



**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

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

**DIRECTOR: DEVELOPMENT MANAGEMENT
(REGION 1), ENVIRONMENTAL AFFAIRS &
DEVELOPMENT PLANNING, WESTERN CAPE
PROVINCIAL GOVERNMENT**

Fourth Respondent

THE MINISTER FOR LOCAL GOVERNMENT,

Fifth Respondent

CHAIRPERSON OF THE MUNICIPAL PLANNING

Sixth Respondent

EXECUTIVE MAYOR, CITY OF CAPE TOWN

Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE

Eight Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 18 MARCH 2022

GOLIATH DJP

Introduction

[1] This is an application in terms of which the Applicants, the Observatory Civic Association (OCA) and Goringhaicona Khoi Khoin Indigenous Traditional Council (“GKKITC”) seek interim interdictory relief to restrain Liesbeek Leisure Properties Trust (“LLPT”) from carrying out further construction works in relation to the development of the River Club, pending review of the relevant environmental and land use authorisations. In order to proceed with the development, the developer had to obtain, among other things, an environmental authorisation from provincial authorities and a land use planning authorisation from the City of Cape Town. After a public participation process and scrutiny, those authorisations were duly granted, subject to numerous conditions. The application has two parts. This matter concerns part A of the proceedings, in terms of which the Applicants seek an urgent order interdicting the developer from acting on the environmental and land use authorisations to commence construction, pending final determination of the review. In Part B of the application, the Applicants seek to review and set aside the two authorisations, as well as appeal the decisions that confirmed the authorisations.

[2] In the review application to be heard in due course, the Applicants seek to set aside four decisions taken in connection with the River Club development namely:

- 2.1 The decision taken by the fourth respondent (“the Director”) on 20 August 2020 to grant environmental authorisation for the proposed

development in terms of section 24 of the National Environmental Management Act, 107 of 1998 (“NEMA”) (“the Director’s decision”).

- 2.2 The decision taken by the fifth respondent (“the Minister”) on 22 February 2021 in terms of section 43 (6) of NEMA to dismiss the appeals lodged against the Director’s decision and to grant environmental authorisation for the proposed development (“the Minister’s decision”).
- 2.3 The decision taken by the City of Cape Town Municipal Planning Tribunal (“MPT”) on 30 September 2020 to approve the proposed development application in terms of section 98 of the Municipal Planning By-Law, 2015 (“the MPT’s decision”).
- 2.4 The decision taken by the seventh respondent (“the Mayor”) on 18 April 2021 to dismiss various appeals against the MPT’s decision in terms of section 108 of the By-Law and to confirm the MPT’s decision to approve the proposed development (“the Mayor’s decision”).

Factual Background

[3] The River Club site, Erf 151832, Observatory was established in 1993 and is located near the confluence of the Black and Liesbeek Rivers. It is bordered to the west and north-west by a natural watercourse following the original course of the Liesbeek River, and by the Liesbeek Canal and the Black River to the east. The original wetland that made up the River Club site was gradually reclaimed. It is approximately 14.7 hectares in extent and consists of a golf course, offices, a

conference venue, restaurants and a parking lot. The site was initially utilized by the South African Railways, the predecessor to Transnet, as recreational grounds for its workers. The property was subsequently sold to Liesbeek Leisure Properties for R12mill and acquired months later by LLPT for the same amount. The River Club is part of a broader area known as Two Rivers Urban Park ("TRUP"), which is approximately 300 hectares in extent and incorporates large stretches of open space on either side of the M5 highway. The area is surrounded by established suburbs and industry. The development site is also located within a historic section of the TRUP in the vicinity of a high concentration of heritage resources of varying grades including the South African Astronomical Observatory, Valkenberg Hospital, Oude Molen eco-village, Maitland gardens, the Alexandra Institute and historic Mill. The South African Astronomical Observatory was built in 1825 on a raised portion of the TRUP and has been declared a national heritage site in recognition of both its historic, scientific, and aesthetic value.

[4] The River Club development site also forms part of a broader area that was the dominion of the Gorinhaiqua (a section of the Peninsula Khoekhoe) in pre-colonial times. According to the Applicants the River Club site is one of the only undeveloped remnants of the grazing lands used in the summer by the Khoekhoe for their cattle. The City disputed this assertion and stated that the site is one of several undeveloped remnants of the grazing lands used by the Khoekhoe. The site hosted significant ceremonies and gatherings and are holders of memory. The Applicants explained that these groups were nomadic pastoralists, who were from 1657 onwards gradually eliminated from the area by Dutch Settlers. According to the Applicants significant historical confrontations occurred in the area, including the

1510 battle with D'Almeida and the 1659 war with the Dutch. However, the Heritage Impact Specialists appointed by LLPT disputed this contention. However, it is common cause that the wider TRUP precinct is regarded as an important area which bears testimony of historical acts of dispossession and violence suffered by indigenous people at the hands of European settlers.

[5] A Baseline Heritage Study for the TRUP commissioned by the Western Cape Provincial Government Department of Transport and Public Works in October 2016 concluded that the entire TRUP site could be regarded as being of outstanding historical, symbolic, scenic and amenity value or a Grade II site in terms of its heritage status as provided for in section 7 of the National Heritage Resources Act, 25 of 1999 ("NHRA"). A grade II heritage grading signifies that the resource can be considered to have special qualities which renders it significant within the context of a region or province.

[6] On 20 April 2018, Heritage Western Cape ("HWC") declared the development site a provisional protected area for a period of two years in terms of Section 29(1) of the NHRA. The LLPT, Department of Environmental Affairs and Development Planning ("DEADP"), Department of Transport and Public Works and the City all submitted appeals against the decision in terms of section 49 of the NHRA. The appeal process was concluded approximately a year later, and the appeals were dismissed. The provisional protection lapsed on 20 April 2020, and the heritage status of the site was never clarified and concluded. HWC described the significance of the River Club as follows when the provisional protection was approved and gazetted:

“The River Club forms part of the wider Two River Urban Park (TRUP) and represents a microcosm of Cape history. It reflects the pattern of South Africa’s social, architectural and political history spanning across the pre-colonial, apartheid and more recent history.

