, own the Indigenous narrative.
>
> Also, only they have the right to deploy the Indigenous narrative."

105 This is compounded in section 5 of the report, commencing at page 1140, where Mr Arendse accepts that “First Nations exercised Indigenous agency by claiming the Indigenous narrative with regard to TRUP and all its constituent precincts. This is then used as a basis in the balance of this section for advocacy in favour of the developer’s proposal, particularly insofar as it pertains to what it misleadingly describes as “the collective aspiration and contention of the First Nations”.

106 The open support of Mr Arendse justified through a baseless acceptance of the First Nations Collective as the sole voice of First Nations groupings, is once again, a manifestation of post-rationalisation of a preconceived development. Such an approach is in conflict with the observation in *Scalabrini* that:

> “engagement … once his mind has already become ‘unduly fixed’ is not compatible with true consultation.”

107 It is also important to note the extent of the First Nations groupings that were excluded. These are listed at paragraph 78 on pages 740-741 Vol 2 of the affidavit of Mr Jenkins. In this regard, the consultants concede that “there may indeed be a range of First Nations groupings who do not support the development”.[4]

108 Over and above this, on a simple comparison of the original TRUP report by Mr Arendse and the First Nations report prepared for purposes of this development, of the eight Khoi groups in the TRUP report, only three groups are interviewed in the First Nations report, supplemented by a SAN and a

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[4] Record Vol 3 p 961.

Griqua group. As pointed out by Ms Prins-Solani, that means that more than half the groups that participated in the TRUP project were not consulted by Mr Arendse either.[5]

109 The fact that the purported consultative process drove a wedge between different First Nations groupings is, perhaps, the clearest, and most tragic, indicator of its non-compliance with the requirements of genuine consultation.

110 Important questions are also raised in the supporting affidavit of Mr Jenkins regarding the ethical foundations of the First Nations report and possible conflicts of interest on the part of Mr Arendse himself.[6]

111 Although the respondents seek to strike these out, there is evidence in both the answering and replying affidavits that confirms the probability that there is substance in Mr Jenkins' concerns. In this regard, a CIPC company search adds substance to Mr Jenkins' assertion in his initial supporting affidavit that Mr Arendse is himself a member of the First Nations Collective. Their search shows that Mr Rudewaan Arendse was a director of Western Cape First Nations Collective (Pty) Ltd from 2 December 2020 to 15 July 2021. Whilst his membership post-dates the date of the FN report, it is unusual that, as a person purporting to conduct an impartial consultation process, he should later join forces with one component of the First Nations groupings involved. The strike out application in respect of this evidence is dealt with later.

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5 Record Vol 8 p 3023 para 20.

6 Record Vol 2 p 731 para 55; para 73 p 737.

112 As far as the ethical approach is concerned, the scientific basis for this criticism is set out in detail, with reference to the SAN Code of Research Ethics in the replying affidavit of Ms Dierdre Prins-Solani at pages 3028 – 3031, Vol 8. The reason why the relevant portion of the affidavit does not stand to be struck is again dealt with later.

113 Based on the foregoing submissions, the consultation process purportedly conducted by Mr Arendse and relied upon by the consultants to deal with HWC's requirement in this regard is entirely non-compliant with section 38(3)(e) of the NHRA and a nullity.

Specialist consultant on intangible heritage

114 As pointed out above, HWC in its letter of 13 September 2019 required the provision of a supplementary report from a specialist consultant in intangible heritage.[7]

115 This requirement of HWC was distinct from the requirement of consultation with affected First Nation communities. The latter requirement was made with reference to section 38(3)(e) of the NHRA. By contrast, the requirement of the appointment of a specialist consultant was made at the end of the letter and in terms of HWC's power in terms of section 38(3) to request information over and above that listed in paragraphs (a)-(g).

116 The first respondent describes this as a recommendation of HWC and asserts that in an abundance of caution they decided to appoint Mr Arendse for this

[7] Record Vol 1 p 152.

purpose. That appears from para 271-272 of the Answering Affidavit at p898 vol 3. They attach Mr Arendse's CV in support of their contention that he is such a specialist.

117 The municipal parties elide this issue and simply assert that "whatever gaps there may have been in the initial assessment were more than filled by the subsequent engagements with the objections, the input from the City's officials, the First Nations Collective and the First Nations Report." (City AA para 205 p1508 vol 4)

118 In the provincial authorities' answering affidavit, they say that -

> "HWC's opinion that 'the HIA would benefit from input from a specialist consultant with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area' was taken into consideration. As indicated above, although the Directorate in their letter of 17 February 2020 (annexure AB4) acted on this recommendation, ultimately, and after unsuccessfully attempting to seek further clarification from IACom and resolve the differing opinions between them and the heritage specialists as to whether the section 38(3) requirements had been met, the Director, and subsequently I, as the consenting authorities in terms of section 38(8) had to take our decisions."[8]

119 Similarly, in their heads of argument, they adopt the stance that this merely had the status of a recommendation, not a requirement, and disavow having made any claim that the FN report of Mr Arendse was the report of a specialist consultant. However, the wording of the letter of 17 February 2020 gives the lie to these assertions. Referring to the requirement of a report by a specialist

[8] Record Vol 4 p2139.

consultant, in paragraph 2.3 of the letter, the Director, the fourth respondent, said the following:

> "Based on the information provided in the supplement to the HI report dated 4 December 2019, the directorate notes that the heritage specialist has provided a response to the comments highlighted in HWC's interim comment. However a more detailed assessment of the potential heritage impacts, which meets the requirements of section 38 of the NHRA has not been provided."

And went on to require that:

> "In light of HWC's final comments dated 13 February 2020, you are hereby required to do the following:
>
> 2.5.1 revise the HIA in order to adequately assess the potential heritage impacts associated with the proposed development accordingly. The HIA must meet the requirements of section 38 of the NHRA."[9] (emphasis added)

120 It is clear from the Director's letter, referring to the "requirements of section 38", that he correctly understood the appointment and report of a specialist consultant to be a requirement, not a recommendation. And it is clear that he regarded the requirements as not having been satisfied, requiring him to act in terms of the first part of the proviso to section 38 to ensure that the requirement was satisfied. Nothing in the letter is consistent with the requirement of a specialist consultant and report being merely a recommendation.

121 The letter also demonstrates that HWC's requirement was perfectly comprehensible. This gives the lie to the fifth respondent's claim in the above-quoted portion of his answering affidavit that there was a need for further

[9] Record Vol 5 pp 2336-2337.

clarity. And the attempt to "resolve the differing opinions between them and the heritage specialists" was a process devoid of any statutory foundation. We will return to this below, but for present purposes, the letter from the Director confirms the status of the request for the appointment of a specialist consultant and a report as a binding requirement and it confirms the failure to provide it.

122 That the specialist appointment and report was a requirement is supported by the sentence in the HWC letter of 13 September 2020 that follows the request, which, using the terminology of section 38(3) is -

> "HWC reserves the right to request additional information as required."[10]

123 That Mr Arendse was not appointed as specialist consultant is apparent from the supplementary report of the consultants where they describe his reports as "dealing with views of several First Nations groupings, first, in respect of the wider Two Rivers area (8 groupings) and, second, in respect of the River Club site (5 groupings)."[11]

124 This makes sense because in the preceding paragraph the consultants recognise only two issues as warranting consideration pursuant to HWC's letter of 13 September 2019 and neither of these is the requirement of the appointment of a specialist consultant.

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[10] Vol 1 p152.

[11] Record Vol 1 p 228.

125 Mr Arendse himself in the First Nations report makes no reference to his having been appointed either as specialist consultant or pursuant to any requirement of HWC.

126 Moreover, Mr Arendse is not a specialist consultant in intangible heritage:

1.62 Mr Arendse's qualifications are in the field of social anthropology and he has no formal qualifications in the heritage field.[12]

1.63 His curriculum vitae, which appears from p1074 vol 3, does not follow the normal format of such a document and, strangely, begins with the following assertion in the first two lines:

> "Expertise : social anthropologist specialising in culture and heritage of indigenous people, specifically social history and intangible heritage of South African First Nations, the Khoi-San."

It is difficult to avoid the impression that the curriculum vitae has been tailored to meet the challenge to his report as being that of a specialist consultant.[13]

1.64 He is also not an expert for the reasons given in the affidavit of Ms Prins-Solani, who is indeed a qualified expert in the field – see Vol 8 p 3018 paras 11 – 11.2. The basis for the resistance to the striking of this affidavit comes later in our argument.

1.65 The serious flaws in the First Nations report demonstrate a complete lack of expertise in the area concerned.

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[12] See his curriculum vitae at Record Vol 3 pp 1192-1197.

[13] P1192ff vol 3.

1 Even if Mr Arendse had been appointed for the purpose required by HWC as a specialist consultant (contrary to what the applicants, fourth and fifth respondents say), his report is not one as contemplated by them because of its many shortcomings. These are set out in paragraph 98 of the applicants' heads of argument and in further detail in the replying affidavit of Ms Prins-Solani. Whilst that affidavit is the subject of a strike out application, the reasons given by her for the report's failings with reference to its decontextualization of intangible heritage, its failure to address the sense of place associated with the landscape of the River Club site and surrounding area, its divisiveness and distortion of the First Nations narrative, its methodology and ethics, are apparent even to a non-expert reader of the First Nations report and are logical.[14] In any event for reasons to be advanced below, the affidavit does not in any respect stand to be struck.

