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

CASE NO: 12994/21

In the matter between:

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

and

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

FOURTH AND FIFTH RESPONDENTS' NOTICE OF APPLICATION FOR LEAVE TO APPEAL

Office of the State Attorney
Mark Owen (061 429 9289 and mnowen@mweb.co.za)

TAKE NOTICE THAT the Fourth and Fifth Respondents intend to make application, on a date to be arranged with the Registrar of the above Honourable Court, for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of the Western Cape Division of the High Court, against the whole of the judgment and order of the Honourable Deputy Judge President, Justice Goliath, delivered on 18 March 2022 ('the Judgment').

TAKE NOTICE FURTHER that the following are the grounds on which leave to appeal will be sought:

1. The Court erred in ordering, in paragraph 145.1(a), that the Fourth and Fifth Respondents are to "[c]*onclu*[de] *meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC*", pending which the development is interdicted from proceeding.

    1.1. The First and Second Applicants did not in their notice of motion ask the Court for the relief granted in paragraph 145.1(a), nor was a case made out in their founding affidavits for such an order.

    1.2. No other party requested the relief granted in paragraph 145.1(a).

    1.3. By going beyond the case made out in the notice of motion and the affidavits, the Court acted irregularly, and in breach of fundamental principles relating to the adjudication of disputes.

    1.4. The Court incorrectly, and without justification, criticised the Fourth

and Fifth Respondents as follows:

1.4.1. for their "…*inability … to provide the Court with precise details of First Nations Peoples who have an interest in this matter, but was* (sic) *excluded from the consultation process*", and incorrectly characterising this "inability" as "*a significant and glaring omission*" (paragraph 130), when the Fourth and Fifth Respondents were not called upon to meet such a case; and

1.4.2. "*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*" (paragraph 123), when this was not an issue raised by the Applicants in their founding papers.

1.5. The Court's irregular conduct has prejudiced the Fourth and Fifth Respondents in that the Court did not observe the *audi alteram partem* rule, and accordingly findings were made against the Fourth and Fifth Respondents in respect of issues not raised in the Applicants' founding papers.

1.6. Judicial intervention of this nature, namely to grant relief in the Applicants' favour which was not sought by the parties and is unsupported on the papers, is impermissible.

2. The Court's order is incapable of enforcement, vague, and confusing.

2.1. The consultative process envisaged by the order would apparently run in parallel with the prosecution of the review; however, when read with paragraph 137 which states: "*In my view there is no reason why an urgent review cannot be heard in this matter, after proper consultation with the First Nations Peoples* (emphasis added)", and the Court's acknowledgment in paragraph 142 that "*further engagement with First Nations Groups may result in a delay in the review hearing*", it is not clear as to when the order is to be implemented.

2.2. It is unclear what the effect of the Court's direction in paragraph 142 that [a]*ny additional information arising from further engagement with First Nations Groups can be filed at a later stage*" will be on the review and how the reviewing court would take such additional information into account.

2.3. The order is unclear as to who should conduct the meaningful engagement and consultation. Is it the First Respondent or the Fourth and Fifth Respondents only in relation to the environmental authorisation? The order does not state which particular groups of First Nations Peoples were allegedly excluded from consultations, and the order is unclear as to the precise persons with whom such consultations should be conducted. Similarly, the order to the effect

that such consultations should be "*meaningful*" is so vague as to be incapable of enforcement.

2.4. Furthermore, if the consultative process is to be held before the hearing of the review, it is unclear what, if any, purpose would be served by the review, in respect of which the Court in paragraph 145.5 grants the parties "*permission to approach the Court for further Directives to facilitate an expedited review in this matter*". The order presupposes, and is premised upon, the factual finding that the consultation process was inadequate (paragraph 131). In characterising its role as being "*to resolve the competing interests inherent in applications of this nature*" (paragraph 137) the Court went beyond considering whether the requirements of an interim interdict had been met and prejudged the outcome of the review proceedings. As there has been a final determination of this issue, it is not clear what the purpose of an expedited review would be.

3. The Court erred and misdirected itself in its central finding to the effect that "*all affected First Nations Groups were not adequately consulted regarding the River Club development*" (paragraph 131).

3.1. As indicated above, this was not the case which the Fourth and Fifth Respondents were called upon to meet.

3.2. It was impermissible, in the particular circumstances, for the Court to seek a factual basis for its finding from the various documents before

the Court, when this issue had not been raised in the founding papers of the Applicants.

3.3. Moreover, the material before the Court was inadequate as a basis for such a finding. For example, the reference in paragraph 120 to the existence of other First Nations Groups and Traditional Authorities is to those who were "*opposed to the development*"; this presupposes that they had knowledge of the development and were therefore opposed to it; it does not support a conclusion that there was no consultation with such persons. Similarly, the statement in paragraph 120 that such persons "*may have an interest in this matter*" is irrelevant and misplaced; this was not an issue raised on the papers and would in any event not have provided a basis for the factual finding ultimately made.

3.4. Similarly, the finding in paragraph 123 that "*certain groups did not participate in the consultation process, or subsequently withdrew from the consultation process*" does not provide a factual basis for the finding made, nor does it support a conclusion that the decisions of the Fourth and Fifth Respondents were susceptible to review because of an irregularity in the public participation process.