The Two Rivers Urban Park landscape has high cultural values of historical, social, aesthetic, architectural, scientific and environmental significance. It contributes to an understanding of past attitudes, beliefs, uses, events, persons, periods, techniques and design. It has associated links with past events, persons, uses, community memory, identity and oral history. It possesses a strong sense of place.

The Two Rivers Urban Park landscape is a complex composite of natural, cultivated and built landscape elements. It is a cultural landscape, transformed by thousands of years of settlement history. The landscape expresses both artistic and innovative qualities in terms of its natural setting, architecture and planting patterns. It also has narrative qualities, possessing a rich layering of physical evidence brought alive by the oral histories of the people who lived and worked in institutions, amongst other things, the Valkenberg Hospital and the South African Astronomical Observatory. Different historical narratives create a story of pioneering and philanthropy, social reform and identity, self-sufficiency, farming and institutionalization.”

[7] It is not disputed that the confluence of the Liesbeek River and Black River, as well as the broader TRUP area have high cultural value of historical, cultural, social, aesthetic, architectural, political, scientific and environmental significance. The unique features and historical significance of the development site necessitated consultation with First Nations Groups. The Western Cape Provincial Government Department of Public Works appointed Mr Rudewaan Arendse of AFMAS Solutions (AFMAS) to consult with First Nations Groups and prepared a report for the purposes of preparing a Local Spatial Development

Framework for the TRUP area. The Department appointed AFMAS as a social facilitator to engage the First Nations about the oral history of the TRUP area. The engagement with the First Nations Peoples was compiled by AFMAS in a report dated 25 September 2019 entitled the *"TRUP First Nations Report"*.

[8] It is evident that there are divisions within the First Nations Groups, since a group in favour of the development was established under the umbrella of the *"First Nations Collective"* ("FNC") after finalisation of the TRUP First Nations Report. Second Respondent, the GKKTIC, terminated its engagement with Arendse during the consultation process at some stage.

[9] The approved development is known as the *"Riverine Corridor Alternative"* and is based on the assessment of the heritage practitioners' assessment which concluded that the presence of the Liesbeek River and its history was the most important characteristic establishing the River Club's site's sense of place. For this reason, the heritage practitioners concluded that the historical significance of the site could be reclaimed through the proposed recovery of the riverine corridor (together with ecological functionality). The project therefore involves the rehabilitation of the riverine corridor along the route of the existing Liesbeek Canal running adjacent to the eastern boundary of the site, while the "old" Liesbeek River Canal on the western edge of the site, the residue of the original course of the Liesbeek River, will be largely infilled and landscaped with a vegetated stormwater swale. The whole of the building will be infilled in order to lift the development approximately three metres higher out of reach of floodwater, as the River Club site is coextensive with the Liesbeek flood plain.

[10] The proposed development is described as a large-scale urban campus or mega development, and contemplates a mixed-use development of the River Club property of approximately 148 425m² in extent. It comprises clusters of multi-storey buildings arranged into two precincts located on podium basement parking levels. The buildings will be allocated to incorporate a variety of uses including retail, hospitality, commercial, institutional and associated uses. The development also includes residential use including low cost inclusionary housing. Amazon, a multi-national corporation is the intended anchor tenant and was consulted and accommodated in the design and layout of parts of the proposed development.

[11] Considering the nature, scale, historical and cultural significance of the property, various statutory and environmental considerations were triggered. Notifications of intent to develop were sent to HWC in compliance with section 38(1) of NHRA because the proposed development will change the character of a site exceeding 5000 m². HWC required the LLPT to undertake a heritage impact assessment. The development involved activities listed in terms of section 24 of NEMA namely the infilling of a watercourse and the development of land zoned as open spaces, and therefore required an environmental assessment.

[12] The LLPT initiated a scoping and environmental impact assessment, culminating in a first Heritage Impact Assessment ("HIA") which was duly considered by HWC's Impact Assessment Committee ("IACom"). HWC proposed an assessment of the entire TRUP precinct finding it "*problematic to consider the specifics of the application in isolation from the broader study*". This was followed by a broader baseline study of the TRUP area which was commissioned by the Western Cape

Department of Transport. The TRUP Heritage Study was concluded and contained various proposals. The IACom considered the TRUP Heritage Study and concluded that the overall site is of at least grade II heritage significance. The Committee recommended that the TRUP area should receive provisional protection under section 29 of NHRA.

[13] In the interim the LLTP commissioned two new heritage specialists, Timothy Hart and Dr Stephen Townsend, to prepare a fresh HIA encompassing both phase one and phase two. LLPT explained that they abandoned the first heritage impact assessment report. In and during January 2018 a draft version of Hart and Townsend's Heritage Impact Assessment ("the second HIA") was published for public comment. There were various serious objections lodged during the public participation process. It was during this period that HWC published a notice provisionally protecting the River Club site. In July 2019 Hart and Townsend produced their final HIA report.

[14] On 13 September 2019 the HWC furnished its interim comment on the second HIA and adopted the view that the second HIA substantially failed to comply with the requirements of section 38(3) and (8) of the NHRA. The HWC's main concern was that the second HIA had not accounted for the intangible significance of the site flowing from its historical associations, and that the assessment was flawed. HWC recommended that a specialist consultant with expertise in intangible heritage should be engaged to provide a supplementary report.

[15] In compliance with HWC's request, and considering the previous role of AFMAS, the developer appointed them to facilitate engagements with the First Nations to establish the oral history and intangible significance of the TRUP. AFMAS subsequently concluded the '*River Club First Nations Report*' in November 2019, which recorded the outcome of consultations with First Nations Groups. The report summarized AFMAS's terms of reference to "*engage the First Nations (the Koi and San) interchangeably referred to as indigenous people, or the Indigent, with regard to their intangible cultural heritage in terms of the River Club project site*".

[16] Subsequently, Hart and Townsend concluded a supplementary report dated December 2019, and expanded on the second HIA. LLPT submitted the supplementary report, and incorporated the AFMAS River Club First Nations Report dated November 2019. The HWC furnished its final comment on the second HIA and the supplementary report on 20 February 2020, and advised LLPT that the report, with its supplement, did not meet the requirements of section 38(3). The final basic assessment report incorporating the second HIA and the supplementary report were submitted to DEADP, which culminated in multiple phases of public comment. It attracted 494 comments from the general public, which were overwhelmingly negative. The primary issues raised were concerns about heritage.