Conclusion in relation to the satisfaction of the requirements of HWC

2 In the circumstances, neither the consultation requirement of section 38(3)(e) of the NHRA, nor the section 38(3) requirement of the provision of a report by a specialist consultant on intangible heritage were complied with.

3 Nor were any of the other requirements set out in HWC's letter of 13 September 2019, with reference to paragraphs (a) to (g) of section 38(3) satisfied.

4 In all of these respects, there was a serious statutory failure of a peremptory statutory provision.

[14] Record Vol 8 pp 3018-3031.

5 Before moving on to the further developments, it is worth noting that the stance of the consultants as being entitled to post-rationalise a preconceived development is confirmed by them on the papers. In this regard, the first respondent's answering affidavit contains the following at page 892 Vol 3.

> "246. As per Ms O'Donoghue's statement that she withdrew from the project, *inter alia* because she was asked to work with Dr Townsend on the HIA, I am advised by Dr Townsend that –
>
> 246.1 While Ms O'Donoghue may have had differences of opinion with several colleagues in 2016 – 2017, it is clear that she knew and accepted that she was engaged in the process of finding the appropriate form for a development of very considerable scale on the property in question."

6 As correctly observed by Ms O'Donoghue in her replying affidavit at Vol 8 p 2985:

> "If Mr Aufrichtig's version is accepted, it would imply that I abandoned my independence which is required as a specialist, and also under the environmental impact assessment regulations, 2014, in order to ensure his desired development is enabled by 'finding the appropriate form' for the First Respondent's proposed development. This would be contrary to what is required from an independent assessment and an independent specialist.
>
> 6. When I am instructed to assess the heritage impacts of a development, the purpose of my assessment is to independently assess the positive and negative impacts of the proposed development on the heritage resources associated with a specific environment and community and make recommendations as to whether measures could be implemented to make the impacts of the development acceptable (if possible). It is not my duty as an independent specialist to ensure 'appropriate form' for a specific development or to ensure that development would be approved by the relevant authorities and/or be economically successful. As an independent specialist I provide the same standard of assessment of the significance of the heritage resources, potential impacts, recommended mitigation

> measures and the recommendations, irrespective of the client's preferred alternative development proposal. Therefore I can confirm that I did not accept that I am merely trying to write reports and find the 'appropriate form' which will allow the proposed development of the first respondent to proceed, and abandon my independence in the process, as Mr Aufrichtig would suggest. It is my view, that it is exactly because I retained my independence that the working relationship between myself, SRK and the First Respondent came to an end."

7 That evidence in the first respondent's answering affidavit is surely the death knell of the validity of the entire HIA process.

Subsequent developments

8 Heritage Western Cape responded to the supplement prepared by the consultants, including the First Nations report, in a detailed 11-page letter dated 13 February 2020, once again setting out in detail with reference to the relevant paragraphs of section 38(3) the respects in which their requirements had not been complied with. It is unnecessary to repeat these because they align with the submissions made above in regard to the supplement and the First Nations report. The letter is to be found at pages 270 – 280, Vol 1 and forms annexure "LL17" to the founding affidavit.

9 Importantly, on 17 February 2020, the fourth respondent in his capacity as Director : Development Management (Region 1), addressed the letter to the first respondent, already discussed, which called upon the first respondent through the consultants to comply with those requirements of HWC where the supplement had fallen short, referring according to him to the specialist appointment and report.

10 As mentioned above, the request emanating was as follows:

> "In light of HWC's final comments dated 13 February 2020, you are hereby required to do the following:
>
> 2.5.1 Revise the HIA in order to adequately assess the potential heritage impacts associated with the proposed development accordingly. The HIA must meet the requirements of section 38 of the NHRA."[15]

11 Once again, the consultants, rather than taking on board HWC's final comment, and addressing the requirements yet to be fulfilled, they went on the offensive. As described in the first respondent's answering affidavit –

> "HWC was provided with two documents : (1) a detailed 43-page matrix, listing HWC's interim and/or final comments, together with the heritage practitioners' response on each point; and (2) a brief 6-page summary, focussing on arguments raised in HWC's interim and final comments.
>
> 277.2 These documents refuted the views expressed by HWC that the HIA (as supplemented), failed to comply with section 38(3)(a)-(g) of the NHRA."

12 Accordingly, the stance of the consultants was that nothing further was required under section 38.

13 What followed the refutation was a workshop and meeting on 4 and 10 March 2020 respectively, which the interim assessment committee of the HWC were seemingly scheduled to attend. Although HWC officials attended, the Committee allegedly belatedly declined to do so.[16] If this is so, it is not entirely surprising. The observations made in the applicants replying affidavit in this regard are worth noting. They are at vol 7 pp 2658-2661, paras 169-169.5 **Refer**

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15 Record Vol 6 pp 2335 – 2337.

16 The first respondent's answering affidavit, record Vol 3 pp 899 – 900 paras 276 – 277.5.

14 On top of that, the statute makes no provision at all for mediation with HWC, whether by the Premier or anyone on his behalf. In addition, the Director and the directorate in the provincial government had found themselves perfectly capable of understanding HWC's requirements.

15 Following upon the abortive workshop and meeting, the first respondent decided not to submit any further supplement to the HIA to HWC and resolved to proceed directly to the decision-maker, being the fourth respondent.

16 Nevertheless, on 31 March 2020, the consultants addressed their "specialist response to HWC's final comment on the HIA for the relevant club" which in turn was part of the documentation which served before the fourth respondent when making his decision.

17 The letter appears at pages 1210 – 1215 Vol 3. The following aspects of the letter are significant.

1.66 The consultants announce at the beginning of the letter that, rather than responding positively and appropriately to the fourth respondent's letter of 17 February 2020, issued in terms of the first part of the proviso to section 38(8), by conducting the further assessment required, they would "outline in brief [their] corrections of and responses to HWC's final comment" and go on to refer to "the omissions, errors, vagueness and incompleteness of HWC's final comment". Once again, apart from the breath-taking arrogance, this reflects a misapprehension of the binding statutory status of HWC's requirements.

1.67 The letter makes no attempt whatsoever to take on board HWC's requirements and adjust the HIA accordingly – instead it purports to challenge the legitimacy of the requirements stipulated by HWC in its successive letters.

1.68 It does so in a tone which generally manifests disdain for HWC and which is at times openly insulting and defamatory, particularly where they say –

> "Bluntly, HWC's reference in the Final Comment to the 2018 provisional protection is, at best, lazy and, at worst, illustrative of the inadequacy of its thinking."

1.69 The letter also, gratuitously, repeatedly accuses the HWC of making "this claim only (and cynically) to avoid concluding its responsibilities under section 38(8) of the NHRA", repeatedly questions its rationality and ultimately gratuitously asserts that HWC lacks the heritage expertise to judge the First Nations report.

1.70 This is unfortunate because, from a statutory perspective, it was placed before the fourth and fifth respondents in their decision-making processes on the environmental authorisation and resulted in their acting in breach of their duties in terms of section 38(8) as we will demonstrate later.

1.71 Their ability to respond in some detail to HWC's requirements gives the lie to their purported inability to comprehend these requirements as a basis for requesting the meetings which were ultimately abortive.

1.72 When it comes to the specific responses to HWC's requirements in relation to paragraphs (a)-(g) of section 38(3), they once again double down and insist on prior compliance, without giving an inch. Because their stances are generally simply reiterated, little point is served by revisiting them. The fundamental point is that the compliance or non-compliance with the requirements of HWC in terms of section 38(3) are peremptory, statutorily required to be enforced by the consenting authority (the fourth and fifth respondents) and compliance is objectively justiciable by this court on review. Because the letter of 31 March 2020 declined to adjust the HIA in any way, it can add no value in terms of achieving compliance with section 38(3) and the proviso to section 38(8).

The Director's decision

18 The relevant part of the decision of the fourth respondent is to be found at pages 322 – 324 Vol 2. Pages 323 and the first part of 324 of the decision essentially set out the sequence of submission and exchange of documents, with a very brief overview of their content, without any critical analysis, along with reference to the abortive workshop and meeting. The crucial part of the decision comes in the last two paragraphs. The relevant part reads as follows:

> "The specialists' response (dated 31 March 2020) indicates that the proposed site creates a real and immediate opportunity, which could trigger meaningful planning of a much larger heritage site. Although the visual openness of the proposed site is highly valued, the existing development on the proposed site does not signal any heritage or cultural significance. An opportunity to commemorate and incorporate the views of

> the First Nations Collective exists in a space that currently displays no heritage significance. Given that significant input, research and engagement with the First Nations has been undertaken and that the views of the First Nations have been incorporated into the proposed development, the potential heritage impacts have been adequately assessed and concerns raised have been adequately responded to.
>
> The directorate's comment on the draft BAR dated 17 February 2020, regarding the revision of the HIA and the external review of the VIA, were adequately addressed in the heritage specialists' written response, dated 31 March 2020." (emphasis added)

19 This reasoning does not withstand scrutiny. The fourth respondent's letter dated 17 February 2020 reflected a correct assessment in terms of the first part of the proviso to section 38(8) that HWC's requirements had not been complied with. The remedial response required by the director in terms of section 38(8) in his letter of 17 February 2020, was to "revise the HIA in order to adequately assess the potential heritage impacts associated with the proposed development." In particular, we know that the Director wanted to see the specialist report from a specialist consultant. There was only one option to satisfy the statutory requirement and that was a revised HIA, including the specialist report.

