his polycentric function and ultimately reached a rational, fair and reasonable decision after carefully weighing up competing interests and divergent views. Respondents averred that construction has already commenced and the state of affairs that the Applicants seek to preserve by means of an interdict has already changed.

[74] Respondents argued that the Applicants have failed to meet the requirements for an interdict as enunciated by the Constitutional Court in **National Treasury v Opposition to Urban Tolling Alliance** 2012 (6) SA 223 (CC). They essentially rely for their *prima facie* right on an alleged right to litigate and review the unlawful decisions, pending the review. Respondents contend that no reviewable irregularity was established against the City, even on a *prima facie* basis. The City emphasised that the Applicants are requesting this Court to interrupt the implementation of complex, polycentric and policy-laden decisions because they are unhappy with the extent to which heritage and the environment were determined. The justification for the interdict is illusory, since it will not protect heritage, but rather stall, and likely terminate the only workable solution for promoting, celebrating and enhancing the site's tangible and intangible heritage. Furthermore, there is no reasonable apprehension of irreparable future harm, because if the development proceeds, it will only benefit the site's heritage and environmental resources. Respondents argued that the balance of convenience is overwhelmingly against the grant of an interdict, and in favour of the considerable public interest in the development going ahead, coupled with the lack of harm that will accrue if the interdict is refused. Furthermore,

Part B of the Applicants' notice of motion already contains their alternative remedy, namely review proceedings.

**Fourth and Fifth Respondents' Submissions**

[75] Fourth and Fifth Respondent emphasized the extensive, varied and complex set of facts which the Director, and thereafter the Minister had to take into account in reaching their decisions. Each decision involved the consideration of an extensive range of documents, specialist reports, views, representations and interests of various parties involved, requiring the weighing-up of various facts and complex issues. The Respondents also considered issues relating *inter alia* to the ecological, hydrological, heritage and socio-economic impacts, and compliance with NEMA and the NHRA.

[76] The heritage assessment process commenced in 2015 when the HWC was notified of the proposed development. The first draft HIA was circulated widely for comment. During the consultation process the HWC provisionally protected the River Club property, and not the wider TRUP area, as a Provincial Heritage Site. The specialists, Hart and Townsend compiled a detailed HIA report. First Nations Peoples made submissions during the appeal process and the specialists acknowledged the First Nations' claims made in the appeal processes. The specialists explained their assessment of the significance, taking into account the views of commenting parties. The specialists commented on the sense of place of

the floodplain, and expressed the view that there was clearly no sense of place as the floodplain has been significantly transformed and is developed as sport facilities.

[77] Respondents explained that the Riverine Corridor Alternative will enhance the significance of the Liesbeek River floodplain. The character of the site will be transformed by the development through the riverine corridor as a visual amenity, an ecological resource, a typographical feature, and historically meaningful features with considerable heritage benefit. Respondents pointed out that although the significance of the site is no longer visible, the floodplain is also recognized as having the greatest historical significance given the difficulty in locating intangible heritages, practices and beliefs in the physical landscape and built world. The specialists stated that it must be recognized *"that these environs are a landscape of memory, a place reverberating with current political meaning."*

[78] Respondents made submissions in respect of the various aspects dealt with in the HIA, including five development proposals and the feasibility thereof. The Riverine Corridor Alternative was described in the greatest detail, including all its benefits. Respondents referred to interim comment of HWC dated 13 September 2019, and explained that a supplementary HIA consisting of 31 pages was prepared in compliance with the HWC's recommendation that a specialist with expertise in dealing with the intangible aspects pertaining to the wider TRUP area be consulted. The specialist engaged with the two reports produced by Mr Arendse of AFMAS.

[79] Respondents denied HWC's suggestion that the specialist *"avoided"* engagement with the First Nations Peoples. Respondents conceded that several First Nations Groups supported the development while other groupings did not. Respondents submitted that engagement with First Nations Groups culminated in revisions to the development proposal in order to indigenize the site. Respondents pointed out that the final comments of HWC largely incorporated their interim comments, and does not repeat the IACom 's recommendation that a specialist be appointed. However, pursuant to the final comments of HWC on 17 February 2020, the DEADP engaged HWC on 4 March 2020. A meeting was arranged between officials of the department, HWC, LLPT, its environmental impact practitioners and the heritage specialists to discuss HWC's final comments. Members of HWC's IACom elected not to attend the meeting. The participants at the meeting agreed that there would be further engagement with HWC and the HWC IACom. However, HWC did not participate in further engagements and stated that *"[a]s such [it] could not see the purpose in having further meetings with the applicant and applicants' representatives, whose views on the matter appeared to be intractable."*

[80] On 10 March 2020, Hart and Townsend and Environmental Assessment Practitioners met with HWC officials to discuss the way forward. However, the HWC IACOM meeting, scheduled for 12 March 2020, never materialised. The heritage specialists provided a further written response to HWC's final comment dated 31 March 2020, which response was included in the Final Basic Assessment Report submitted on 8 June 2020 to the competent authority.

[81] 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, as the consenting authority in terms of section 38(8), had to take his decision. He found that section 38(3) of the NHRA had been complied with and that HWC's "*concerns raised have been adequately responded to*".

[82] The Director accepted that the heritage resources, in comparison to those in the surrounding areas, are intangible, but nonetheless of high historical significance. The Director approved the specialist' recommendation to translate the intangible heritage resources into a concrete form by rehabilitating the canalised portion of the Liesbeek River on the eastern boundary of the site to restore ecological functioning, and to provide public access along the 40m wide bank as part of the restored Liesbeek River corridor and its confluence, which is claimed as a living heritage site by the First Nations Peoples, as a historical and topographical feature thereby locating the site within the indigenous narrative of the broader TRUP area associative cultural landscape.