[17] On 20 August 2020, the Director issued an environmental authorisation for the proposed development. Appeals were lodged against this decision to the Minister in terms of section 43 (2) of NEMA. HWC submitted an appeal on 10 September 2020. The HWC appealed on a single ground, which was that the decision was unlawful for want of compliance with section 38(8) in that the heritage assessment did not fulfil

the requirements of HWC. It is apparent that there is disagreement between the environmental authorities and the HWC regarding the impact of the proposed development on heritage resources, and the fulfilment of the relevant requirements envisaged in section 38(3) of the NHRA. HWC elected not to participate in any legal proceedings arising from the environmental and planning authorisations granted in respect of the River Club Development.

Chronology

[18] A brief summary of the chronology and timelines are as follows:

- 18.1 On 18 January 2018 Hart and Townsend submitted a draft heritage impact assessment in respect of the development to HWC and the Western Cape Department of Environmental affairs and Development Planning (DEADP). The draft invited comments from interested and affected parties.
- 18.2 The developer's land use application was accepted by the City on 27 March 2018, and was published for public comment. The application was circulated to various City departments for consideration. This included detailed comments and analysis from the City's Environmental and Heritage Management in a 21-page report.
- 18.3 On 20 April 2018 HWC published a provisional report recording that the River Club site was protected for a maximum period of two years from date of publication.
- 18.4 On 1 July 2019 following input from various interested and affected parties Hart and Townsend revised the heritage impact assessment.

- On 13 September 2019 HWC furnished its interim comment on the second HIA and requested the developer to further engage with the First Nations in respect of the property's heritage resources.
- 18.5 On 25 September 2019 AFMAS submitted the TRUP First Nations Report to the Western Cape Provincial Department of Transport and Public Works.
- 18.6 In November 2019 AFMAS concluded the River Club First Nations Report. In December 2019 Hart and Townsend prepared a supplement to the second HIA.
- 18.7 On 19 December 2019 the developer submitted its application for environmental authorisation to the Western Cape Provincial authorities. On 13 February 2020 HWC issued its final comment on the development, including its assessment of the December 2019 supplement to the heritage impact assessment. HWC indicated that the heritage impact assessment does not comply with section 38(3) of the NHRA, and it was therefore not in a position to endorse the development proposal.
- 18.8 In April 2020 the developer's consultants completed the Final Basic Assessment Report, setting out the environmental impact assessment of the development. On 20 August 2020 the Provincial Director (Fourth Respondent) issued the environmental authorisation for the development.
- 18.9 On 18 September 2020 the City's Municipal Planning Tribunal ('the MPT') considered the land use application. On 30 September 2020 the

parties were notified of the MPT's decision to authorise the development. The OCA appealed the MPT's decision. On 23 February 2021 the City's Planning Appeals Advisory Panel ("PAAP") considered the appeals in respect of the MPT's decision and heard oral representations from both applicants. The PAAP recommended that the appeals be dismissed. On 18 April 2021 the Mayor dismissed the appeals in respect of the decision to approve the land use application of the LLPT, and confirmed the approval of the development.

- 18.10 On 22 February 2021 the Provincial Minister dismissed the appeals against the environmental authorisation and varied the conditions of approval. At this stage the LLPT still required a water use licence in terms of the National Water Act, 36 of 1998 ("NWA") to proceed with construction.
- 18.11 On 10 June 2021 the OCA received notification from the Department of Water and Sanitation that it had issued a water use licence to the LLPT. On 21 June 2021 the OCA lodged an appeal against the Minister's decision to issue the water licence. Observatory residents observed earthmoving vehicles move onto the site the weekend of 20 and 21 June 2021. On 29 June 2021 the attorneys for LLPT applied to the Minister to have the suspension lifted.
- 18.12 On 7 July 2021, the OCA was informed by the Department of Water and Sanitation that the LLPT had submitted a request to the Minister of Water and Sanitation in terms of section 148(2)(a) of the NWA for the

operationalising of its water use licence, notwithstanding the OCA's appeal.

18.13 On 26 July 2021 the OCA's attorneys were informed by LLPT's attorneys that the application to have the suspension of the developer's water use licence lifted, was successful and that construction had commenced on that day. The review application was launched on 2 August 2021.

Applicants' delay in instituting legal proceedings

[19] Applicants indicated that on 9 March 2021 they were advised by Cullinans that urgent interdict proceedings were unlikely to succeed if instituted before the LLPT commenced activities on the site because of the difficulty of establishing a reasonable apprehension of irreparable harm.

[20] Applicants explained that following the dismissal of OCA's land use appeal, they approached Cullinans to represent them for the purposes of the review proceedings. OCA had to engage all relevant stakeholders and apply its mind to litigation funding due to its limited financial resources. On 11 May 2021 OCA informed LLPT of its intention to apply to Court for an order reviewing and setting aside the environmental authorisation and land use planning authorisations which permitted the LLPT to undertake the proposed development, and the decisions to dismiss the appeals against the environmental authorisation and land use planning authorisations.

[21] On 11 May 2021 OCA's attorneys requested a written undertaking that the LLPT would not proceed with the proposed development pending the outcome of review proceedings that it intended to launch. The LLPT refused to oblige to the request. On 12 May 2021 attorneys acting on behalf of LLPT replied by confirming that the LLPT is not in a position to give such undertaking. Applicants stated that on 9 June 2021 Cullinans instructed Counsel to draft review papers emphasising that the matter was urgent. However, Cullinans was provided with an incomplete working draft of part of the review application.

[22] Applicants also alluded to the fact that they had hoped to persuade the HWC to exercise its powers to prevent irreparable damage to the heritage value of the site while an application for the TRUP area to the South African Heritage Resources Agency for the TRUP area to be graded as a Grade II Provincial Heritage resource was pending. Applicants stated that they were advised that they should exhaust all available remedies before approaching the Court for an interim interdict. Applicants and their legal representatives participated in an on-line meeting with HWC on 14 June 2021 where they were advised that HWC does not intend to take enforcement action and would also not oppose or institute any review proceedings in respect of the environmental authorisation granted to the developer. On 6 July 2021 Cullinans appointed junior counsel to prepare an application for an urgent interdict.