20 The letter of 31 March 2020 represented a stubborn refusal to revise the HIA – the direct opposite of what the director had required in the letter of 17 February 2020. On this basis alone, his decision must be set aside on the basis of his failure, on his own documentary record, to ensure in terms of the first part of the proviso to section 38(8) that the HIA fulfilled the requirements of the HWC and the NHRA in terms of subsection (3).

21 In terms of the second part of the proviso to section 38(8), the fourth respondent was obliged, before granting the authorisation of the development, to take into account "any comments and recommendations of the relevant heritage resources authority with regard to such development". If he was to part company with the views of HWC, as he clearly did, this part of the proviso required him to demonstrate in his decision a careful articulation and consideration of each of the main comments and recommendations of HWC. HWC's comments and recommendations were discernible from the setting out of its requirements in relation to the HIA. Yet there is no substantial reference to, or analysis of, any of them.

22 Even if the Court were to accept that the HWC's request for a specialist report from a specialist consultant was a recommendation and not a requirement, the Director was required to engage with that recommendation in his written decision, particularly in that it was described as a "strong recommendation".

23 In truth what the decision reveals is that, instead of having regard to the comments and recommendations of HWC, he had regard to the comments and recommendations of the heritage consultants, including their deeply problematic comments of 31 March 2020.

24 On this basis, the fourth respondent's decision stands to be set aside by reason of the failure to comply with both the first and second parts of the proviso to section 38(8).

The Minister's decision on appeal

25 The HIA, having failed to comply with the requirements of HWC, and the fourth respondent having failed to ensure the correction of its shortcomings in terms of the first part of the proviso to section 38(8), the Minister's decision could only have been saved had he intervened to ensure compliance on the part of the consultants with the requirements of HWC. He did not do so and, accordingly, his decision too stands to be set aside on the basis of the failure to comply with the first part of the proviso to section 38(8).

26 A proper approach to the appeal, given that it is in the nature of a re-hearing, would have been –

1.73 in relation to the first part of the proviso to section 38(8), to make a genuine effort to analyse and take note of the requirements of HWC in their letters of 13 September 2019 and 13 February 2020 and then, in order to make up for the omission of the fourth respondent, to demand of the developer and the heritage specialists to provide the requisite outstanding information; and

1.74 to make a genuine effort to "take into account" the "comments and recommendations" of HWC.

27 Instead, the fifth respondent refers virtually exclusively throughout his decision-making process, verbatim and uncritically, to the HIA.

28 Moreover, instead of analysing and extracting the requirements, comments and recommendations from the detailed letters of 13 September 2019 and 13

February 2020, the Minister addressed correspondence to HWC in the course of the appeal which read as follows:

> "3. I have reviewed your comments dated 13 February 2020 and 11 December 2020 as well as the information provided in the Supplementary Report to the HIA Report dated 4 December 2019, as well as the Applicant's Responding Statement dated 12 October 2020. I am of the view that the issues you raised in your response dated 11 December 2020, have been addressed in the Applicant's Supplementary Report to the HIA Report, as well as the Responding Statement.
>
> 4. Should you wish to clarify and provide additional information on the HIA requirements to supplement the current HIA and Supplementary Report, please submit this to the Ministry of Local Government, Environmental Affairs and Development Planning on 10 February 2021.
>
> 5. Should you not provide me with an indication of such information, I will then surmise that the Supplementary Report to the HIA Report does satisfy the NHRA and HWC requirements in that all issues raised by yourself have been adequately addressed."[17]

29 Apart from not constituting an adequate substitute for analysing and giving proper consideration to HWC's letters, the letter is inherently illogical. If the Minister was indeed satisfied that the developers documents satisfied the HWC's requirements in terms of section 38(3), there was no need to send a letter in the first place. The very fact that the letter is sent constitutes an acknowledgement by the Minister that the requirements had not been satisfied. Given that the HWC letters of 13 September 2019 and 13 February 2020 are clear and have been supplemented by HWC's appeal documentation, they were perfectly within their rights to refer the Minister back to these documents.

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[17] Record vol 1 p 397.

30 In any event, the compliance of the HIA with the requirements of HWC is a matter which is objectively justiciable on review by this court and the aforegoing analysis demonstrates that the Minister was wrong in concluding that the applicants' documentation was satisfactory.

31 Insofar as the second part of the proviso to section 38(8) is concerned, the Minister's decision, despite its considerable length, is devoid of any attempt seriously to take into account the comments and recommendations of HWC.

32 An important component of the Minister's failure to take into account the requirements, comments and recommendations of HWC was his disregard of the concerns raised by HWC pertaining to the First Nations report, particularly as set out in paragraph 97 of that letter.[18] Instead, the Minister relied repeatedly and uncritically on the deeply flawed findings of the First Nations report.[19]

Conclusion on the review of the NEMA and NHRA decisions

33 For these reasons and the further reasons set out in the heads of argument, the decisions of the fourth and fifth respondents are reviewable on the basis of at least two of the review grounds relied on in the founding affidavit –

1.75 Section 6(2)(b) of PAJA, in that a mandatory and material procedural condition prescribed by an empowering provision was not complied with – more particularly there was non-compliance with both the first

[18] At Vol 1 p 278.

[19] Record Vol 6 pp 2239, 2241, 2258, 2262, 2263, 2264, 2266 and 2313.

and second parts of the proviso to section 38(8) of the NHRA, read with section 38(3).

1.76 Section 6(2)(f)(ii)(bb) of PAJA in that the decisions of the fourth and fifth respondents were not rationally connected to the purpose of the empowering provision, section 38(8) read with section 38(3), which are designed to ensure that cultural rights and heritage resources and the impact on them of development are properly factored into the decision-making processes pertaining to developments.

34 On the same facts, additional review grounds in section 6(2) of PAJA would become available upon supplementation in terms of rule 53(4).

35 On the basis of the foregoing analysis, the applicants have demonstrated the requisite prima facie right. And they have done so at a level that is at the very least at the strong end of the spectrum, a topic to be discussed later in the argument.

36 If the NEMA decisions are set aside, then the construction is unlawful. This is so regardless of the validity or otherwise of the land-use planning decisions.

The land use planning decisions

37 It is obvious from the papers and the heads of argument that the applicants are still in the process of refining their review grounds in respect of the municipal planning decisions. Those will be matters that receive considerable attention in the affidavits to be filed in terms of rule 53(4).

38 However, what is clear particularly from the Mayor's answering affidavit, is that very extensive reliance was placed in the municipal decision-making process on the First Nations report prepared by Mr Arendse of AFMAS.[20]

39 That report is demonstrably unconstitutional, unlawful, unreliable, based on racist archival material and racist conclusions drawn from it and deeply flawed in multiple further respects. That too will form the subject matter of elaboration in the supplementary affidavit in terms of rule 53(4), insofar as its implications for the validity of the municipal decision-making process are concerned.

40 It is so that the remaining review grounds against the land use planning decisions were raised in reply. We persist in those at this stage obviously only to the extent that they might survive the strike-out application which is dealt with below. The strike out is essentially futile, because the grounds will return in the supplementary affidavit if they are struck at this stage of the proceedings.

41 As pointed out earlier, the manifest reviewability of the NEMA decisions is sufficient to establish the requisite prima facie right.

The *Shell* case

42 There is a recent judgment of the Eastern Cape Division of the High Court in the matter of *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy.*[21] The matter provides considerable support for the grant of the relief sought by the applicants in the present matter. As is reasonably well-

[20] Vol 5: "DP6", page 2011; Vol 4: Mayor's Answering Affidavit, pages 1450 – 1453, para 55 and subparagraphs 55.1 – 55.4; 1447 – 1449, para 51 – 53; page 1457, para 66; pages 1516, para 242; page 1454, para 57; pages 1517 - 158, para 247.

[21] Unreported judgment dated 28 December 2021 under Case No. 3491/2021 ("*Shell*")

known, the matter concerned the conduct by Shell of a seismic survey using air guns fired from a ship off the Wild Coast in the Eastern Cape. The applicants were, in the main, members of traditional communities living along the coast, including traditional healers from those communities.

43 The seismic survey was to be conducted pursuant to the grant of an exploration right by the Petroleum Agency of South Africa in terms of section 79 of the Mineral & Petroleum Resources Development Act No. 28 of 2002. The purpose of the seismic survey was to provide imaging of the subsurface to determine whether there might be energy reserves below the sea floor.

44 The applicants sought an interim interdict in Part A of the notice of motion preventing the relevant respondents from proceeding with the seismic survey pending the grant in terms of Part B of a final interdict prohibiting the respondents from proceeding with the survey unless and until they had an environmental authorisation under NEMA.

45 Also in support of their claim for interim relief they raised the failure to meaningfully consult with them in relation to the seismic survey, because it impacted on their customary, environmental and cultural rights in terms of sections 24, 30 and 31 of the Constitution.[22]

46 The applicants relied on the judgment of the Constitutional Court in *Bengwenyama*[23] where the Constitutional Court held that consultation (in that case under the MPRDA), included amongst its purposes not just the full

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[22] At paras 1 – 9.

