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

In the matter between: **CASE NO: 12994/21**

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 MUNICAL PLANNING	Sixth Respondent
EXECUTIVE MAYOR, CITY OF CAPE TOWN	Seventh Respondent
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eight Respondent

APPLICATION FOR LEAVE TO APPEAL JUDGMENT DELIVERED ON 5 MAY 2022

GOLIATH DJP

[1] The Liesbeek Leisure Property Trust ("LLPT"), the City, the Province and the First Nations Collective ("FNC") (collectively "the Respondents") seek leave to appeal against the whole of the judgment and orders handed down by this court on 18 March 2022 in respect of interlocutory proceedings in Part A of this matter. This matter has its genesis in the highly controversial development of the River Club site, Observatory, which forms part of the broader area known as the Two Rivers Urban Park that was the dominion of First Nations Peoples in pre-colonial times. The appeals are directed at the orders contained in paragraphs 145.1 (a) and (b) of the judgment, which interdict LLPT from proceeding with any construction on erf 151832, Observatory, pending:

1.1 the conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of the Second Respondent ("HWC"); and

1.2 the final determination of the review proceedings in Part B.

[2] Section 17(1) of the Superior Courts Act, Act 10 of 2013 regulates applications for leave to appeal and provides:

"**Leave to appeal**

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[3] The test which was applied previously in applications of this nature, was whether there were reasonable prospects that another court may come to a different conclusion. With the enactment of section 17 of the Act the threshold for granting leave to appeal a judgment of a High Court has been significantly raised. In **Mont Chevaux Trust v Goosen & 18 Others** 2014 JDR 2325 (LCC) at para 6 the following was stated:

> *"It is clear that the threshold for granting leave to appeal against the judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted, was a reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new Statute indicates a measure of certainty that another court will differ from the court who's judgment is sought to be appealed against."*

[4] In considering the application for leave to appeal, the court is obliged to take cognisance of the higher threshold that needs to be met before leave to appeal may be granted. The more stringent test was reaffirmed by the Supreme Court of Appeal in **S v Smith** 2012 (1) SACR 567 (SCA) where the following was stated at paragraph 7:

> *"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects*

are not remote, but has a realistic chance of succeeding. More is required to establish that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[5] The consultation order in paragraph 1.1 above became a central feature in the application for leave to appeal. Applicants abandoned the consultation order as envisaged in paragraph 145.1 (a) of the order of court. However, Respondents argued that this Court is *functus officio* in respect of the consultation order and may not reconsider relief it has already granted pursuant to evidence it has already evaluated and merits it has already traversed, even if the Court, on reconsideration, believes that the relief was inappropriate.

[6] The crux of Respondents' argument is that the order in paragraph 145.1 (a) is final in effect, and thus appealable. Respondents made extensive submissions on the consultation order, notwithstanding the fact that it was abandoned by Applicants, primarily aimed to substantiate the argument that the court order is final and thus appealable. Respondents argued that the effect of the consultation order is that this court had made decisions regarding both the interdict application and the validity of the impugned decisions, and consequently the court has disposed of a substantial part of the Applicant's case which were supposed to be determined in Part B (the review application). Respondents therefore submitted that in granting the consultation order, the court has predetermined the review relief in Part B of the application, that is the validity of the impugned decisions. Respondents argued that deciding the validity of

the impugned decisions, and therefore effectively deciding Part B, was impermissible for a court seized with an urgent application for interim relief. Respondents further submitted that the court had erred in granting relief in paragraph 145.1 (a) since it was impermissible for the court to grant relief against the Respondents based on grounds that were not sought nor pleaded.

[7] The City argued that para 145.1(a) is vague and unworkable because it is not clear who must be consulted, who must conduct the consultation, under which statutory regime (if any) the consultation must occur, and how it will be determined that the consultation has been "*meaningful*". If the further consultation is to have any purpose, the parties consulted must have a reasonable opportunity of influencing the decisions. However, the municipal (and provincial) decision-makers, who are *functus*, cannot vary the decisions unless they are set aside in Part B. Since this court has determined that the further consultation must be concluded before the review in Part B, the further consultation is pointless.

[8] Fourth and Fifth Respondents contended that the court set a pre-condition that construction must be halted, in order to embark on a further consultation process without attempting to set out the parameters of, or indicate what such consultation should involve, thus leaving this aspect of its order incurably vague and unable to be implemented. Respondents contended that HWC's comments do not offer any guidance. Consequently, this part of the order is indeterminate, open-ended, and irredeemably vague and does not comply with the requirements of clarity and certainty that is required of orders of court. Fourth and Fifth Respondents further submitted that the court's finding that HWC's recommendation is binding on the province is

erroneous.

[9] Eighth Respondent argued that the facts clearly demonstrate on the papers that all the identified interested and affected groups, in particular, First Nations Peoples, participated in the various consultation processes, including the planning approval and the environmental authorisation process. Eighth Respondent stated that Second Applicant voluntary withdrew from the First Nations Collective during the consultation process. Second Applicant's papers demonstrate unequivocally that First Nations Peoples Groups, other than the FNC, participated fully in the consultative process, albeit to oppose the development. After Second Applicant withdrew from the FNC it continued to participate in its own right in the planning and environmental appeals in both processes and making extensive submissions throughout both processes.