[83] Respondents pointed out that Applicants submitted appeals to the Appeal Authority against the Director's decision, and essentially relied on the issues raised by HWC. As part of the appeal process, the Minister, as the Appeal Authority, wrote to HWC on 25 November 2020 requesting it to supply the necessary information required to supplement the current heritage assessments which would fulfil the requirements of HWC and the NHRA.

[84] On 11 December 2020, HWC indicated that the IACom in its comments, had supplied all the information with specific reference to the provisions of section 38(3) of the NHRA which required compliance. HWC indicated that it was concerned that if only certain of these requirements were highlighted, the impression may be created that these are the only issues which must be addressed. On 26 January 2021 the Minister wrote a further letter to HWC in which he recorded that he had reviewed HWC's interim and final comments, the Supplementary HIA and the LLPT's response to all the appeals, and was of the view that the issues raised in HWC's final comment had been addressed. The Minister indicated that should HWC not provide him with an indication of such information, he would assume that the Supplementary HIA satisfied the NHRA and HWC requirements and that all issues raised by HWC had been adequately addressed.

[85] On 3 February 2021 HWC advised that it could not agree with the Minister's contentions and re-iterated that it was of the opinion that the supplementary HIA and the responding statement merely re-state the initial opinions expressed in the original HIA, and do not in fact address the issues raised in HWC's final comment. Ultimately the Minister had to make a decision on this matter despite the difference of opinion between HWC, which stated that the heritage assessments did not comply, and the heritage specialists, who stated that they did. No further information was provided by HWC. The Minister accordingly took into consideration all the different facets of the development on the environment and concluded that the overall need and desirability of the development supported the granting of the environmental authorisation.

[86] The Director and Minister, when they took their decisions, were fully aware that HWC had expressed different views to the independent heritage specialists about whether the heritage assessments complied with section 38(3) of the NHRA. The decision by the Director, upheld by the Minister on appeal, identified significant benefits of the development to the broader public. Respondents submitted that an interim interdict would bring development activities to a halt, which would probably result in the loss of all the benefits of the development. Any losses that would be suffered would far outweigh any alleged inconvenience which the Applicants would endure if the interim interdict were not to be granted.

[87] Respondents stated that the appeal decision of the Minister was concluded on 22 February 2021, but the Applicants waited until 3 August 2021 to launch this application. The decision of the Executive Mayor on appeal was taken on 18 April 2021, approximately three and a half months before this application was launched. Respondents aver that no adequate explanation was provided by the Applicants for the delay, which in the particular circumstances, was inordinate. Applicants were well aware of the urgency of the review proceedings, which needed to be instituted to prevent the commencement of the development in that their internal appeals were rejected.

[88] With reference to **Juta & Co Ltd v Legal and Financial Publishing Co Ltd** 1969(4) SA 443 (C), Respondents argued that an applicant for interim relief must act with maximum expedition in launching and prosecuting the application. In the event of an applicant failing to bring interim proceedings to finality, it stands to forfeit its

right to temporary relief. Respondents contended that the urgency alleged by the Applicants is self-created. Respondents therefore averred that the Applicants have not established a *prima facie* right, and also failed to establish that the balance of convenience is in their favour. Respondents submitted that the Applicants had failed to establish the requirements for an interim interdict.

**Eight Respondent's Submissions**

[89] Mr Charles Jackson, also known as Chief !Garu Zenzile Khoisan, submitted an affidavit in his capacity as Chairperson of the Western Cape First Nations Collective. He is also the Head of and Chief Representative of the Western Cape Gorinhaiqua Cultural Council. Eight Respondent joined the proceedings as an interested party and supported the application to oppose the application. He explained that the First Nations Collective comprises a conglomerate of Khoi and San Indigenous people, who participated in the consultation process with all the relevant stakeholders. According to the FNC it represents the majority of senior indigenous Khoi and San leaders and their Councils in the Peninsula namely Gorinhaiqua, Gorachouqua, Cochoqua, The Korana, The Griqua Royal Houses, San Royal House of Nǁn≠e; and other San structures under leadership of Oom Petrus Vaalbooi and other leaders with whom they have a long working history, as well as all other indigenous structures that support the Western Cape First Nations Collective, under full cultural protocol. Included in these structures are the following:

89.1 First Nations cultural institutions, houses and associations, even those specifically described as cultural councils and tribal houses that form part of the National Khoi-San Council; and

89.2 All First Nations cultural institutions, houses and associations, even those specifically described as cultural councils and tribunal houses that form part of the Khoi Cultural Heritage Development Council; and

89.3 All First Nations cultural institutions, houses and associations, even those specifically described as cultural councils and tribal houses that form part of the Institute for the Restoration of Aboriginal South Africans; and

89.4 The Foundation Nation Restoration; and

89.5 The Cape Khoi San Labour Forum.

[90] Eight Respondent explained that GKKITC initially participated in the First Nations Collective, but withdrew from the consultation process. They are satisfied that the consultation with and input by the FNC have been incorporated into the final approved plans for the development.

[91] Eight Respondent emphasised the future benefits of the development will present the FNC and all Khoi and San descendants the right of return to their ancestral land. The history of the Khoi and San will be told and celebrated through the development, and the heritage of the Khoi and San will be preserved. The development also presents an enormous opportunity for the advancement of their socio-economic rights, and benefits the interests of the Khoi and the San into

perpetuity. It is this process of the *"Right to Return to their ancestral land that FNC has advanced through the consultation process with all stakeholders for and in the development of the ancestral land in the area known as the Two Rivers Urban Park."*

[92] The area is of particular significance to the Gorinhaiqua and other *"significant"* Khoi and San Clans in the Peninsula as historically recorded. The land represents the first area of dispossession of the Khoi and San in South Africa. Eight Respondent pointed out that the Heritage Western Cape was not satisfied with the heritage impact assessment compiled by LLPT, but this was duly addressed. The FNC is satisfied that the Heritage Impact Assessment Report adequately deals with the intangible heritage associated with the site. They argued that the legality of the construction works must be weighed against the efficacy of an interdict, and in the current matter the legality aspect trumps the efficacy of an interdict, and an interdict should be refused.