[23] *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others* 2011 (4) SA 113 (CC).

provision of information about the activity consulted on, but also a recognition that "the consultation process and its result are an integral part of the fairness process" and that, although the achievement of consensus was not required, the consulting party should "consult … with a view to reaching an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation".[24]

47 The applicants made extensive references to their rights to intangible heritage and culture associated with the sea. The deponents to the applicants' founding affidavit said that "they adopt the attitude that, not only does the land belong to them, but they also belong to the land. That is so because the land is central to their identity. It sustains them."

48 Another deponent referred to their practice of walking to the sea "to collect its healing waters and sacred sand".[25]

49 Of particular importance for the present matter is the following paragraph:

> "[14]Members of the Amadiba Traditional Community also know the sea and the land to have healing properties. In some instances, traditional healers rely on the sea, for example to cleanse themselves and their patients. Some of the ancestors reside in the sea because they loved the sea in life and some of them died in the sea. It is considered very important by members of the Amadiba Traditional Community not to disturb these ancestors through pollution or other disturbances. That belief should not be difficult to comprehend by those who do not share the customs of the Amadiba Traditional Community if regard is had to the fact that graves on land are not easily disturbed or moved. Members of the Amadiba Traditional Community are concerned that the seismic survey will upset

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[24] *Bengwenyama* at paras 64 – 67, quoted at para 10 of the *Shell* judgment.

[25] At paras 12 and 13.

> their ancestors and impact on their cultural and spiritual relationship with the sea. They are concerned that Shell did not consult with them in that regard."

50 They also claimed that:

> "Because it is integral to the community's cultural identity and customary system, in other words, the sea is integral to who they are, they have over time developed sustainable fishing practices which pose no great risk to marine life in the area."

51 They also relied on the ocean for sustainable harvesting of seafood.

52 Insofar as consultation was concerned, Shell insisted that it had not only followed but exceeded all requirements for public participation. Their database of interested and affected parties included a wide array of provincial and local authorities, traditional leaders, NGOs, community-based organisations, and industry groups, including the fishing industry. Public notice had been given in newspapers of the public participation process. The applicants insisted that they as coastal communities were not amongst those consulted. To the extent that public meetings had been held, this had been a long way from where they lived. Shell insisted that they had consulted with their traditional leaders. The applicants rejected this as being inconsistent with their custom.

53 In this regard, the court held -

> "[Shell] did not identify the numerous small scale and subsistence fishing communities along the coastline where the seismic survey will be performed. Regard being had to the above, the consultation process was in my view, inadequate."

54 In discussing the consultation requirement, the court also referred to the judgment in *Maqoma*[26] where the following was said at 491 F-H:

> "However convinced the empowered authority may be at the outset, of the wisdom or advisability of the intended course of action, he is obliged to constrain his enthusiasm and to extend a genuine invitation to those to be consulted and to inform them adequately of his intention and to keep an open and receptive mind to the extent that he is able to appreciate and understand views expressed by them; to assess the view so expressed and the validity of objections to the proposals and to generally conduct meaningful and free discussion and debate regarding the merits or demerits of the relevant issues. So receptive must his mind be that, if sound arguments are raised or other relevant matters should emerge during consultation, he will be receptive to suggestions to amend or vary the intended course to the extent that at least a possibility exists for those with whom he consults to persuade him to alter his intentions if not to abandon them."

55 In response to the assertion of their intangible heritage in cultural rights, the court held as follows:

> "[32]I accept that the customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How can ancestors reside in the sea and how can they be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. We must accept that those practices and beliefs exist. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the Constitution those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment."

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[26] *Maqoma v Sebe NO and Ano* 1987 (1) SA 483 (Ck)

56 Also of significance to the present matter is that the applicants had not yet refined their Part B relief. They still intended amending the relief sought under Part B to add a prayer reviewing and setting aside the exploration right, which had not been reviewed in the initial notice of motion. There was also doubt about the validity of their contention as to the need for an environmental authorisation under NEMA, the Minister having filed an affidavit suggesting that the approved environmental management programme used to support the original application for an exploration right was statutorily deemed to constitute an environmental authorisation. In this regard, the Learned Judge said –

> "Whether that is so, however, is a decision to be made by the court. Although I am of the view that the applicants have prospects of success in that regard, it is a matter that should rather be considered by the court which will determine the relief sought under Part B of the notice of motion."

57 In dealing with the question of irreparable harm, the court identified the harm as follows:

> "[38] The applicants rely on cultural and spiritual harm; the threatened harm to marine life; and the negative impact on the livelihood of small scale fishers, arising from the harm to marine life. I have already dealt with the impact that the seismic survey will have on the applicant communities' cultural and spiritual beliefs. To conclude the discussion on this topic, reference is made to the evidence of Jacqueline Sunde, a senior researcher at the Department of Environmental and Geographical Science at the University of Cape Town… She stated:
>
> > '18. The material basis of the Dwesa-Cwebe's ocean-coastal culture comprises three elements – sense of place linked to their coastline, a relational ontology linking them to their ancestors and the way meaning is substantiated through socio-ecological interactions (performing rituals in the sea, the sea providing sustenance through fishing and harvesting activities), thus including both tangible and

> intangible culture. This is very evident in the Dwesa-Cwebe communities' coastal land-ocean culture today."

58 The court was willing to accept that this, along with the considerable expert evidence regarding the harm to marine life, was sufficient to satisfy the requirement of irreparable harm.[27]

59 The court then turned to the question of balance of convenience, saying:

> "[66] I will now consider the balance of convenience. To make a finding in that regard the court must balance the harm that the applicants will suffer if the interim interdict is granted, as against the harm that Shell will suffer if the interim interdict is granted. The balance of convenience is not evaluated in isolation. The stronger the prospects of success in the main proceedings, the less the need for the balance to favour the applicants and vice versa.[28]
>
> Shell contended that the balance of convenience very much favoured the refusal of relief because it would suffer prejudice that was "real and devastating if the interim interdict against it would be granted, whereas the prejudice that the applicants would suffer if the interim interdict would not be granted is speculative.
>
> [68] Shell's case is that, if the interim interdict is granted, it will be final in effect because it will make it impossible for the survey to be completed by the end of May 2022; that Shell and Impact Africa will be unable to exploit the exploration rights and that the termination of the survey will result in an immediate cost of approximately R350 million to Shell and Impact Africa, with an estimated total loss as a result of having to terminate the survey and subsequent loss of exploration rights exceeding R1 billion."

60 They described the potential harm to them as "catastrophic".

61 These considerations did not, however, win the day. The court held as follows:

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[27] At paras 37 – 65.

[28] Referring to *CIPLA Medpro (Pty) Ltd v Aventis Pharma SA and related appeal* 2013 (4) SA 579 (SCA) at para 61.

> "Shell should not now be allowed to use the consequences of its own failure to adequately consult with all interested and affected persons as a ground for why an interim interdict should not be granted against it. Constitutional rights are at stake. The financial loss that Shell and Impact Africa are likely to suffer cannot be weighed against the infringement of the constitutional rights in question. Put differently, the anticipated financial loss to Shell and Impact Africa cannot justify the infringement of the applicant's constitutional rights. The breach of those constitutional rights threaten the livelihoods and well-being of the applicant communities as well as their cultural practices and spiritual beliefs. Where constitutional rights are in issue, the balance of convenience favours the protection of those rights.[29]
>
> In my view the applicants have established that the balance of convenience favours them."

62 In relation to the question of whether or not there was an alternative remedy, Shell referred to an administrative remedy involving an approach to the Minister to cancel or suspend an exploration right under the MPRDA. In this regard, the court said:

> "It is obvious that the section envisages a time-consuming procedure which, if followed, would allow the continuous threat of infringement of the applicants' rights. Although the above section does provide a remedy, it is in the circumstances of this case not a satisfactory remedy."

63 The question of urgency was also raised. Shell adopted the attitude that the applicants had failed to show why they would not obtain redress at a hearing under Part B in due course. It was also pointed out that the applicants could have acted earlier and have intervened as parties in a prior application where similar relief had unsuccessfully been sought against Shell in respect of the same seismic survey. In this regard the court held as follows:

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[29] Referencing *Propshaft Master (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality and others* 2018 (2) SA 555 (GJ) at para 10.7.

> "[79] On 8 December 2021 Shell requested a case flow meeting for a more reasonable timetable than the one contained in the notice of motion. On that same day I presided over that meeting. The parties agreed on the date of the hearing as well as the dates for the delivery of their respective affidavits and heads of argument. It is correct that the application must have caused severe inconvenience to Shell and its legal representatives, particularly this time of the year. However, when regard is had to the steps taken by the applicants after they had become aware of the commencement of the seismic survey, the issues raised in this application [here referring to the fact that there was a threat of infringement to constitutional rights and the rule of law] that Shell had, under the circumstances, sufficient time to put its case before the court, as well as the public interest in the outcome of this application, I have decided to exercise my discretion in favour of the applicants and dispense with the rules insofar as they regulate the periods when documents should be delivered."

64 In the circumstances, the court granted the application and ordered Shell and the Minister to pay the costs.

65 The significance of this judgment in respect of the balance of the requirements for an interim interdict will be dealt with below. However, it is appropriate at this stage to point out that –

1.77 The fact that Part B relief was still to be further refined, potentially introducing an entirely new review application in respect of the exploration right, did not preclude the grant of the interdict. This is relevant to the fact that the applicants are still in the process of refining their review grounds, particularly against the City and the Mayor.