[23] Applicants noted that they were mindful of the fact that the development activities on the site could not proceed without a water use licence, which was still to be decided on appeal. After the suspension of the water licence was lifted on 26 July

2021, OCA resolved on 27 July 2021 to proceed with review proceedings. The review application was launched on 2 August 2021. First Applicant had explained in some detail how and why it had taken such a long time to launch this application. I am mindful of the fact that the OCA had resolved on 24 November 2020 to institute review proceedings to prevent the proposed development. However, the Minister's appeal decision was made on 22 February 2021, and the MPT's appeal decision by the Mayor on 18 April 2021. It would have been impractical to have launched two separate reviews.

[24] The review proceedings were launched three and a half months after the last decision-making process. Applicants may be criticised for not commencing with review proceedings at that stage, but considering the fact that a water use licence prevented construction, I do not consider that it can be said that the Applicants' inordinately delayed instituting review proceedings. At this stage the Applicants were already in the process of preparing papers in the review application. It is evident that LLPT did not inform the Applicants of its intention to invoke the provisions of the National Water Act 36 of 1998 to suspend the effect of the appeal relating to the water licence. LLPT averred that the Applicants should have been aware of these provisions, and anticipated that their appeal could be rendered ineffective to stop construction on the site. In the absence of any notification by the LLPT I do not believe that the Applicants should be penalized in such circumstances.

[25] The proceedings were instituted seven days after the lifting of the suspension of the water use licence during an appeal process, which occurred on 26 July 2021.

In any event, the parties communicated with each other in relation to the commencement of construction work and LLPT was alive to the fact that review proceedings were imminent. I am accordingly satisfied that explanation provided by the Applicants are reasonable.

Applicants' Submissions

[26] In view of the fact that HWC elected not to participate in legal proceedings, the Applicants relied extensively on concerns raised by HWC in its interim and final comments. The crux of the review challenge essentially rests on the proper interpretation of section 38(8) of the NHRA and whether the Fourth Respondent and MEC usurped the discretion of Heritage Western Cape in determining that the LLPT's Heritage Impact Assessment HIA complied with the necessary requirements. Applicants criticized the conclusions arrived at in LLPT's specialists' heritage impact assessment and submitted that the requirements of section 38(3) of the NRHA was not considered by the Director and was woefully misconceived by the Minister, whose evaluation was illogical, and entirely untethered from the provisions of the NHRA. Applicants expressed the view that there was a failure by the environmental decision makers to engage with the issues at stake and to apply their minds to the impact of the proposed development on what are widely accepted to be exceptional heritage resources.

[27] Applicants' further review grounds were based on the core complaints articulated by the HWC in its interim comments related to the heritage specialists'

failure to recognise and ascribe significance to the intangible heritage resources on the River Club site, and to represent these resources in a useful format. HWC asserted that the mapping diagram based significance on ecological rather than cultural values, and reduced the acknowledged and far wider cultural landscape of the valley to just the rivers. Applicants therefore contested the view held in the heritage impact report that "*the river itself is the only tangible visual element which survives as a resource which warrants protection*". Applicants submitted that the assessment of significance is inadequate, and that the conclusions regarding an assessment of the impact on the proposed development on heritage resources are flawed and unreliable.

[28] Applicants argued that there was a complete failure by the environmental decision makers to understand the nature of the enquiry envisaged in terms of section 38(8), and generally to perform the duties imposed by that section, namely, to ensure that heritage resources are subject to an evaluation that complies with section 38(3) of the NHRA and that the views of the relevant Heritage Authority (HWC) are properly considered. Applicants submitted that the second HIA does not lend itself to a systematic analysis against the requirements of section 38(3), and failed to adequately assess the environmental significance of the heritage resources on site. Furthermore, with regard to historical significance, insufficient weight was attached to intangible heritage significance, and the evaluation of intangible significance is flawed.

[29] Applicants submitted that the mapping of heritage resources was considered to be "*illogical and flawed*", and resultantly impacted on the approach adopted in second HIA and the reliance on it. Applicants argued further that the effect of section 38(3)(a) and (b) is that a heritage impact assessment must, at a minimum, provide a graphic representation of all affected heritage resources, coupled with an objective assessment of the significance of those resources. Applicants contended that the heritage impact assessment report must also evaluate and ascribe significance to the heritage resource in accordance with the conceptual framework established by the NHRA. Furthermore, section 3(3) of the NHRA gives express recognition to intangible heritage.

[30] Applicants pointed out that the developer's approach to define and limit the significance to the riverine corridors only, any meaningful discussion of the impact on the development on the floodplain is undermined, and its significance has been changed or derogated from. Applicants criticised the conclusions and findings in the second heritage assessment report, more particularly that the only heritage feature of any practical significance on the site is the river corridor, and that the impacts associated with the proposed development are acceptable, and that there is no need to impose any restrictions on the built form of the proposed development.

[31] Applicants contended that adapting or changing the particular heritage resource significantly affects the sense of place, and is likely to have a negative impact on the intangible heritage associated with that place. Applicants stated that intangible heritage may for example, be a place to which oral traditions are attached,

or which is associated with living heritage as envisaged in Section (3)(2)(b) of the NHRA, or a place that is important in the community, or the pattern of South Africa's history as stated in Section 3(3)(a). Furthermore, the assessment of significance in the HIA was inadequate, and failed to take into account the evaluation criteria set out in section 3(3) of the NHRA, in particular whether the River Club site:

- "31.1 is considered to have cultural significance in the community;
- 31.2 could yield information about heritage;
- 31.3 is important in exhibiting particular aesthetic characteristics valued by a cultural group."

[32] Mr Tauriq Jenkins, the Supreme High Commissioner of the Goringhaicona Khoi Khoin Traditional Indigenous Council under Paramount Chief Aran, deposed to an affidavit setting out the significance of the River Club site to Indigenous Peoples, and the living heritage associated with it. He expounded on the history of Khoi and San culture and pointed out that narratives about the First Nations Peoples groupings are often contested on various grounds. He stated that there are a number of Indigenous/ First Nations Peoples whose cultural heritage is affected by the proposed development. Cultural organizations and collective structures have been established to represent, revive the cultures, and protect the interests of First Nations Peoples. On 1 April 2021 the Traditional and Khoi-San Leadership Act 23 of 2019 came into effect to facilitate a process to verify and recognize traditional Khoi and San leadership positions and communities. The process is still to commence

and will result in the official recognition of Khoi and San leaders who will serve in the national and provincial houses.