[93] FNC argued that they worked tirelessly to make this project a reality, and the development will meet the aspirations of the FNC to finally secure the historical and heritage recognition of the Khoi and San. The older Khoi and San descendants would like to witness and experience the return to their ancestral land, and this development project grants them the space and opportunity to celebrate their heritage and culture. Eighth Respondent expressed their dissatisfaction with the delay in instituting these proceedings, and elaborated on the historical background of the River Club Site.

[94] FNC emphasised that the planning for the TRUP site had a strong consultation component since the initial process commenced as early as 1998. They expounded on the Khoi and San Culture and disputed Second Applicants standing and qualifications to participate in these proceedings, as well as the entitlement of the Goringhaicona to identify itself as representatives of the Khoi and San. The FNC contended that the Second Applicant is not a Khoi descendant, and seeks to rewrite their history in order to enhance the role of the Goringhaicona. FNC submitted that the most established urban house in the TRUP area was the Gorinhaiqua and not the Goringhaicona. FNC asserts that the recorded authentic historical fact is that the Gorinhaiqua is the only group to have a kraal in Two Rivers Urban Park.

[95] The FNC criticised Second Applicant's approach during the consultation process and stated that it amounted to a blanket opposition to the proposed development, failed to present a coherent opposition plan, and failed to provide alternative mechanisms for the memorialization of Khoi and San Clans in the development. FNC maintained that consultation was extensive, informative, comprehensive and represented the authentic views of the First Nations Leadership. In their view the consultation with the FNC was adequate to meet the expectations of the HWC, which is borne out of the AFMAS report.

[96] Second Applicant took issue with certain statements made by Eight Respondent, and, in reply, stated that the main purpose of FNC's answering affidavit appeared to be to disparage Goringhaicona People and to attack him personally. Second Applicant reiterated that FNC does not represent the majority of the First

Nations Peoples. He produced confirmatory affidavits in support of this assertion. Second Applicant denied that he has ever participated in the FNC or was ever part of the FNC. He therefore asserts the Mayor's statement in this regard is incorrect. Second Respondent disputed the Eight Respondent's contention that he was not acting in the best interests of the Khoi and San Nation.

**Amicus Submissions**

[97] The Forest Peoples Programme (FPP) was admitted as Amicus in this matter. FPP is a human rights non-governmental organisation specialising in the rights of forest and other indigenous peoples. FPP was founded in 1990, registered by the Dutch Stichting, and has been a registered charity in the United Kingdom since 2000. The organisation has consultative status with the United Nations (UN) and observer status with the African Commission on Human and Peoples Rights (ACHPR). The organisation has significant legal expertise in the field and published a wide range of reports and other material on the human rights of indigenous groups. FFP made extensive submissions regarding international treaties, quasi-judicial decisions and international principles which it alleges may assist the Court in this matter. The submissions aim to demonstrate South Africa's international legal duties towards indigenous persons.

[98] FPP contends that South African authorities, prima facie at least, failed in their duty towards the Khoi and San People. The development of the site will mean that the Khoi and San Peoples rights as indigenous people will be irreparably violated.

FPP expressed the view that the status *quo* should be maintained to avoid this irreparable harm.

[99] FPP referred to the history of the site and noted that certain aspects of the historical background are disputed. FPP stated that the Khoi-San are an ethnic minority for purposes of the Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which was ratified by South Africa. The Amicus referred to four relevant treaties, all of which were ratified by South Africa:

99.1 First, section 31(1)(a) of the Constitution is modelled on article 27 of the ICCPR which South Africa has ratified. This legally binding guarantee stipulates:

*"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture."*

99.2 Second, article15(a) of the International Covenant on Economic Social and Cultural Rights (ICESCR) requires State parties to recognise the right of everyone to take part in cultural life.

99.3 Third, under Article 17(2) of the African Charter on Human and Peoples Rights (African Charter) every individual may freely take part in the cultural life of his community.

99.4 Fourth, South Africa has also adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which clarifies how the right to culture applies to indigenous peoples. While UNDRIP is a

non-binding instrument, the Supreme Court of Appeal has relied on UNDRIP to interpret the scope of the Constitution in matters concerning customary rights and culture.

99.5 Article 11(1) of UNDRIP provides:

*"Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites."*

99.6 Article 13(1) reads:

*"Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons".*

99.7 Article 32(1) provides that *"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage".*

99.8 UNDRIP's drafting history indicates that these provisions attracted a wider measure of support from States than almost any others. Significantly, only 5 years after UNDRIP came into effect in 2007, the International Law Association adopted a Resolution providing:

*"States are bound to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith - through all possible means - in order to ensure its preservation and transmission to future generations. Cultural rights are the core of indigenous cosmology,*

*ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.*

*Indigenous peoples have the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent."*

[100] Section 31 of the Constitution of South Africa is modelled on article 27 of the ICCPR. The Khoi-San are an "*ethnic minority*" for the purposes of ICCPR, and individual members are protected by ICESCR article 15 (1)(a) and article 17 (2) of the Charter as of right. The Constitution does not specifically identify the Khoi-San (or any other group) as an indigenous people, but the South Africa Human Rights Commission (SAHRC) effectively accorded them this status in a report during 2004. The report confirmed their forced removal from their ancestral land.