1.78 The judgment conveys powerfully the truism that the fact that heritage and cultural rights may be intangible is no obstacle to the grant of an interim interdict where they can be shown to be linked to physical phenomena such as the land and the sea and fall under the cultural rights in section 30 and 31. This is so even in the face of the most powerful economic interests.

1.79 The courts take consultation seriously. A process that excludes an small but important section of society, whose cultural and spiritual rights are threatened, will not be accepted as passing constitutional muster. Nor can such a section of society be dictated to as to the organisational structure through which they should be consulted.

Irreparable harm

66 In order to comprehend the seriousness of the harm that will be suffered by the second applicant, by Mr Jenkins and by all of those First Nations groupings who it is now accepted do not support the development, it is helpful to have regard to the words of Mr Jenkins.

> "22. The Khoi peoples have a deep and profound relationship with their ancestral lands. These relationships cannot be encompassed within the Roman Dutch law concept of land as inert property which may be bought and sold and which land owners are free to do with as they please subject only to compliance with the law. For Khoi peoples, the landscapes that we inhabit not only have material value as a source of food, water etc. but also have spiritual and cultural significance.
>
> 23. According to the oral history and mythologies of the Khoi, the Universe is animate and populated by many beings. For example, stars are regarded as the souls of people. Major stars like the morning star

(known as Dawn) and the evening star (Dusk) have a special significance and our ancestral myths tell of how they came into existence and relate them to key figures in our cosmology. Similarly, water, rain, thunder, lightning, are also beings and TsuiIlGoab is the personification of the natural forces that produce rain.

24. From our perspective landscapes have a spiritual dimension and our sense of self is so intimately connected with the land, rivers, stars and animals and the cosmos as whole that they could be characterized as interconnected and inalienable parts of the self. How we live in relationship with these other beings is an essential aspect of Khoi spirituality and impacts on those beings also have impacts on us."[30]

67 One is immediately struck by the resonance of these descriptions with those of the coastal communities who successfully interdicted the seismic survey by Shell.

68 To understand the profound impact of the commencement on the second applicant, Mr Jenkins and those similarly situated, of the development on the land, regard may be had to what Mr Jenkins told Mr Arendse for purposes of his earlier report on the Two Rivers Urban Park:

> "25.1The Khoi and the San have the most exquisite symbiotic relationship with the soil, with the river, with the stars, with IKaggen], who's the mantis. And, when you look at the Liesbeeck River, the flow of that river and the land next to it. When I talk about a symbiotic relationship, I 'm saying that the river is flowing within; it's embodied within the consciousness of the Khoi, and so is the land. You can't separate the two. So, when you separate the Khoi from the land permanently, you separate a part of the body itself. It's disembodying the physical body; the physical manifestation that's imbibed in them. By dislocating the Khoi permanently from the land and from its proximity to the river, you're completely, you're ripping the soul out of them. It was physical, visceral dislocation, because of the understanding, the integral understanding of connectivity.

[30] Jenkins Pages 719 – 720 Vol 2.

> 25.2 Here you can actually identify for the first time where the act of land grab occurred, and then you can also identify for the first time where, without a leasing arrangement, without brokered arrangement, land was ostensibly stolen. You must also understand, this particular land is layered with a sedimentary pain of the first violation of the fence that was put up, which started the first Khoi war, which started the first forced removal .....
>
> 25.3 When that first war started ..... it started that process of movement and elimination which over a period of approximately 180 years started from this war ... the annihilation and extinction of the Cape San, we trace it back specifically to these people here.
>
> 25.4 What about the holocaust of the first nations, about the genocide? …
>
> 25.5 On the broader spectrum it is, to us, a very significant period because of the amount of damage and decimation and destruction that it caused. For thousands of years integration with other groupings didn't result in this. …The shooting of our animals that were also part of the symbiotic relationship of the Khoi. You can't just place the Khoi outside of environment and say, that's the environment [You can't remove the Khoi from its environment]. The Khoi in itself has an environment.
>
> 25.6. There was tremendous pain when there were no more live animals. There was tremendous pain when the hippo colonies were wiped out. There was tremendous pain. Not only were the Khoi dislocated, but the sentient beings around them, with whom they had these kinds of relationships, were also shot…"

69 Further, Mr Jenkins refers to the fact that "this area has a unique *genius loci* (spirit of place) even to this day.[31] He also refers to the sacred status of water and rivers and the fact that areas where rivers met were used as meeting places for people, in other words a confluence of both rivers and humanity.[32] He describes the River Club site as being "part of an area that is the epicentre of

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[31] At para 27 Vol 2.

[32] Paras 28 and 29 p 723 Vol 2.

not just colonial conquest, dispossession and diaspora but also of resistance. This is a place of deep spiritual meaning and of revolution."[33]

70 For the Khoi and communities similarly situated, and Mr Jenkins, the continuation of the development on the land is simply a continuation of the process started with the arrival of the Portuguese in 1510. Given the holistic manner in which they view their universe, ripping up, and pouring concrete into the land is a form of disembodiment.

71 Importantly, save in two respects, the consultants through the first respondent's replying affidavit do not take serious issue with these parts of Mr Jenkins affidavit. The exceptions are insofar as he refers to the place being known as the place of the stars[34] and insofar as its being part of the site of the d'Almeida battle is concerned.[35] To the extent that they contest Jenkins' version of the battle, they rely on the report of Atwell and Associates, annexure J24 to the first respondent's answering affidavit.[36] However, this report suffers from the same problem of post-rationalisation of a view designed to support the development, in that it is adversarially sets out to make out a case for the battle not having taken place on the River Club site. In any event, what is indisputable is that the River Club site, evokes memory of and debate about the D'Almeida battle and what it means for our history whether or not it is based on geographical precision.

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33 Para 32 p 724 Vol 2.

34 First respondent's AA para 418 p 955 Vol 3 and para 224 – 226 p 885 Vol 3.

35 First respondent's AA para 422 p 956 Vol 3.

36 Annexure J 24 to the first respondent's AA commencing at p 1272 Vol 3.

72 What the *Shell* case tells us is the fact that the world view of others might struggle to comprehend their universe and the nature of the harm caused to it by development in its various manifestations, particularly harm to their intangible cultural heritage, is no reason to deny it the constitutional protection it deserves, and to leave it to the ravages of relentless development.

73 Nor does the fact that there has already been a level of harm inflicted on the land mean that it is deprived of any potential association with intangible heritage. It is notorious that the oceans have been terribly damaged by over-fishing and pollution, particularly plastic pollution. That provided no basis for the refusal of the relief sought in the *Shell* matter.

74 The holistic conception of the universe by the second applicant and other First Nations groupings opposed to the development also provides the answer to the suggestion that the harm is a *fait accompli* and therefore beyond the reach of interim relief. On their conception and, objectively so, each new piece of ground excavated or built upon for the development and each new ton of concrete poured into it is a further injury to their living heritage rights. If anything, the fact that the harm is deliberate and ongoing enhances the urgent need for the grant of interim relief. A continuing wrong is manifestly an appropriate circumstance for the grant of an interim interdict; even more so than a harm that is reasonably apprehended.

75 It is also important to bear in mind in this regard that it is early days in the development. Only part of precinct 2 is under construction, with large amounts of land still unaffected, for the time being by the forthcoming development of

the remainder of precinct 2 and of precinct 1. This is by no means a fait accompli.

Balance of convenience

76 In *Olympic Passenger Service,*[37] Holmes J said the following:

> "Where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak… In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less the need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him."

77 Of course, Judge Holmes' judgment predates the Constitution. As is correctly observed in the *Shell* case, the fact that a party seeks to enforce a fundamental right in the Constitution counts strongly in favour of the grant of the interdict. Add to that the fact that, on the NEMA decision-making process, the applicants have shown a clear right, or, at the very least, a most compelling prima facie case, the balance of convenience should, on that approach, have little, if any impact.

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[37] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 D at 383 D-G.

78 The applicants' position is fortified by the judgment of this court per Dlodlo J, in *Camps Bay Residents and Ratepayers Association.*[38] That case concerned an application for an interim interdict to stop construction pending the review of the City of Cape Town's approval of building plans. The application was brought more than a year later than the decision to approve the plans (i.e. well outside the 180 day period provided for in PAJA) and at a time when the construction was 95% complete.

79 The Learned Judge held as follows:

> "[10]I am guided by a series of decisions of this division as to the manner in which applications for the interim cessation of building works pending review proceedings are to be addressed. The manner in which the courts in this division have addressed applications for the interim cessation of building works pending review proceedings is well-established. It has been laid down in a long series of decisions. [The decisions are then referred to] What appears from this line of decisions is the following:
>
> > 'The prospects of success in the contemplated review proceedings represent the measure of the strength or otherwise of the alleged right that the applicant must establish *prima facie* in order to obtain interim relief….'
>
> The stronger the prospects of success in the review proceedings (i.e. the *prima facie* right) the greater the subordination of prejudice occasioned by a cessation of the building work. Otherwise stated, the principle of legality tends to operate decisively in this context.
>
> As Conradie J noted in *Beck's* case supra, if applicants are likely to be proved right in the review proceedings, 'it is desirable that the building operations should be stopped now, that is to say, sooner rather than later'.
>
> Important purposes and functions of granting interim relief in this context are that a respondent 'does not build himself into an impregnable position by the time the review comes to be heard' and, secondly, to prevent the bias exercised by a completed (but unlawful) structure towards the

[38] *Camps Bay Residents and Ratepayers Association v Augustides* 2009 (6) SA 190 (WCC).