[33] Jenkins elaborated and explained the historical, spiritual and ritual significance of the TRUP area and the importance of the confluence of the Liesbeek and Black Rivers as a place of confluence of various First Nations Groups. Jenkins confirmed that Mr Rudewaan Arendse interviewed him for purposes of a report, and he was concerned that the interview procedure did not comply with even minimal ethical standards. After the publication of the TRUP First Nations Report a number of people interviewed by Arendse formed the "*First Nations Collective*" who announced that they intended to engage with the developer. According to Jenkins those opposed to the development were subsequently vilified and abused. Following interim comment by HWC it came to his attention that Arendse had been engaged by the developer, which he considered to be a conflict of interest. He subsequently perused Arendse's report entitled "*River Club First Nations Report*" in which the proposed development was portrayed as a victory for First Nations Peoples.

[34] Jenkins expressed reservations about the contents of the report, *inter alia*, the fact that it sought to elevate the First Nations Collective as the authoritative voice of First Nations Peoples, undermined the standing of the Chief of the Goringhaicona in relation to the development, de-legitimized the view of the Second Applicant and downplayed the significance of the River Club site and its associated heritage to the Goringhaicona and other Indigenous People.

[35] Furthermore, the report refers to the Goringhaicona in derogatory terms as “drifters” and “outcasts” and the Gorinhaiqua, the group supporting the development, in favourable terms as “*the traditional custodians of the historic landscape that encompasses the River Club site and the broader Two Rivers area*”. Jenkins contended that the report perpetuated “*divide and rule tactics*” and promoted division between First Nations groups. Jenkins therefore disputes the veracity of the supplementary report incorporated into the second HIA insofar as it concluded that there has been meaningful engagement with First Nations Groupings. He stated that the narrative reflected in the HIA threatens the identity, legitimacy, history and future of the First Nations as a group. Jenkins pointed out that Arendse is a member of the FNC, and the developer has entered into a “*social compact*” with the FNC in which the developer commits to ensuring that the members of the FNC benefit from the procurement processes during the construction of the development. The social compact incorporates various features included in the development. Jenkins submitted that there are numerous other First Nations Groups opposed to the development. He conceded that the Second Respondent had actively participated in the public participation process and remains opposed to the development.

[36] Applicants submitted that the error in approach and the assessment of impacts, “*downplayed the irreversible impacts of transforming a green lung at the heart of the TRUP into a mega project.*” The intangible heritage on the site had been disregarded in the heritage assessment process. Applicants further aligned themselves with the conclusions of HWC that the AFMAS Reports are unreliable due

to the non-participation of some groups, the methodology for engagement, and the contested research process by participants in the engagements.

[37] Applicants contended that the heritage resources will be adversely affected by the proposed development, and the HIA failed to adequately consider alternatives other than "*Riverine Corridor Alternative*" and the "*Island Concept Alternative*". The Applicants argued that the supplement to the Second HIA does no more than defend and re-argue the original opinions and conclusions of the authors. The report proceeded to address what the authors perceived as the main issues arising from the interim comment of HWC, namely engagement with First Nations Groupings, land use planning in the two rivers area, identification and mapping of heritage resources, assessment of significance, and alternatives and mitigation of impacts. No proper consideration was given to lower bulk alternatives such as "*the Mixed-Use Affordable Alternative*" and "*the Reduced Floor Space Alternative*" as these were considered economically unviable.

[38] In their Heads of Argument the Applicants invoked the provisions of substantive constitutional rights under sections 9(1), 30, 31 and 24 of the Constitution of the Republic of South Africa, 1996. Applicants argued that they have established a strong prima facie right warranting protection by the Court. They contended that it is beyond question that the irreparable destruction of the River Club site will eventuate if the relief sought in part A is not granted. Applicants averred that the infilling in the natural course of the Liesbeek River and much of the floodplain will constitute an assault on the river and destroy a key element of the site forever. The

construction of high buildings would obstruct the sight lines between the area around the confluence of the two rivers and mountains and irretrievably alter the sense of place and open vistas.

[39] Applicants pointed out that the destruction of the site had already begun, alluding to the fact that the developers proceeded with construction notwithstanding well documented opposition to the project. Applicants argued that if the destruction of the site is allowed to continue while the review is determined, the relief sought may become meaningless. Applicants contended that the balance of convenience favours the granting of the interdict in the light of the magnitude of the destruction that will result if an interdict is not granted. Applicants further submitted that they have no alternative recourse. Applicants argued that there exists no good reason why the financial interests of a single developer should trump the rights of ordinary citizens to have their heritage respected and protected.

LLPT Submissions

[40] The LLPT pointed out that for the first time in their Heads of Argument, the Applicants sought to invoke substantive constitutional rights under sections 9(1), 30, 31 and 24 of the Constitution. LLPT argued that the Applicants had failed to make out a basis for their belated reliance on these substantive rights, nor do they demonstrate any reasonable apprehension of impending or imminent irreparable harm to "*intangible heritage*."

[41] The LLPT pointed out that the central premise of the Applicants' case was that the decision makers failed to take into account the intangible cultural heritage associated with the development site and its surrounding environment. According to LLPT, Applicants misconstrued the HIA specialists' reference to the absence of any tangible manifestations of the First Nations' cultural associations with the river. The specialists were merely noting that the fundamentally transformed River Club site no longer bears any *"tangible manifestation of human interactions and beliefs set against and within the natural landscapes"* The HIA specialists were contrasting the River Club site with a different category of cultural landscapes which retain an *"active social role in society closely associated with a traditional life"* bearing in mind that landscapes continue to evolve and may *"exhibit significant material evidence of their historic evolution."* LLPT argued that the Applicants have failed to signify any showing of intangible heritage, which was either not assessed or assessed but considered in an irrational manner.