[101] The term "*indigenous peoples*" is not defined in the Covenant, the Charter or the UNDRIP, but there can be no doubt that it applies to the Khoi-San. The relevant bodies have identified three connected duties which State Parties owe to their indigenous communities namely, to take positive steps to protect their cultural rights; to enable them to effectively participate in decisions which might threaten their ability to exercise those rights and; in certain circumstances, not to permit projects to proceed without free, prior, informed consent. ("FPIC")

[102] South Africa's international legal duties require it to consider all aspects of the site's significance, including the intangible. In instances where no single organisation or group of individuals are clearly authorized to represent the views of the community, the State must develop an alternative process to ensure that the community can nevertheless effectively participate in the relevant decisions.

[103] If the development is likely to have a significant direct impact on the cultural integrity of a community or otherwise pose a major threat to it, the State may permit it to proceed only with the affected community's FPIC. It will be for the Court to determine on evidence whether and to what extent the development will affect the right of the Khoi-San to enjoy their own culture, whether the community was given an opportunity to participate effectively in the decision to permit the development, and whether its FPIC should have been sought before any decision was made. The Amicus pointed out that international human rights law texts do not define "*culture*", but the term has been broadly construed. The Amicus referred to a seminal UN Human Rights Commission report in 1993, which concluded that indigenous cultural heritage comprises:

> "*everything that belongs to the distinct identity of people [including] all those things which international law regards as the creative production of human thought and craftsmanship such as songs, stories, scientific knowledge and artworks. It also includes inheritance from the past.*"

[104] The Amicus referred to the provisions in international instruments and pointed out that the combined effect of these provisions are:

104.1 The Khoi-San people continue to "*exist*" as a minority, however dispersed the community may have become as a result of economic or other developments beyond its control.

104.2 The Court should have regard to the impact of the proposed development of the site on the ability of the Khoi-San People as a whole to preserve their cultural heritage.

104.3 One of the many forms in which culture may "*manifest itself*" is through a community's association with land to which it has strong historical links.

104.4 If the development of the site weakens those links, the Khoi-San will have been denied their rights under articles 27 and 15(1)(a) if they have not been able to participate effectively in the decision whether and on what terms the development should proceed.

[105] The Amicus pointed out that the Court may form the view that no single body of persons or organisation was clearly "*authorised*" to "*effectively participate*" on behalf of the Khoi-San in the decision whether to permit the development. There are no clear guidelines on how a State should proceed in those circumstances. Furthermore, if an appropriate consultation process is not developed, such consultations will not comply with the requirements of the International Labour Organisation Convention 169 on Indigenous and Tribunal Peoples (not ratified by South Africa).

[106] The Amicus expressed the view that divergent views must be considered, and not only those who support the proposal, still less to abandon the attempt to establish consensus because opinions are divided. Furthermore, a community can never forfeit its right to effectively participate merely because it happens not to have a "*truly representative*" organisation when the decision is due to be made. Whether the relevant authorities had complied with its duty to obtain FPIC will depend on the Court's assessment of the facts and circumstances of the case. If there is a prima facie case that the government officials have fallen short of the relevant international legal standards, then the interim interdict should be granted. The Amicus considers international law relevant to this matter, and contended that the Court cannot decide whether the Applicants' rights have been infringed without considering how international law has defined and given content to the right to enjoy one's culture.

[107] Third, Sixth and Seventh Respondents responded to the submissions made by the Amicus. They argued that the reference to international law is unnecessary, unhelpful and irrelevant in this matter. Chapter 7 of the City's Municipal Planning By-Law regulates adequate and effective participation in respect of Municipal Planning decisions. The City pointed out that there is no attack on the validity of the By-law, and all processes should be measured by the provisions of the By-law. A Basic Assessment Report was formulated as a precursor to obtaining environmental approval. Second Applicant was fully aware of the processes involved in compiling a Basic Assessment Report.

[108] The Phase 1 HIA in respect of the development was circulated widely for comment. A second HIA was prepared at the developer's instance by two new heritage specialists. All relevant stakeholders were consulted throughout the process. In July 2019 the developers' consultants prepared an additional report after considerable efforts were made to engage First Nations Groupings. Both the Province and the developer appointed AFMAS solutions to conduct research on the indigenous history of the TRUP area. The River Club First Nations Report was the product of engagement with the FNC, as the historical custodians of the site. Efforts were made to reach consensus with other indigenous groups. Multiple phases of public comment were facilitated. All interested and affected parties were engaged, including indigenous groups and communities. The decision-makers met all the requirements for adequate engagement processes as envisaged in international treaties.

[109] The City argued that the development poses no risk to cultural resources or to the survival of an indigenous communities. The decision to grant municipal planning authorisations for the River Club was preceded by extensive consultations. Furthermore, the FPP's submissions consist of principles drawn from non-binding international resources.

[110] Fourth and Fifth Respondent pointed out that the NHRA is the central legislation regulating the management of South Africa's heritage resources. The NHRA and NEMA prescribes various considerations and compliance provisions in respect of the development. Consequently, the issues of tangible and intangible

cultural heritage, as well as environmental authorizations were measured against the relevant statutory requirements. The NHRA and NEMA also provide for consultation and participation in environmental impact assessments and heritage impact assessments, which had been duly complied with. The FNC was duly consulted, and Second Applicant elected not to participate, but continued to submit representations in the public participation process.

[111] With regard to the requirement to obtain free, prior and informed consent (FPIC), Respondents argued that the FPP did not make out a case that the development will substantially compromise the cultural integrity, nor does international human rights law require that a development may only take place with the consent of First Nations Peoples. The FNC was duly consulted prior to the environmental authorisation being issued. There also exists no requirement in the NHRA or NEMA for a particular grouping adversely affected by the approval of environmental authorisation, first to consent thereto. Our law recognises the right to participate, but does not grant any particular group the power to deny an application by refusing to provide consent.