> favourable determination of a regularisation application so as to 'permit a result that would not have been permitted if the factor of a *fait accompli* had not been present'. See: *Searle's* case supra para [11]." (emphasis added)

80 Although brought under PAJA, the essence of the challenge to the NEMA decision-making process here is a legality-type challenge – the non-compliance with section 38(3) and (8) has been marked and it is accordingly manifestly a case where the principle of legality must operate decisively. On an application of the principles laid down in this judgment, the construction must be stopped.

81 To the extent that any balancing exercise is to be conducted, it is submitted that in the context of this matter it is to be approached with extreme caution. The value of the constitutionally protected heritage and cultural rights which the applicants seek to protect, rights which have their origin in the birth of ancient societies and which have subsisted for millenia, should not readily be devalued in a contest with wealthy property developers with substantial funds at their disposal.

82 The prejudice faced by the applicants, particularly the second applicant, and similarly situated First Nation communities and Mr Jenkins has been dealt with in the preceding section. Certainly, in the *Shell* matter, anticipated losses in excess of R1.3 billion were not considered to outweigh the cultural and spiritual constitutional rights in question. This was notwithstanding that the *prima facie* right there was at the weaker end of the spectrum, compared to the right in the present matter. The prejudice to the applicants, is also permanent and irreparable. This much is also recognised in the *Camps Bay Residents and Ratepayers* matter which correctly points out that the continuation of

construction pending review seeks to place the developer in an impregnable position and force the outcome of the relief in the review application, and subsequent development applications, even if illegality and reviewability have been demonstrated. The Court is not sitting with

83 The response to the applicants in respect of the claims by the first respondent regarding the balance of convenience are dealt with in detail in the replying affidavit and annexures at pages 2635 to 2644 of Vol 7 and, in respect of the public interest from, pp 2644-2650.

84 The replying affidavit includes an analysis of the relevant provisions of the development agreement with Amazon Development Company.

85 We highlight the following aspects of the analysis in the replying affidavit:

1.80 A number of agreements are relied on by the first respondent. A notice in terms of rule 35(12) was served on the first respondent in respect of these agreements. The only agreements forthcoming were the development agreement and the lease agreements with Amazon Development Company. The development facility agreement or agreements were not provided as required by rule 35(12). Rule 35(12) provides as follows under circumstances where a party fails to provide a document in response to a notice under that subrule:

> "Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording."

1.81 In the circumstances, no reliance may be placed on the development facility agreements as justifying the refusal of relief in these proceedings.

1.82 The first respondent bound itself to an extremely tight construction programme for completion of the development before any of the environmental authorisation and land use planning permissions had been granted.

1.83 This is so despite the fact that it is clear from the terms of the development agreement that both parties understood that there was considerable uncertainty attendant upon the timetable and they purported to structure their agreement accordingly.

1.84 The development agreement provided for two junctures at which the LLP could assess the viability of the contractual timetable and exit the agreement without incurring penalties – the first respondent elected at its own risk not to place reliance on these.

1.85 The parties were in any event able to negotiate an extension of five months in respect of the agreed practical completion date and lease commencement date.

1.86 Despite provision for extensions also arising from Covid delays, the first respondent asserts that it absorbed the full impact thereof without reliance on the contract – again this is something which the first respondent took upon itself.

86 The following further submissions are made in regard to the assertions in the first respondent's answering affidavit:

1.87 In paragraph 79 p 845 Vol 3, it is stated that "ADC recently agreed to reset the practical completion date and consequently the lease commencement date" to the dates of 30 November 2022 and 1 December 2023 respectively. No explanation is given as to why the parties did not factor in the judicial review proceedings before this court.

1.88 Insofar as it is asserted that Amazon Development Company has made it clear that it cannot and will not tolerate any further significant delay, and insofar as further averments are made regarding its intentions in the event of delay, the evidence is hearsay and is not confirmed on oath by any witness from the company.

1.89 Insofar as litigation delays are relied upon, there is no reason why the parties should not ensure that the further review hearing and any appeal is conducted on an expedited basis.[39]

1.90 The setting out at paragraphs 96 to 118, pp 849 – 855 Vol 3 of the financial consequences of delay or cancellation are not a model of clarity. Nonetheless, it appears from a summation that the financial consequences for the first respondent are nowhere near those which were asserted by *Shell* in that matter.

[39] Para 81 p 846 Vol 3.

1.91 The definition of “anticipated practical completion date” in clause 2.1.3 of the development agreement[40] commences with the words “unless otherwise agreed by the Tenant in writing”. In those circumstances, and with no affidavit from them, there can be no reliance on assertions by the first respondent as to how Amazon Development Company will respond to litigation delay.

1.92 In this regard, one would expect the first respondent to be far more forthcoming as to what has been discussed between it and Amazon regarding the potential for the testing of administrative decisions for legality under the Constitution. Given the controversial nature of the development, this must have been anticipated by the parties.

1.93 It is submitted that this court should be slow to deny the applicants protection of their constitutional rights on the say-so of Mr Aufrichtig and in the absence of any full disclosure by him and Amazon in this regard.

87 The public interest component of the balance of convenience is dealt with in detail in the applicants replying affidavit at paragraphs 128 – 141 pp 2644 – 2650 Vol 7.

88 In sum, it is pointed out there that:

1.94 Amazon is committed to commissioning the development of a campus in Cape Town and, if it does not go ahead on the River Club site, it

[40] Page 2696 Vol 7.

will go ahead at one of a number of potential suitable sites in Cape Town.

1.95 The events surrounding the Vogue development cannot support the case that the City seeks to make out in relation to it, namely that the enforcement by the poor of their constitutional rights is inimical to property development, property developers and economic development.

1.96 Property development companies are very well aware of the risk and costs associated with delays in obtaining the necessary approvals to develop sites and factor these into their financial and operational plans, and in the construction and other contracts that they enter into. These risks are higher if, as in the case of the River Club site –

1.96.1 the site requires rezoning;

1.96.2 departures from the land use planning policies are necessary in order to obtain the necessary land use planning authorisations;

1.96.3 the site has specific ecological or heritage qualities, requiring additional authorisations;

1.96.4 there is a high degree of public opposition to the proposed development which means that it is foreseeable that those opposing the development will appeal authorisations that are granted and that if those appeals are dismissed, may

enforce their constitutional rights by way of constitutional litigation.

1.97 The evidence (subject to the strike out application) suggests that Amazon was well aware of the risks and of the potential for delay and required prospective developers to provide it with information to assist it in quantifying such risks.

89 In all the circumstances, the balance of convenience should not operate to deny the applicants their constitutional rights.

No adequate alternative remedy

90 It is clear from all of the decided cases, including the more recent cases of *Camps Bay Residents and Ratepayers* and the *Shell* case that the appropriate manner of proceeding in circumstances such as the present is to apply for a judicial review of the relevant decisions and at the same time to seek urgent interim relief preventing further construction or the continuation of any other offending activity.

91 The applicants on more than one occasion called upon the respondent not to proceed with the development pending the judicial review proceedings. Had they heeded the call, there would have been no need to seek urgent interim relief. By ignoring the calls and proceeding with the development notwithstanding its highly questionable legality, the first respondent forced the applicants to bring an application for urgent interim relief.

92 The review proceedings are not an alternative remedy that potentially replaces the interim interdict proceedings. They are being pursued and the first respondent has made it quite clear that that is not going to stand in the way of construction proceeding.

Urgency

93 The issue of urgency is dealt with in detail in both the founding and replying affidavits.[41]

94 In respect of the latter stages of the litigation, the matter is also taken up in the answering affidavit to the strike out applications.[42]

95 By way of overview, what the affidavits demonstrate is that –

1.98 The criticisms directed at the applicants are overblown and unwarranted.

1.99 It was manifestly appropriate and in the interests of justice and the efficient management of the court system to combine the reviews of the NEMA and land use planning decisions into one review application – this limits costs and wastage of court time and is consistent with the reality that both forms of authorisation are necessary for construction to be able to proceed. The respondents' answering affidavits reveal the extent to which the two decision-

[41] FA paras 22 – 24.7 pp 19 – 22 Vol 1; Reply paras 8 – 22 pp 2597 – 2606 Vol 7.

[42] AA in the strike out applications Vol 8; pp 3146-3188.

making processes were interrelated, for example, in relation to the extensive reliance of the Mayor on the First Nations report.

1.100 Indeed, had the review in respect of the NEMA decisions proceeded separately, it may well have been met with the defence that the applicants had an internal remedy which it had failed to exhaust in the form of an appeal in respect of the land use planning decisions.

1.101 PAJA makes it clear that 180 days is the period within which review proceedings must be brought – this was complied with.

1.102 The applicants were to be commended for having brought their reviews within the statutorily stipulated time, having regard to the extraordinarily vast amount of documentary material and the factual period of, literally, five centuries, that had to be covered.

1.103 Until such time as the Minister of Water Affairs had acted in terms of section 148(2)(b) to lift the suspension of the water use licence pending appeal, that there were no grounds for seeking urgent interim relief – a prior application would no doubt have been met with the objection that there was no reasonable apprehension of irreparable harm.