[42] LLPT contended that only the Second Applicant ("GKKITC") can notionally assert equality and cultural rights under sections 9(1), 30 and 31 of the Constitution. Furthermore, the Applicants had failed to show any aspect of the GKKITC's cultural life that they will no longer be able to enjoy. Consequently, there can be no right to cultural life that is threatened by an impending or imminent irreparable harm. Furthermore, Applicants failed to justify that any such limitation is not justifiable under section 36 of the Constitution. LLPT pointed out that the Applicants appear to invoke spiritual and religious significance which the Second Applicant attaches to the landscape. LLPT reiterated that in its current condition, the River Club site neither

reflects cultural heritage which the First Nations associate with the degraded site, nor does it afford any meaningful access to the site. In any event, the right to cultural life cannot necessarily prevail over private land ownership.

[43] The LLPT submitted that the various development conditions imposed in respect of the development are designed to address concerns raised after an extensive public participation process, and an evaluation of all expert reports in relation to the site. The LLPT stated that the internationally recognised mechanisms for safeguarding intangible heritage were informed by expert advice, and more importantly, the cultural community's aspirations for the site.

[44] LLPT submitted further that the relevant authorisation processes included meaningful public participation and the impugned decisions incorporate mechanisms which will ensure accessibility of the cultural landscape to the First Nations. The notable additional aspects of the approved development *inter alia* include:

44.1 Articulating and celebrating the significance of the place and its historical associations to First Nations Groups by establishing an indigenous garden for medicinal plants used by First Nations; establishing a cultural, heritage and media centre, establishing a heritage-eco trail circling the site, and establishing an amphitheatre for use and cultural performances by First Nations Groups and the general public;

44.2 Commemorating First Nations history in the area by: (i) establishing a gateway feature inspired by symbols central to the First Nations

- narrative at the road crossing of the ecological corridor; (ii) incorporating symbols central to the First Nations narrative in detailed design of the buildings; and (iii) naming internal roads inspired by people or symbols central to the First Nations narrative.
- 44.3 Retaining approximately 60% of the River Club property as publicly accessible open space, with 25% of the River Club property being made available for recreational activities, including lawned areas, foot and cycling paths, and an ecological corridor.
- 44.4 Rehabilitating the Liesbeek Canal to function as a natural watercourse, with a 40m setback buffer which will include riverine vegetation to allow faunal movement, grassed banks and walking and cycling trails.
- 44.5 Infilling the unlined course of the Liesbeek River, treeing the infilled area, providing for bioretention swales and incorporating standing water ponds or "pocket wetlands" along the "swale area" to retain stormwater in early summer and support Western Leopard toad breeding cycles.
- 44.6 Infilling portions of the site above the 1:100 year floodplain.

[45] Over and above the development on the River Club property itself, the development includes certain infrastructure on the adjoining City properties. These include –

- 45.1 Infrastructure to be constructed by LLPT: (1) a 2-lane extension of Berkley Road over the Black River; (2) a new bridge linking the site to the Liesbeek Parkway at Link Road over the original course of the Liesbeek River; and (3) the widening of the Liesbeek Parkway into the original course of the Liesbeek River, between Station Road and Link Road.
- 45.2 Infrastructure to be constructed by the City: (1) the “dual” Liesbeek Parkway between Link Road and Malta Road; and (2) the upgrade of the Berkley Road Extension to the River Club property, including widening the proposed Berkley Road Bridge over Black River, and extending Berkley Road to link Berkley Road (and M5) with Malta Road and Liesbeek Parkway at some point in future.

[46] LLPT submitted that the Applicants did not allege that the impugned decisions are defective for lack of adequate public participation as contemplated in section 6 (2) of the Promotion of Administrative Justice Act 3 of 2000, and Second Applicant opted out of the public participation process. LLPT submitted that it is clear that the Applicants' real complaint is not that the decision-makers failed to take into account a relevant consideration, or that the impugned decisions are not supportable on the facts, but rather that the decision-makers failed to attach adequate weight to the value of the intangible cultural heritage.

[47] LLPT submitted further that Applicants had failed to provide credible supporting evidence to justify their assertion that the conditions imposed for the development are mere “*window-dressing*”, and that the First Nations Collective support is the product of “*manufactured consent*”. LLPT denied Jenkin’s averments that the developer and the FNC had entered into a social compact incorporating financial benefits in favour of FNC.

[48] LLPT argued that the Applicants shifted ground in relation to the basis for their challenge to the environmental decisions. The challenge was initially based on two propositions namely first, that the decision-makers acted ultra vires section 38(8) of the NHRA by determining that the HIA met the relevant requirements as provided for, notwithstanding HWC’s determination that the HIA was defective in this regard. Second, the decision-makers acted unreasonably or irrational in concluding that the HIA complied with section 38(8) of the NHRA, notwithstanding HWC’s assertions to the contrary. LLPT stated that it is apparent from the Heads of Argument that the Applicants have abandoned the first challenge as articulated in their founding papers. They now only persist with a limited challenge on the basis that the Provincial decision-makers failed to take into account HWC’s comments and recommendations and that their decisions were thus irrational.

[49] LLPT stated that on a proper construction of section 38(8) of the NHRA, the obligation of the consenting authority “*to ensure that the [heritage impact] evaluation fulfils the requirements of the relevant heritage resources authority*” involves an objective test. This proviso requires the consenting authority to determine whether

the HIA includes the information specified by the relevant heritage resources authority under subsection (3), after giving due consideration to the latter's comments, any responses from the applicant, as well as any other relevant information. While the view of the relevant heritage resources authority as to compliance with subsection (3) is an important consideration, the consenting authority is not bound thereby.

[50] The LLPT pointed out that Applicants' founding papers were focussed on restating HWC's comments, and that the HIA failed to fulfil content requirements under section 38(3) of the NHRA. However, the founding papers lack any clear articulation of the intangible cultural resources which the HIA allegedly failed to identify, map or assess. Furthermore, the Applicants have impermissibly changed course in their reply and purported to make out a new case for the relief sought, namely, that HWC's "*recommendation*" to supplement the HIA with input from a "*specialist consultant*" to deal with the "*intangible aspects*" pertaining to the Two Rivers Area escalated to the level of a mandatory content requirement under section 38(3) of the NHRA. If the Applicants wished to challenge the environmental authorisation decisions on the basis of an alleged failure to implement HWC's recommendation under section 38(3), they should have made out a case in their founding papers. They should not be permitted to do so in reply in urgent court proceedings.