[112] Respondents referred to consultation provisions provided for in the Promotion of Administrative Justice Act 3 of 2000, and argued that free prior, informed consent is not a requirement which our law can incorporate, or need to follow, since doing so would undermine the foundations of our administrative law. Fourth and Fifth Respondents therefore submitted that the submissions of FPP do not assist the Court in deciding the issues before it.

[113] Respondents disputed the assertion by the Amicus that the Khoi-San will be permanently denied access to any part of the development site. They emphasised that the development's various heritage commemoration features will not deny access, but rather provide infrastructure to allow for the continuation of intangible indigenous heritage by members of indigenous communities.

**Discussion**

[114] The requirements for the granting of an interim interdict are well-established as set out **in Setlogelo v Setlogelo** 1914 AD 221. The Applicant must establish a *prima facie* right, even if it is subject to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the granting of the interdict; and the applicant must have no other remedy. The Constitutional Court restated the requirements for an interim interdict in **National Treasury v Opposition to Urban Tolling Alliance** 2012 (6) SA 223 (CC). With reference to the application of this test in a constitutional dispensation, the Constitutional Court stated at paragraph 45:

> *"The Setlogelo test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to*

*grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."*

[115] The Court continued in paragraph 47:

"*(w)hen a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought*"

[116] The Court further held that the principle of separation of powers demand that an interim interdict against the State can only be granted in the "*clearest of cases*", or where the applicant has made out a *"strong case*", or if the applicant could show that *"exceptional circumstances"* existed.

[117] It is common cause that heritage specialists Messrs Hart and Townsend, in terms of section 38(8) of the NHRA and NEMA and its regulations, compiled the heritage impact assessment dated 2 July 2019, which was also distributed as part of the Basic Assessment Report circulated in terms of regulation 19(1)(a) of the NEMA EIA Regulations of 2014. Hart and Townsend identified various factors which contributed to the unusually complex HIA such as its location within the TRUP area, the HWC's decision to grant provisional protected status to the River Club site, the legal and procedural framework, public participation processes, appeal processes and land-use planning decision-making processes. Furthermore, the extensive and detailed history of the property and the historic claim to ownership of the TRUP area

by the First Nations Peoples added to the complexity of the HIA. Ultimately, notwithstanding an extensive public participation process, the consultation with First Nations Peoples became a vital component of the HIA.

[118] The involvement and interests of First Nations Peoples inevitably triggers various international human rights instruments and best practices referred to by the Amicus. The term "*intangible cultural heritage*" has evolved through the years and generally includes objects, traditions or living expressions inherited from our ancestors and passed on to our descendants. The Convention for the Safeguarding of the Intangible Cultural Heritage, a UNESCO treaty adopted in 2003 defines the term as follows:

> "1. *"Intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity…* "
>
> "2. *The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural*

*heritage;(b) performing arts;(c) social practices, rituals and festive events;(d) knowledge and practices concerning nature and the universe;(e) traditional craftsmanship."*

[119] Tangible heritage refers in general to a wide range of buildings, structures, townscapes, places or objects of aesthetic value, graves and burial grounds, places of memory, historical settlements, artefacts, archaeological sites and many more. It therefore refers to material heritage, which is either movable or immovable, and can be natural or man-made.

[120] LLPT, supported by its heritage consultants and Mr Rudewaan Arendse, have sought to persuade the Court that the proposed development is supported by the majority of First Nations Groups through the FNC. Jenkins contested this assertion and alerted the Court to the existence of other First Nations Groups and Traditional Authorities who are opposed to the development and may have an interest in this matter. These include:

120.1 The vast majority the Peninsula Khoi sovereign formations, including the Goringhaicona Khoi Khoin Traditional Indigenous Council, the Cochoqua Traditional Authority, the Hessequa Traditional Authority under Chief Lanville, and the Gainouqua Traditional Authority under Chief Kenneth Hoffman;

120.2 The Khoi and San Kingdom Council of Southern Africa, the Nama, the !Aman Traditional Council under Paramount Chief Martinus Fredericks,

!khoraIlgaullaes Council, IKhowese Nama Traditional Council under its South African representative Kaptein John Cornelius !Kham-aob Witbooi, and the Kai Korana Trans-frontier under Khoebaha Melvin Arendse; and

120.3 The National House of |Xam Bushmen Nation which encompass the following 11 |Xam Bushmen Tribes of the |Xam Nation:

(a) The Khomani San led by Petrus Vaalbooi;

(b) The Khwe Bushmen led by King Tier;

(c) The //Xegwi/ |Xam led by Queen Anette Loots Voster;

(d) The Guriqua led by Paramount Chief Anthony Andrew's;

(e) The Hawequa led by Paramount Chief Shedrick Kleinscmidt;

(f) The! Xau-Sakwa led by Paramount Chief Danster;

(g) The Sonqua-|Xam led by Paramount Chief Pietrus Windvogel;

(h) The Karoo-|Xam led by Paramount Chief Hermanus Baaitjies;

(i) The Kalahari-|Xam led by Chief Piet Barends;

(j) !Xun led by King Tier; and

(k) The Ubiqua led by Prins Lieffie.

120.4 Revivalist umbrella organizations such as the First Indigenous Nation of Southern Africa (FINSA), the Democratic Federation of Indigenous People SA, the A|Xarra Restorative Justice Forum and the Western Cape Khoisan Legislative Council.