3.5. As indicated above, the criticism of the Respondents (including the Fourth and Fifth Respondents) in paragraphs 123 and 130 is misplaced, and appears to assume an obligation on the Respondents

to furnish this type of information, when no case to the opposite effect was made out in the Applicants' founding papers.

4. The Court erred, in the second paragraph 132, in finding that **"***the current tension amongst First Nations Groups strengthens the need for meaningful engagement and proper consultation*". The fact that there was disagreement amongst First Nations Groups regarding whether the development should take place does not provide any basis for the orders granted, and in particular does not provide a basis for an order to the effect that there should now be "*meaningful engagement and proper consultation*".

5. The Court erred in finding that the recommendation in Heritage Western Cape's ('HWC') interim comment to appoint an independent consultant, which according to paragraph 132 appears to be what the Court believes will constitute meaningful engagement, is binding on the Fourth and Fifth Respondents.

5.1. In the Applicants' founding affidavit only two references, in paragraphs 91 and 134, were made to HWC's recommendation. In both instances, the mention of the recommendation is part of a description of the conclusion of HWC's interim comment.

5.2. In their heads of argument, the Applicants sought to rely on the failure of the Fourth and Fifth Respondents to implement HWC's recommendation as a ground for alleging that the Fourth and Fifth Respondents did not comply with s 38(3) of the National Heritage

Resources Act 25 of 1999 ('the NHRA'). They did so based on two references in paragraphs 31 and 50 of their replying affidavit, the import of which only became apparent on receipt of the Applicants' heads of argument. Accordingly, the Fourth and Fifth Respondents brought a striking out application for paragraphs 31 and 50 of the Applicants' replying affidavit, which should have been granted.

5.3. In any event, HWC's recommendation to appoint another specialist does not involve the specification of information to be provided in a report, as contemplated in section 38(3) of the NHRA. On its own terms, it related to a recommendation regarding the possible source of further inputs on intangible heritage aspects. No information of any kind is specified.

5.4. On the Applicants' own version, the requirement to appoint a specialist consultant with expertise in dealing with the intangible aspects pertaining to the wider TRUP area was not a requirement in terms of information to be provided, but was a recommendation.

5.5. Accordingly, the Court erred on the one hand by concluding in paragraph 141 that the Fourth and Fifth Respondents will not be prejudiced if the matter complained of is not struck out, when on the other hand the Court made a positive finding that HWC's recommendation must be complied with based on material impermissibly before the Court.

6. The Court erred in criticising the AFMAS report of Mr Arendse, and in finding that Mr Arendse was "*conflicted*", "*compromised*" and "*biased*". Mr Arendse was not the decision-maker in respect of the decisions taken by the Fourth and Fifth Respondents, and there can be no suggestion that the Fourth and Fifth Respondents themselves were "*conflicted*", "*compromised*" or "*biased*".

7. The Court erred in its application of the requirement to consider the balance of convenience when considering whether to grant the interim interdict.

    7.1. The extent of the Court's consideration of the parties' competing interests when weighing the balance of convenience in favour or against the granting of the interdict is found in paragraph 143 which states that: "*The fact that the development has substantial economic, infrastructural and public benefits can never override the fundamental rights of the First Nations peoples*".

    7.2. It is therefore apparent that the Court failed to undertake the exercise of weighing the balance of convenience, as it should have. The Court simply, and erroneously, found that whatever the economic, infrastructural, and public benefits of the development were, these could "*never*" override the alleged rights of First Nations People. In any event, there could be no question, in the context of an application for an interim interdict, of such alleged rights being "*overridden*".

    7.3. In considering whether interim relief should be granted, the Court erred by having regard only to the interests of the immediate parties

to the application, and not also to the interests of other persons and the wider public.

7.4. The decision of the Fourth Respondent, upheld by the Fifth Respondent on appeal, identifies significant benefits to the broader public, which include, amongst others, the recognition of intangible heritage aspects; the rehabilitation of the currently degraded site; the significant socio-economic benefits summarised in paragraph 3.12 of the Fourth Respondent's decision, namely investment in the economy and employment opportunities, the provision of inclusionary housing, and the creation of public open space involving landscaped areas, pathways, and river walks replacing the existing private open space.

7.5. The Court erred by not giving proper weight to the consideration that should the interim interdict be granted, this would bring the development activities to a halt, which would probably result in the loss of all the benefits of the development referred to above, to the serious prejudice of the wide range of persons who would otherwise have benefitted from the development, directly or indirectly. In these circumstances, the 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, and the effect thereof would be final.

8. The Court erred in failing to find that the Applicants had failed to make out a

prima facie case for the relief sought.

9. The Court erred in failing to order the striking out of the portions of the Applicants' replying affidavit sought by the Fourth and Fifth Respondents.

10. The Court erred in failing to dismiss the application, with costs.

11. The Fourth and Fifth Respondents have reasonable prospects of success on appeal, and it is in the interests of justice that leave to appeal be granted.

SIGNED and **DATED** AT **CAPE TOWN** on this **6th** day of **APRIL 2022**

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