[51] LLPT emphasised that the Applicants also no longer relied on HWC's lapsed two-year provisional protection order under section 29(1) of the NHRA as precluding

the City's decisions; the alleged failure to take account of HWC's investigation of a possible listing of the River Club site on the heritage resources register; or an irrational departure from certain policies and planning instruments.

[52] LLPT argued that it is apparent from the founding papers that the review of the City's decisions was little more than an afterthought, and that this challenge was tacked on in an attempt to justify the Applicants delay in taking the environmental authorisation decision on review. Instead, the heads of argument now challenge the City's decision on the basis of irrationality, for "*dismissing*" objections from its Environmental Management Department regarding potential hydrological and biodiversity impacts, and accepting "materials" or expert reports submitted by the LLPT. The new ground of review raised in heads of argument is impermissible and prejudicial to the Respondents.

[53] LLPT argued that the OCA AGM resolution of 24 November 2020 demonstrates that not only were they aware of the need to institute review proceedings "*as soon as reasonably possible*" if their internal appeals were unsuccessful, but also that they authorised their management body to instruct attorneys for legal advice on review proceedings to stop the development. When the Provincial Minister published his appeal decision on 22 February 2021, it was incumbent upon the Applicants to institute judicial review proceedings in relation to this decision without unreasonable delay.

[54] On 18 April 2021 the Mayor's appeal decision was published, but the OCA waited until 19 April 2021 to find suitable counsel to prepare review papers. Furthermore, the Applicants' characterisation of the OCA's engagement of HWC in late April 2021 as an attempt to exhaust all available remedies before approaching the Court is unconvincing. By then two months had lapsed since the Provincial Minister's decision and the Applicants had not taken any steps to obtain legal advice regarding review proceedings. In early May 2021, 71 days after the Provincial Minister's decision, OCA briefed counsel to establish the existence of sustainable review grounds.

[55] Given the Applicants active involvement in the public participation process, they would have been fully aware of the extent of the records of decision and the complexity of the issues. Their inaction for over six months since first resolving to seek legal advice, and three months after receipt of the Provincial Minister's decision was not reasonable in the circumstances. Furthermore, the Applicants imply that it was only when they received notice of the granting of the LLPT's water use licence on 10 June 2021, and the HWC confirmed that it did not intend to take enforcement action or institute review proceedings, that the necessity for interdictory relief arose. LLPT contended that these submissions lack merit and the Applicants should reasonably have been aware of the provisions of the National Water Act 36 of 1998, which provide for a procedure to suspend the effect of an appeal. Given the lengthy nature of the process before the Water Tribunal, the Applicants should have anticipated the reasonable likelihood that LLPT would avail themselves of this remedy.

[56] Furthermore, when LLPT refused to give an undertaking to refrain from the commencement of the development pending review proceedings early May, the Applicants should have been aware of the urgent need to launch an interdict application. The Applicants' reasons for their delay must also be considered against the backdrop of their conduct since instituting these proceedings. They served papers in excess of 800 pages and required the Respondents to file answering papers within four days. LLPT argued that the Applicants have failed to demonstrate why the matter is urgent and why substantial redress cannot be obtained at a hearing in due course.

[57] LLPT submitted that the Applicants lost sight of the complexity of seeking an equilibrium between competing interests in line with the principle of sustainable development. The decision-makers acted in good faith in seeking to achieve the equilibrium contemplated under the principle of sustainable development, and the Applicants have failed to provide any reasonable or rational basis for the Court to second-guess their evaluation. The decision-makers also sought to promote and protect the cultural heritage by imposing conditions designed to enhance and preserve the cultural heritage associated with the River Club.

[58] According to LLPT, interim relief is likely to prevent them from complying with its obligations under the development agreement to achieve practical completion of the work by 30 November 2022, and handover to Amazon on 1 December 2023. LLPT noted that delays in the project are likely to trigger penalties, cost escalations,

financing fees, and termination of lease agreements, which may render the River Club development entirely unviable. A suspension of the construction work will also result in sunk and wasted costs and trigger other negative financial implications. As a result of the Covid-19 construction delays there is little latitude for further delays in the construction programme. According to LLPT any delay would most certainly result in the termination of the development agreement, which would result in the immediate loss of employment of construction workers. LLPT emphasised the substantial sum of capital costs involved in the project, the creation of employment opportunities, and economic benefits of the project. LLPT submitted that the Applicants could have instituted expedited review proceedings rather than belatedly claiming interdictory relief.

[59] LLPT submitted that the Applicants have failed to establish on a balance of probabilities that the authorisation conditions will not adequately safeguard the intangible cultural heritage associated with the River Club and its immediate environment. Furthermore, even assuming that the Applicants are able to demonstrate a *prima facie* right, at best it is a fragile *prima facie* right. The weaker the *prima facie* right the greater the need for the Applicants to demonstrate that the balance of convenience favour them. The harm that LLPT will suffer is severe, irreversible and out of proportion to that which may be sustained by the Applicants. LLPT therefore argued that the Applicants have not established the requirements for interdictory relief.

The Third, Sixth and Seventh Respondents Submissions

[60] The Respondents, which include the City of Cape Town, submit that the interdict application must be dismissed because:

- (i) it lacks urgency;
- (ii) the grant of an interdict will cause massive prejudice while its refusal will cause none;
- (iii) the applicants make out no *prima facie* right that is threatened by irreparable harm;
- (iv) the applicants make no case for a review;
- (v) the provisional protection order has expired; and
- (vi) the applicants have another satisfactory remedy.

[61] Respondents stated that the Applicants brought this application on an urgent basis, but any urgency is self-created. The City communicated the last of the impugned decision to the Applicants on 19 April 2021, and this application was only served on Respondents three and a half months later, on 3 August 2021. The City stated that the Applicants contended that these proceedings are urgent, but delayed bringing this application for five and a half months after being informed of the Province's reasons and for three and a half months after being informed of the Mayor's reasons. Applicants brought this application in a dilatory fashion, and is disingenuous in attributing their inaction to a water licence decision. Applicants cannot claim extraordinary relief in the form of an interdict because they neglected to pursue the relief that was always available to them, namely an expedited review.