[121] Jenkins stated that Traditional Authorities and Organisations are likely to view the ethics engaged in the consultation process with First Nations Groups as a

violation of the San Code of Ethics. It is common cause that Arendse prepared both the TRUP Report for the Western Cape Government of Transport and Public Works, and AFMAS River Club First Nations Report at the instance of the developer. The LLPT approached AFMAS Solutions shortly after completion of the TRUP First Nations Report, following interim comments made by the HWC. LLPT commissioned Arendse *"given his success in interacting with several First Nations Groupings in the process of preparation of the land-use planning local area spatial development framework in the TRUP First Nations Report dated 25 September 2019".*

[122] Arendse confirmed that he had conducted nine interviews (including Jenkins), which informed the TRUP First Nations Report. The First Nations Collective was constituted shortly after Arendse consulted with First Nations Groups for the TRUP First Nations Report. Thereafter, at the instance of the developer, Arendse engaged with the FNC to compile the River Club First Nations Report barely two months later. The AFMAS River Club First Nations Report dated November 2019 was thus a product of engagement with the FNC, and derived, in part, from the TRUP First Nations Report's consultation process with Arendse as the facilitator. Significantly, Arendse did not contest the assertion of Jenkins that he is a member of the First Nations Collective who supported the development.

[123] Although the HWC considered that *"formal notice commenting procedures"* had been complied with, it was nonetheless of the view that there had not been meaningful consultation with First Nations Groups. It is common cause, and was not seriously disputed that certain groups did not participate in the consultation process,

or subsequently withdrew from the consultation process. The FNC attributed their withdrawal or non-participation to a variety of possible reasons, including potential conflict of interests or representing Nguni groups or groups from outside South Africa, or individuals and groups with no historical, ethnic, geographic, cultural or heritage linkages to the River Club land or the Two Rivers landscape as a whole. The heritage practitioners accepted that there may indeed be a range of First Nations Groupings who do not support the development. None of the parties could provide the Court with precise details in this regard.

[124] The AFMAS River Club First Nations Report compiled by Arendse is of great significance since it was subsequently integrated into the developer's HIA by way of the December 2019 supplement. The HWC furnished a "*final comment*" on the Second HIA on 20 February 2020 in which it reiterated its views contained in the interim comment. HWC expressed the view that the AFMAS Report appeared to be unreliable for the following reasons:

> "*the scope of the engagement resulted in a number of groups electing to not participate fully: the research process was contested by participants in the engagements; there were doubts about the impartiality of the research questions; the methodology for the engagement does not appear to follow accepted oral history interviewing protocols; the confusion between this report and the DT&PW-commissioned report presumably a reference to the contemporaneous report prepared by AFMAS solutions in connection with*

*First Nations issues in the broader TRUP brought the ethics of the engagement into question". (at page 9 of the comment)*

[125] Ms Deirdre Prins-Solani, a consultant and practitioner in the field of intangible heritage, education and community-based inventorying criticised the AFMAS Report. She stated that the methodology used by Arendse was deeply flawed, decontextualizes intangible heritage, and fails to appreciate the ethical norms that should be applied to such studies. The report is divisive and does not promote the work of living heritage which should rather foster continuity, understanding and mutual respect amongst groups who have a specific shared intangible heritage. Its tone and emphasis on difference and diverse positions and opinions and the marginalisation of certain custodians of the site and larger TRUP area negates the premise for social cohesion through culture. She expressed the view that the report effectively attempts to strip the River Club land of historical significance in order to make a case in favour of the development.

[126] Prince-Solani attributed the pro-development and divisive nature of the AFMAS report to Arendse's decision to include only certain Khoi groups in his study which culminated in the AFMAS River Club Report. There were 8 Khoi groups interviewed in the TRUP Report, but only 5 Khoi groups interviewed regarding their accounts of the First Nations Narrative. Of the 8 Khoi groups in the TRUP Report, only 3 groups were interviewed in the 2019 River Club First Nations Report supplemented by a San and Griqua group. Consequently, more than half of the groups that participated in the TRUP Report project were not involved or present for

conducting interviews with Arendse to explain how the proposed development will impact on their heritage, considering their respective First Nations Narratives.

[127] Prince-Solani pointed out that Arendse used interviews and extracts with representatives from the communities concerned to make a case for positional power and *"ownership"* of the land, rather than investigating intangible heritage. The lack of inclusivity was noted by HWC, and is contrary to standard practice of community-based inventorying, which promotes inclusion. The exclusion of certain groups made it impossible for decision makers to take into account all relevant considerations with respect to the impacts of the development. She stated that to the extent that the San and Khoi share ancestral roots, traditional worldviews, and similar experiences of marginalisation and oppression, it was expected that a heritage expert would consider the SAN Code as the golden standard for the conduct of research with indigenous people in South Africa. She pointed out that Arendse made no reference to the SAN Code of Ethics, which deals explicitly with the issue of prior informed consent. She pointed out that Arendse appeared to have no documentation at all of informed consent as envisaged in the SAN Code of Ethics. Consequently, Arendse failed to comply with international best practice standards for identifying, researching and assessing intangible heritage.

[128] Respondents disputed the views expressed by HWC and criticised its final comments with regard to Arendse's reports, and its apparent dismissal of his engagements with the FNC. LLPT submitted that none of the parties who participated in and signed off individually and collectively on the TRUP First Nations

Report expressed any concerns with the methodology adopted by Arendse. LLPT expressed the view that Arendse's report is persuasive in his method, its argument and its conclusions. The views expressed by Prins-Solani were also criticised, and her replying papers are the subject of an application to strike out. Significantly, the views and concerns expressed by Prince-Solani are similar to those of HWC. The leader of the FNC, Chief Zenzile Khoisan criticised the HWC for ignoring the FNC's support for the development. According to Eight Respondent the development will facilitate the *"return of First Nations Peoples to ancestral land."* Jenkins expressed reservations with regard to the perceived benefits for First Nations People arising from the development.