1.104 The urgency was in fact brought about by the first respondent's refusal to allow the constitutional review process to proceed in terms of section 33 of the Constitution and its insistence on forging ahead with the development knowing of the very real risk of the setting aside of one or more of the authorisations.

1.105 The proceedings were launched within seven days of the applicants' becoming aware of the decision of the Minsiter of Water Affairs to lift the suspension of the water use licence.

1.106 For the reasons set out in the answering affidavit to the strike out applications, the latter part of the litigation has been conducted reasonably and efficiently.

96 Accordingly, there is no merit in the resistance to the grant of the relief sought in prayer 1 of Part A of the notice of motion.

97 In the ultimate event, the parties had more than enough time to file their papers. Dates have been arranged through agreement. Although the delay in the hearing date has prejudiced the applicants, it has given the respondents that much more time to prepare.

Strike-out applications

98 This section of the notes addresses applications brought by the first respondent ("the LLPT"), the third, sixth and seventh respondents ("the City"), and the fourth and fifth respondents ("the Province") (collectively, "the strike-out applications") to strike from the record allegations in the replying affidavits deposed to by Leslie London ("the reply"), Bridget O'Donoghue and Deirdre Prins-Solani.

99 The applicants oppose the strike-out applications in so far as they concern:

1.107 paragraphs 31; 50; 52.1; 52.2; 52.3; 52.4; 52.5; 85; 86.1; 86.2; 86.3; 86.4; 86.5; 86.6; 87; 88; 89; 90; 130; 131.1; 131.2; 132; 134.1; 134.2 and 134.3 of the reply;

1.108 paragraph 11 of Ms. O'Donoghue's affidavit; and

1.109 paragraphs 7 to 45 and 47 to 48 of Ms. Prins-Solani's affidavit.

100 The material in dispute can be grouped broadly under the following three heads:

1.110 material in support of the challenge relating to the Director's and the Minister's failure to ensure that a specialist report from a specialist consultant in intangible heritage was submitted (the Province's strike-out application);

1.111 material dealing with the legality of the First Nations report and the qualifications of its author (the LLPT's strike-out application);

1.112 material adduced in support of the challenge that the MPT and the Mayor acted irrationally in departing from the views of the City's Environmental Management Department (the LLPT's and the City's strike-out application);

1.113 material adduced in connection with Amazon's 2018 Request for Proposals (the LLPT's strike-out application); and

1.114 material in Ms. O'Donoghue's replying affidavit responding to averments in the LLPT's answering papers concerning the termination of her mandate.

101 These supplementary heads of argument are structured as follows:

1.115 First, we make legal submissions as to the basis upon which we say that the applications should be disposed of.

1.116 Second, we deal with the disputed material under the heads mentioned above.

Legal submissions

102 A party is entitled to introduce in reply new corroborating evidence in respect of an issue that was raised in the founding affidavits and taken up in the answering affidavits.

103 Thus, in eBotswana[43], the court was concerned with satellite signal that Sentech had wrongly leaked into Botswana affecting its TV stations' viewership. eBotswana relied on a survey of viewers. The reliability of the survey was challenged in various respects in the answering affidavits. In reply the applicant put up for the first time an affidavit by the managing director of the survey company, explaining its mandate and attaching a report setting out the methodology adopted, the number of interviews conducted and its key findings. All of this material would have been available at the time of preparing the founding affidavit.

104 The court permitted the introduction of the affidavit in reply, saying[44] -

> "In view of the contents of the answering affidavit it was well within the ordinary procedural rules for the applicant to respond by introducing further

[43] eBotswana (Pty) Ltd v Sentech (Pty) Ltd and Others 2013 (6) SA 327 (GSJ).

[44] At para 28.

> corroborating facts. Even if certain of the averments could have been made in the founding affidavit, on its own that is no basis for excluding it from consideration. It is evident that Sentech would not have been able to challenge the averment or document produced. A common-sense approach based on want of prejudice precludes their exclusion from consideration."

105 In *Hidro-tech Systems,*[45] the court was also faced with a strike out application on the basis that evidence in or attached to the replying affidavit had not been adduced in the founding affidavit. It included, amongst others, a fresh report by a forensic auditor commissioned to analyse the financial statements attached to the answering affidavit.

106 Irish AJ held[46] as follows:

> "All of the other matter is sought to be struck out as new matter raised in reply. It is wrongly characterised as such. The matter seeks to reply to material introduced into the affidavits by the respondents in the answering affidavits and, more particularly, the annexures thereto. I do not agree that the material is 'new matter', in the sense that it makes out a case that was not made out in the founding papers. To the extent that it uses material gleaned from the answering affidavits to fortify the case made out in the founding affidavits, it is unexceptional. This is clearly the case with the affidavit of Geater. She is a forensic auditor who was requested by the applicant's attorney to peruse and report on the financial statements annexed to the answering affidavits. She compiled a report which was confirmed on affidavit, and put in in reply. In this report she pointed out a number of anomalies in the first and second respondents' annual financial statements, that called into question the supposed independence of the two companies; but she ultimately declined to draw any firm conclusions in the absence of further detail. This seems to me a perfectly acceptable response to documentation put up by the respondents themselves."

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45 Hidro-tech Systems (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 483 (C).

46 At para 81.

107 Even if the matter is properly construed as new matter, a court may not grant an application to strike material from a pleading unless it is satisfied that the applicant will suffer prejudice on account of the impugned material. Rule 23(2) provides in express terms that "the court shall not grant the [striking out application] unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence it it not be granted."

108 The issue of prejudice is dealt with in some detail in the applicants' answering affidavit to the strike-out applications at Vol 8: pages 3144 to 3187. The following is apparent from that affidavit:

1.117 As early as 10 September 2021, more than two months before the original hearing date, all of the parties were alerted by senior counsel for the City by email of the possible need to consider filing further answering affidavits upon receipt of the replying affidavits;

1.118 Senior counsel indicated that hearing dates would not be agreed to before this had been considered;

1.119 At a meeting of counsel on 28 September 2021, counsel for the respondents proposed hearing dates for November, which were ultimately agreed to on 7 October 2021;

1.120 At no point in the subsequent email exchanges relating to dates was there any mention of the filing of further answering affidavits.

1.121 In the affidavits filed in support of the strike-out applications, one of the respondents seek to attribute the failure to file further answering

affidavits to the late filing of the applicants' heads (by 3 court days) and their unwillingness to shift the hearing date. The correspondence at the time however does not bear them out. It is devoid of any reference to the need for time to file further answering affidavits.

1.122 It is also a relevant consideration in the adjudication of the strike out application that the review proceedings have not reached the stage when a supplementary affidavit may be filed in response to the rule 53 record and when the notice of motion may be amended. Matter raised in the applicants' replying affidavit will be supplemented and the respondents will have a further opportunity to answer all of it in their Part B answering affidavits.

109 Without conceding that this is the case, to the extent that any of the issues in reply might be considered a new legal point, it is trite that a party may raise a new point of law in argument, provided it is a pure question of law.[47] While this rule is cited most frequently in the context of appeals, it applies in all proceedings.[48]

110 The rationale underpinning this rule is that a Court must not be precluded from giving the correct decision on accepted facts merely because a party failed to raise a legal point[49]. A contrary position would infringe the principle of legality.[50]

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[47] Paddock Motors (Pty) Ltd v Inglesund 1976 (3) SA 16 (A) at 23D – 34G; De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue 1986 (1) SA 8 (A) at 33E-G; Telkom Suid-Afrika BPK v Richardson 1995 (4) SA 183 (AD); CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC) at paras 65 - 67.

[48] See for example the unreported judgment Business Partners Ltd v Yellow Star Properties (7188/2011) [2012] ZAKZDHC (17 July 2012).

[49] Telkom Suid-Afrika BPK v Richardson 1995 (4) SA 183 (AD).

[50] CUSA v Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC) at para 67.

Challenge relating to the failure to appoint an intangible heritage expert

111 The Province seeks to strike paragraphs 31 and paragraph 50 from the reply on the ground that this material "impermissibly introduces a new review ground in reply and/or introduces new material in reply".

112 The import of paragraphs 31 and 50 is that the Director and the Minister failed to ensure that the HWC's requirements in terms of section 38(3) of the NHRA were met insofar as they failed to ensure that a specialist consultant was appointed and a report provided by him or her.

113 This issue was raised in the founding affidavit in paragraphs 91 and 92. Paragraph 91 ends saying -

> "The interim comment concluded with the recommendation that a specialist consultant with expertise in intangible heritage should be engaged to provide a supplementary report."

114 As a follow on, the very next paragraph says -

> "Instead, the LLPT caused a supplementary report to be submitted in December 2019 … which was prepared by the same authors as the Secon HIA and essentially re-argued its conclusions. … The supplementary report also incorporated a report entitled "The River Club First Nations Report' prepared by Rudewaan Arendse of ASMAS solutions. … This report purported to be an investigation of the 'aspirations' for the site on the part of the First Nations people." (emphasis added)

115 The contrasting of the requirements of the HWC in paragraph 91 with what was actually provided in paragraph 92 demonstrates clearly that the applicants were making the case that the requirement of a report by a specialist in intangible heritage was not being complied with.