[62] The City submitted that upon an inspection of the site it observed that the property's open spaces have been either converted into golfing greens or covered in asphalt. The Liesbeek River's waterways are choked, run-down and canalised. The River Club golf course constitutes a degraded environment, and there is not a single indicator of the site's importance to the history of South Africa in general or the First Nations Peoples in particular. The current land uses run contrary to the site's heritage.

[63] The City pointed out that the FNC, an association of Indigenous Groups and leaders with an interest in the River Club site, partnered with the developer, and assisted to inform how the development can commemorate the site heritage. As a result, the FNC and the developer proposed several commemorative features which includes an indigenous garden for use by the First Nations; a cultural heritage and media centre, an amphitheatre for cultural performances, commemoration initiatives, and a heritage eco-trail. The indigenous garden will allow the First Nations' knowledge of food and medicine to be put into practice, and the cultural, heritage and media centre will allow their history to be recorded and taught. The heritage eco-trail will align with the indigenous aspect of the site's ecology and allow pedestrians to experience that ecology on foot. The garden and amphitheatre will allow for various modes of expression. All these features will enhance the property's heritage. In this regard the FNC was satisfied with the extent to which the proposed development incorporates heritage resources, which are currently not accommodated at the River Club site.

[64] The City emphasised that none of the parties contended that the golfing greens and River Club amenities are adequate or appropriate ways to protect, enhance and celebrate the property's heritage resources. The City stated that conditions of approval for the development were imposed to ensure continuous engagement with interested parties, including the Second Respondent. Consequently, there has been and will continue to be ample opportunity for further engagement regarding the development's protection and calibration of the property's heritage.

[65] The City argued that nothing positive will be gained from preserving the status quo. On the contrary, the granting of the interdict will only harm heritage resources and sabotage the only viable opportunity to protect and celebrate heritage resources that had arisen in eighteen years. The City argued that interested and affected parties were granted the opportunity to make submissions regarding heritage, and further opportunities will be provided as the development progresses. Consequently, the City submitted that there has been extensive consultation and participation of interested parties and it duly considered all heritage concerns. All these concerns were recorded in the developer's motivations, the expert assessments, the objectors' responses, the City's own evaluations, and various analyses conducted by the HWC. In a few instances where there might be adverse impacts in respect of heritage resources, those impacts were assessed and mitigated. Although the Applicants do not support the First Nations Collective, they cannot deny that the current uses of the River Club site do not protect or advance the existing heritage resources. The City

argued that the NHRA requirement is “*to consult with communities affected by the proposed development and interested parties*”, and does not require consensus.

[66] The City noted that it is mindful of its duty, as an organ of State, to protect, promote and fulfil the obligation to ensure sustainable development as contemplated in section 24 of the Constitution. The development will include a significant residential component, which is an important element of the development's sustainability offering. The City further contended that it evaluated the development's ecological costs and environmental impacts, with due regard to several thorough investigations and assessments undertaken by experts, as well as input from the City's environmental officials and objections from concerned third parties. The City stated that the River Club development will be an excellent example of sustainable development.

[67] The development will fund the erection of a bridge over the confluence of the Black on Liesbeek Rivers. A development charge of more than R73mill was imposed to ensure the adequate provision of services. This will be leveraged to finance infrastructure, in the form of the Berkley Road extension which will connect Berkley Road in Ndabeni to Malta Road in Salt River.

[68] The City argued that the economic benefits of the development are substantial considering that Cape Town is in the midst of an economic crisis that resulted in less commercial activity and higher unemployment. The City further reminded the Court of the impact of Covid-19 on the economy and pointed out that

the development will provide an immediate injection of billions of rand in investment and thousands of jobs.

[69] The City submitted further that the granting of the interdict will cause massive prejudice, and delays can be terminal for large-scale developments. As the lifespan of the project increases, so does its costs, and an excessive delay will render the project economically unfeasible. Developments which are halted pending legal proceedings, create a substantial element of uncertainty, which adversely affect the investors' and anchor tenant's willingness to support the development. An interdict will impact negatively on the benefits of the development, which will in itself inflict unjustifiable and irreparable harm on Cape Town's economy at a time of crisis. The City disputed the Applicants' assertion that the subject property will suffer irreparable harm in relation to the relevant heritage resources if construction proceeds. The City submitted that no harm will be inflicted on the relevant heritage resources, and maintained that such resources will effectively receive much better protection than they currently have, should the development proceed unhindered. The City argued that the Applicants incorrectly believe that they are entitled to determine what happens to the River Club site. They were given an opportunity to make comprehensive submissions, but are not entitled to veto the development on the basis that they disagree with it.

[70] The City pointed out that the Applicants introduced three new arguments against the City's decisions, which are not raised in the founding papers namely:

- (i) The Mayor allegedly improperly dismissed flood risk concerns;

- (ii) The Mayor allegedly dismissed all the “*considered and well-substantiated views by its own internal experts.*”
- (iii) It was allegedly “*procedurally irrational*” for the Mayor to prefer the assessments by the expert procured by the developer over the City’s own environmental management department.

[71] Respondents contended that the new arguments are impermissible since firstly, the arguments are not pleaded in the founding papers, and secondly, the Applicants’ heads of argument are supported only with reference to annexures. The City stated that it is impermissible for a party to argue the contents of an annexure, without that particular ground having been fully pleaded in its founding papers. The City also pointed out that none of the arguments for the review of the City’s decisions in the Applicants’ heads of argument refer to the crucial issue of heritage.

[72] Respondents argued that the Applicants have abandoned the grounds of review set out in their founding affidavit, and the new grounds disclose no reviewable irregularity and are palpably weak. The City submitted that the interdict application fails to take cognisance of the overwhelming public interest in the development in terms of job creation, billions of Rand in investment, the development of critical transport infrastructure, and providing affordable housing, all while rehabilitating the Liesbeek River.

[73] Respondents argued that the Mayor had to consider a range of complex and policy-laden factors. The Mayor’s extensive reasons indicate that he had discharged