[129] Notwithstanding the fact that the HWC elected not to participate in these proceedings, the central theme of the concerns raised by it revolved around the protection and preservation of the cultural and historical heritage of Indigenous Groups, including intangible heritage resources. Resultantly, HWC insisted on meaningful participation and consultation with affected First Nations Peoples.

[130] I am mindful of the developer's contention that their consultants made considerable efforts to engage with First Nations Groupings. However, in my view Arendse was conflicted and his position as an objective and trusted expert to facilitate meaningful consultations with those opposed to the development was compromised. The AFMAS report is described as *"an independent stand-alone report"*, which detailed the aspirations of the First Nations Groups in respect of the River Club development. It is evident from the papers filed of record that Arendse's

Reports created tensions and deep divisions in at least two First Nations Groups. Having due regard to the contents of the Arendse Reports, the perception of Jenkins that Arendse was biased in favour of the FNC was reasonable in the circumstances. Consequently, the AFMAS River Club Report is tainted and cannot serve the purpose it was intended for. Furthermore, the inability of the Respondents, more particularly the City and LLPT, to provide the Court with precise details of First Nations Peoples who have an interest in this matter, but was excluded from the consultation process was a significant and glaring omission.

[131] I am accordingly satisfied that all affected First Nations Groups were not adequately consulted regarding the River Club development. I am further satisfied that those who were excluded or not adequately consulted may suffer irreparable harm should the construction continue pending review proceedings. The harm to be prevented in the present circumstances is the continuation of the building construction in the event that the review Court finds any irregularity in relation to the constitutionally protected rights of indigenous groups

[132] I am mindful that the City's municipal-planning authorisation includes conditions of approval requiring the developer to ensure further engagement with indigenous communities, including the First Nations Collective and Second Applicant, before the heritage infrastructure is finalized. Consequently, it was anticipated that engagement should be ongoing before and during the construction. Considering the divisions and mistrust amongst First Nations Groups, it is unclear how this condition will be complied with. It is apparent that there is considerable

contestation among First Nations Groups as to who are regarded as the historical custodians and custodial owners of the indigenous heritage narrative of the TRUP area. The Arendse Reports exacerbated the situation.

[132] The consultation process involving Arendse was wholly inadequate and an independent consultant should be appointed for this task. Furthermore, the current tension amongst First Nations Groups strengthens the need for meaningful engagement and proper consultation. The City conceded that from a heritage perspective, any development of the River Club would transform the site and floodplain, affecting the wider TRUP environment. Consequently, proper engagement and consultation remains a central feature of the proposed development.

[133] The record generated by the body of objections during the public participation process, and the various appeals, establish that the LLPT was aware of potential legal action arising from the impugned decisions. LLPT was therefore aware that the development of the River Club site was controversial and strenuously contested when they commenced with construction work on the site. They were aware of the pending review application and indicated to the Court that they commenced construction at their own risk. Resultantly, it was anticipated that at the time of the hearing of this matter that the risk exists that LLPT may face prejudicial consequences in the event of an interim interdict being granted or an adverse finding against them in the review proceedings. Put differently, LLPT proceeded to

commence with the construction in the face of a looming review application, and consciously took the risk to proceed with construction.

[134] LLPT argued that it will suffer disproportionate and unjustified hardship in the event that interim relief is granted, and referred to its contractual obligations in respect of the development. It appears that LLPT committed itself to a construction timetable and deadlines notwithstanding its knowledge that the development is strenuously contested. LLPT was fully aware that a legal challenge was looming and refused to provide an undertaking to refrain from acting on the environmental and planning authorisations. A prohibition on the continuance of construction work in these circumstances cannot be construed as prejudicial to the LLPT. At the hearing of this matter LLPT indicated that they elected to continue with construction at its own risk.

[135] On 24 November 2021 the matter could not be heard, and the parties could subsequently not agree to a mutually convenient date for the hearing of this matter in December 2021. Consequently, the matter could only be heard on 19,20 and 21 January 2022. On 20 December 2021 First Respondent's attorneys repeated their request that construction activities on the site be halted pending the hearing of the matter, but the request was declined. In my view LLPT may derive benefits from its persistence to proceed with construction, by placing themselves into a position from which only limited relief would be available, regardless of the merits of the review application. It is highly probable that the continued construction of the development

could render the review academic as it will limit the just and equitable relief that the Court may award.

[136] The danger therefore exists that the Court adjudicating the application for review, when the construction is already in an advanced stage, may consider that LLPT had built themselves into an *"impregnable position"* which could then have an influence on the review proceedings. Consequently, in the absence of an interim interdict, the advanced state of the building construction might render review proceedings a *brutum fulmen*. The Applicants will be prejudiced by the potentially adverse implications in such circumstances where a Court would be reluctant to exercise its discretion in their favour in an eventual successful review. (See: **Van der Westhuizen and Others v Butler and Others** 2009 (6) SA 174 (C).

[137] Ultimately, the Court seeks to ensure, as far as is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief. I have noted the Respondents' submissions that the Applicants should have launched urgent review proceedings in this matter. However, the fact that the Applicants may have unduly delayed instituting urgent review proceedings does not detract from the duty on the relevant decision makers to properly consult with the First Nations Peoples, and the duty of the Courts to ensure that the rights of vulnerable Indigenous Groups are protected. I am satisfied that this matter is urgent, because the ultimate test on urgency is whether, if not given an audience in the urgent court, the Applicants and affected First Nations Groups will be denied

substantive redress in due course. In my view there is no reason why an urgent review cannot be heard in this matter, after proper consultation with the affected First Nations Peoples. The Court has to resolve the competing interests inherent in applications of this nature. Consequently, I am of the view that the commencement of the construction work is irrelevant in the determination of the interdictory relief sought by the Applicants. The construction must be halted in order to embark on a proper consultation process.