116 The requirement of a specialist appointment and report is again referred to in paragraph 134 (p 70). This forms part of a longer narrative in the founding affidavit that contrasts the LLPT's successive HIA's and comments with the letters addressed to them by HWC in which non-compliance with section 38(8) is repeatedly pointed out. It is clear that the applicants rely on that non-compliance to make out their case.

117 This culminates in the review grounds in para 198.1 on p98 (in respect of the Director) and that in para 199.1 (the Minister), which embrace all the elements of the non-compliance with section 38(8) in the review ground under section 6(2)(b) of PAJA - a mandatory and material procedure was not complied with.

118 Moreover, the first respondent fully understood paragraphs 91 and 92 to be a challenge to compliance with the requirement of the appointment of and a report by a specialist consultant - see paras 270-272 on p898 of its answering affidavit which reads in relevant part -

> *"*270. …As a consequence and in an abundance of caution, the LLPT implemented the recommendation of HWC in its interim comments and duly appointed a specialist consultant with expertise in intangible heritage, viz Mr Arendse.
>
> 271. Mr Arendse subsequently prepared what is referred to in the founding papers as the AFMAS Report. A complete copy of the River Club First Nations report, together with Mr Arendse's curriculum vitae is attached above as Annexure JA9.2. As already explained elsewhere, the report was annexed to the Dec. 2019 HIA Supplement, which integrated the findings and recommendations of Mr Arendse's report into the rest of the analysis, assessment and conclusions of the HIA.

> 272. For reasons elaborated upon below, it is denied that the Dec. 2019 HIA Supplement or the River Club First Nations report was defective or otherwise inadequate."

119 This demonstrates that the issue was squarely raised in the founding affidavit and responded to by the first respondent. This is also evidenced by the first respondent having put up the CV of Mr Arendse. Although the applicants were then fully entitled to elaborate and corroborate the non-compliance in response to what the first respondent was averring in answer, in truth in paragraphs 31 and 50 Mr London does little more than re-assert was was already raised in the founding affidavit.

120 For his part, the Minister himself deals with the allegation at paragraph 37 of his answering affidavit, pointing out that the HWC acknowledged the "unquestionable qualifications and heritage standing" of the heritage specialists of Hart and Townsend and explaining that the Director initially sought to act on the recommendation of the appointment of and report from a specialist, but the environmental authorities eventually had to take their decisions, given that the HWC allegedly refused to clarify its requirements in this regard.[51]

121 This discussion takes place under the rubric "Compliance with section 38(3) of the NHRA." (see p 2138 vol 5) The Minister was thus fully aware also which review grounds were in issue.

Material dealing with the First Nations report

[51] Vol 5: Minister's answering affidavit, page 2139, para 37.

122 The LLPT and the City seek to strike all material adduced in the replying papers addressing the First Nations report and, specifically, the author's qualifications and methodology.

123 The allegations in dispute are paragraphs 52.1; 52.2; 52.3; 54 and 52.5 [52] of the reply; and paragraphs 11 to 45 and 47 to 48 of the replying affidavit of Ms. Deirdre Prins-Solani.[53]

124 The averments in these paragraphs respond to issues placed in dispute in the answering affidavit of Mr. Aufrichtig.

125 Mr. London avers in paragraphs 91 to 92[54] and 134[55] of the founding affidavit that the LLPT failed to act on the HWC's recommendation that it procure a specialist report on intangible heritage.

126 Responding to these allegations, Mr. Aufrichtig contends that:

1.123 The LLPT acted upon the HWC's recommendation by appointing Mr. Arendse to prepare the First Nations report;[56]

1.124 Mr. Arendse is "a leading authority" on the First Nations history and narrative in the TRUP area - in support his curriculum vitae is put up.[57]

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[52] Vol 7: RA, page 2615 to 2618.

[53] Vol 8: Replying affidavit of Deirdre Prins-Solani, pages 3018 to 3038.

[54] Vol 1: FA, page 55.

[55] Vol 1: FA, page 70.

[56] Vol 3: page 898, para 270.

[57] Vol 3: page 926, para 336.1

1.125 The methodology employed by Mr. Arendse followed "accepted oral history interviewing protocols".[58]

127 Every allegation with which the respondents have taken issue in this regard are aimed directly at rebutting these assertions.

Material adduced in support of the irrationality challenge against the mpt and the mayor's decisions

128 In its founding papers, the applicants seek *inter alia* to review the decisions of the MPT and the Mayor on the grounds that they were arbitrary and capricious.[59]

129 In substantiation of this ground of review, the founding affidavit of Mr. London alleges at paragraph 193 (and subparagraphs)[60] that the City's Environmental Management Department ("EMD") submitted an appeal against the environmental authorisation for the development on multiple grounds (which are listed).

130 The legal conclusion which the applicants seek to draw from these facts is stated in paragraph 195, specifically, that the MPT's and the Mayor's departure from sound and duly adopted policy (as evidenced by the EMD's appeal) was indicative of an irrational decision-making process.

131 This case is expanded upon in paragraphs 86.1 to 86.5 through a comparison of objections in the EMD's appeal relating to flood risk and biodiversity

58 Vol 3: page 930 – 931, 346.2.

59 Vol 1: FA, page 101, para 200.3.

60 Vol 1: FA, pages 85 – 86.

management against the Mayor's attitude to these matters in his appeal decision. This material is raised in response to the Mayor's assertion that the EMD's appeal was dealt with comprehensively in his appeal decision.[61]

132 To the extent that this matter is found to be impermissible new matter in reply, I submit that the parties are not in a position to claim that they have suffered any prejudice on account of this material because:

1.126 The City will in due course have the opportunity to file answering affidavits in response to supplementary affidavits filed by the applicants in terms of rule 53(4).

1.127 On 10 September 2021, the City indicated that it intended to file further answering affidavits in response to any new matter raised in the applicants' replying papers. It has failed to do so, despite having had almost two months to attend to the preparation of the envisaged affidavits.

1.128 The City has presented comprehensive argument on these issues running to 26 pages in the appendix to its heads of argument and has done so by reference to the founding and answering papers.

<u>Material adduced in connection with Amazon's 2018 request for proposals</u>

133 The disputed paragraphs in this connection are paragraphs 130; 131.1; 131.2; 132; 134.1; 134.2 and 134.3 of the reply.

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[61] Vol 5: City's Answering Affidavit, page 1529, para 293.

134 This material concerns a Request for Proposals put out by Amazon in 2018 for the development of its new regional headquarters in Cape Town. These allegations are directed at establishing that:

1.129 Amazon is committed to employing more people in Cape Town, which plans are unlikely to be affected by the outcome of these proceedings; and

1.130 Amazon will in all likelihood appoint another developer to construct its headquarters at one of multiple alternative sites in Cape Town (which do not trigger environmental and land use approvals) in the event that the River Club development does not go ahead.

135 These allegations are made in response to the extensive material in the answering papers of the LLPT and the City dealing with the anticipated economic fall-out if the interim relief is granted, much of which is premised on the assumption that in these circumstances Amazon will not construct its regional headquarters at an alternative site in Cape Town.[62]

136 They do not constitute new matter in reply. They were not relevant to any issue in dispute at the time the founding affidavit was prepared. An applicant is not expected to be prescient as to the content of the answering affidavits. The evidence is raised legitimately and directly in response to issues raised in the answering affidavit and is admissible on the authority of *eBotswana* and *Hidro-tech*.

[62] See paragraphs 10.1 – 10.3 and 53.3 City's heads of argument and paragraph 155 of the LLPT's heads of argument.

Averments by Ms. O'donoghue concerning the termination of her mandate

137 Paragraph 11 of the replying affidavit of Ms. O'Donoghue contains Ms. O'Donoghue's version of the circumstances in which her mandate as heritage specialist was terminated. It is a response to allegations at 256 to 258 of Mr. Aufrichtig's answering affidavit[63] that her mandate was terminated on account of repeated missed deadlines and failures to attend scheduled meetings.

138 Mr. Aufrichtig's allegations cast aspersions on Ms. O'Donoghue's professional conduct, and she is entitled to answer them.

Conclusion

139 The applications to strike out stand to be dismissed.

140 Even if the strike out applications were all to be granted, the applicants have made out a case for the relief sought on the papers as they would then stand.

141 In all the circumstances, it is submitted that the applicants have made out a case for the grant of the relief sought in Part A of the notice of motion.

142 The applicants do not persist in the relief sought in prayer 2.2 of Part A of the notice of motion.

143 The applicants were forced by the conduct of the first respondent to bring the Part A relief.

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[63] Vol 3: page 898.

144 They have been supported in their prima facie unlawful conduct, and in resisting the interim interdict proceedings, by the remaining respondents. In the circumstances the respondents should all be ordered to pay the applicants' costs, such costs to include the costs of two counsel jointly and severally, the one paying the other to be absolved.

145 The applicants in this matter sought appropriate relief in respect of breaches of the provisions of NEMA and the Municipal Planning Bylaw which is a statute as envisaged in section 32(1) of NEMA.

146 Accordingly, in the event that the court declines to grant the relief sought, section 32(2) ought, we submit, to apply. It reads as follows:

> "A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

147 The applicants also, in such circumstances, place reliance on the *Biowatch* principle.[64]

Alan Dodson SC

Jane Blomkamp

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[64] *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC)

Chambers, Sandton and Johannesburg

19 January 2022