[138] Three strike out applications were filed by LLPT, the City and the Province in relation to various allegations in the Applicants' replying papers on the basis, in the main, that they introduce new review grounds in reply and/or introduce new material in reply, or are irrelevant. LLPT applied for the striking out of certain paragraphs together with annexures in the replying affidavit of Professor Leslie London dated 17 September 2021, the expert replying affidavit of Ms Bridgit O'Donoghue, the expert replying affidavit of Ms Deidre Prins-Solani, and the entire affidavit of Mr Derick Ambrose Henstra dated 14 September 2021. Third, Sixth and Seventh Respondent applied for the striking out of paragraphs 85-90 of the replying affidavit of London together with annexures, paragraphs 24-26 of the replying affidavit of O'Donoghue together with annexures, and the entire replying affidavit of Prince-Solani. Fourth and Fifth Respondent applied for the striking of paragraphs 31 and 50 of the Applicant's replying affidavit of London.

[139] The averments which the Respondents seek to have struck relate *inter alia* to allegations in response to matters raised in the answering papers, differences of

opinions of heritage specialists, aspects relating to HWC's comments, and allegations surrounding legal arguments in respect of section 38 (8) of the NHRA. Further allegations implicated in the striking applications relate to criticisms relating to the nature of development proposals, engagement processes, and the relevant impugned decisions.

[140] The papers filed in this matter are prolix and understandably deadlines had to be extended by agreement to allow for the filing of papers. Respondents complained that they were not given reasonable time frames within which to file answering papers. Furthermore, the urgency for the hearing of Part A impacted on the ability of the parties to adequately deal with certain aspects in the review challenge. At the hearing of this matter the Court was informed that the Rule 53 record still needed to be prepared and delivered to the Applicants. It is well established in review applications that an Applicant has the right to supplement its founding affidavit after the Rule 53(1) record is filed. Applicants confirmed that on receipt of the record their case will be refined and reformulated, and review grounds will in all likelihood be amended.

[141] This Court is mindful not to inappropriately traverse the purview of the review court. The issues to be determined in the review were considered for the restricted purpose of determining whether the Applicants make out a strong case for the interim interdict to be granted. In my view the majority of the grounds relied upon in the striking applications implicate the review grounds and related issues. The City responded to the new arguments relied upon for the review of its decisions. In am in

any event satisfied that none of the Respondents will be prejudiced if the matter complained of is not struck out since the Respondents will be given further opportunities to respond to any new matter or additional review grounds. The parties made brief submissions with regard to the striking out applications, and not much time was taken in argument dealing with the striking-out applications.

[142] I am mindful that further engagement with First Nations Groups may result in a delay in the review hearing. Furthermore, the preparation of the Rule 53 record may also result in further delays in expediting review proceedings. However, Respondents were aware of the pending legal action, and there is no need to delay the filing of the Rule 53 record in this matter. Any additional information arising from further engagement with First Nations Groups can be filed at a later stage.

**Conclusion**

[143] This matter ultimately concerns the rights of indigenous peoples. The fact that the development has substantial economic, infrastructural and public benefits can never override the fundamental rights of First Nations Peoples. First Nations Peoples have a deep, sacred linkage to the development site through lineage, oral history, past history and narratives, indigenous knowledge systems, living heritage and collective memory. The TRUP site is therefore central to the tangible and intangible cultural heritage of the First Nations Peoples. I am of the view that the fundamental right to culture and heritage of Indigenous Groups, more particularly the Khoi and San First Nations Peoples, are under threat in the absence of proper

consultation, and that the construction of the River Club development should stop immediately, pending compliance with this fundamental requirement. I am satisfied that the Applicants had established a *prima facie* right, and a reasonable apprehension of irreparable and imminent harm if an interim interdict is not granted. I am further satisfied that the balance of convenience favour the granting of an interim interdict, and is the only appropriate remedy in the circumstances. In my view, Applicants have shown, on the evidence and the law, compliance with all the requirements for interim relief on the basis of the refined test in OUTA. I am accordingly satisfied that it is constitutionally appropriate to grant an interim interdict.

[144] The City noted that Chief !Garu Zenzile Khoisan, representing the FNC, has extolled the development as a genuine instance of indigenous agency: members of the FNC partnering with a commercial enterprise to ensure both sustainable development and the enhancement of the site's heritage resources. The order of this Court must therefore not be construed as criticism against the development, or casting aspersions on the views expressed by the First Nations Collective. The core consideration is the issue of proper and meaningful consultation with all affected First Nations Peoples.

[145] In the result the following order is made:

145.1 First Respondent is interdicted from undertaking any further construction, earthworks or other works on erf 151832, Observatory, Western Cape to implement the River Club development as authorised

by an environmental authorisation issued in terms of the National Environmental Management Act, 107 of 1998 on 22 February 2021 and various development permissions issued in terms of the City of Cape Town's Municipal Planning By-Law, 2015 pending:

(a) Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC.

(b) The final determination of the review proceedings in Part B.

145.2 The three applications to strike are dismissed.

145.3 There shall be no order as to costs in the striking-out applications.

145.4 Costs of this application are to stand over until the finalisation of the review application.

145.5 The parties are granted permission to approach this Court for further Directives to facilitate an expedited review in this matter, and are also herein hereby given leave to amplify or amend the terms of this order so as to give practical effect to the orders granted herein.

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**DEPUTY JUDGE PRESIDENT GOLIATH**

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