[10] Eighth Respondent further stated that this court failed to appreciate that the central requirement of section 38(3)(e) of the National Heritage Resources Act, 25 of 1999 ("NHRA") is that the results of the consultations with interested and affected persons must be incorporated in the relevant heritage impact reports. Section 38(3)(e) does not require consensus among affected persons, but requires that a process is reflected in the reports. Eight Respondent argued that there was compliance with the requirements of section 38(3)(e) in all material respects and HWC never contended that certain groups had been intentionally or deliberately excluded. Eighth Respondent noted that none of the Applicants made out a case on the evidence that any First Nations Peoples group, or indeed any affected person were excluded from the consultation processes, and no such case is pleaded in the founding papers. Consequently, this court misdirected itself in finding that there was an onus on the

Respondents to prove that there were First Nations Peoples groups that had an interest in the matter and were excluded from the process in circumstances where none of the parties on the papers made this contention.

[11] Applicants stated that the OCA and GKKITC welcomed the spirit in which the consultation order was made as being one which applied and embraced the duty of the judiciary in fashioning relief to have regard to the fundamental rights in the Bill of Rights, the values underlying it and the obligations of South Africa under international law. In this regard, the OCA and the GKKITC, through their attorneys, proposed on a without prejudice basis, to amend the consultation order so as to provide for a conciliation process to be ordered between the Respondents and all First Nations Groups having an interest in the matter in terms of section 17 of the National Environmental Management Act. No. 107 of 1998 ("NEMA").

[12] Applicants pointed out that sections 17 and 18 of NEMA make express provision for such a process. At the same time, the OCA and the GKKITC proposed amendments that would ensure that the exchange of affidavits pursuant to Rule 53 would continue while the conciliation was under way. In this way the OCA and the GKKITC sought to address concerns raised by the Respondents about the delaying effect that the consultation order would have on the expeditious disposal of the review provided for in Part B of the notice of motion. The OCA and GKKITC explained that they advised the Respondents that if they persisted in their oppositional stance, they would be left with no option but to abandon the consultation order in terms of rule 41(2) of the Uniform Rules. All of the Respondents have rejected the proposal. Applicants explained that it is the right of OCA and the GKKITC in terms of Section 34 of the

Constitution to convey to the court, the basis upon which the abandonment was made.

[13] Rule 41(2) provides that *"Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandonment in part shall have effect subject to such abandonment."* With regard to the abandonment of the consultation order, LLPT alluded to the fact that the consultation order impacts on third parties, and consequently cannot be abandoned. The consultation order related to interim and final comments of HWC relating to the final heritage impact assessment report and compliance with the provisions of section 38(3)(e) of the NHRA, which provides that the responsible heritage resources authority must specify the information to be provided in a report required in terms of section 38(2)(a), provided that, inter alia, the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources must be included in such report. The central feature of these comments related to the impact of the development on intangible heritage resources, which is one of the issues to be considered in part B.

[14] In my judgment I have noted 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. There exist no guidelines as to the form and manner of consultations with First Nations Groups, and I expressed reservations regarding the role of the facilitator in this regard. However, it was anticipated that engagement should be ongoing before and during the construction.

The issue of consultation therefore remains relevant in respect of the development regardless of any order of court. I am satisfied that the issue of meaningful consultation had not been finally disposed of by the (now abandoned) order of court, since same remains relevant in the absence of the court order, and the full extent of engagement will finally be determined by the review court in Part B. I am accordingly satisfied that no third parties will be prejudiced by the abandonment of paragraph 145.1(a) of the order since the nature of any engagements and consultations will be revisited by the review court.

[15] *Erasmus Superior Court Practice* sets out the effect of an order or judgment a court as follows:

> *"The general, well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to set it aside or to correct, alter or supplement it. The reasons are twofold: first, the court becomes functus officio and its authority over the subject-matter ceases; secondly, the principle of finality of litigation expressed in the maxim interest reipublicae ut sit finis litium (it is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end. The inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law. The general rule does not apply to interlocutory orders.* (See: **Van Loggerenberg et al** *Erasmus Superior Court Practice* at D1-561 (RS 15, 2020))."

[16] In the result I am satisfied that there is no bar to the abandonment of the relief complained of, and no third party will be prejudiced by the abandonment of the consultation order. Consequently, the effect of the abandonment of the consultation relief is that the remaining part of the order has effect, subject to the partial

abandonment. The application for leave to appeal therefore stands to be adjudicated on the basis that the interim order is made solely pending the final determination of the review proceedings provided for in Part B.

[17] LLPT argued that the court erred in that the Applicants failed to establish any alleged prima facie right which could not be vindicated on review if construction activities were to continue in the interim. LLPT stated that the Applicants failed to demonstrate a prima facie right, and the court made no finding that unless construction was stopped, any alleged prima facie rights could not be vindicated in remitted appeals or applications to the relevant decision-makers. LLPT argued further that the court incorrectly considered the LLPT's commencement of construction in the balance of convenience enquiry, where this consideration is only relevant for purposes of the review court's exercise of its discretion as to just and equitable relief.

[18] LLPT argued further that in finding that the balance of convenience favoured the Applicants, the Court failed to consider properly or at all the evidence that by interdicting the LLPT from carrying out any construction work, the LLPT and the wider community would suffer irreparable harm, while the applicants would suffer none. LLPT argued that there is no reason why the review court would be reluctant to exercise its discretion in favour of the applicants in an eventual successful review, or why the building construction might under review proceedings be a *brutum fulmen*.

[19] LLPT contended that if the relief granted in paragraph 145.1 of the Order remains operable, the crippling financial liabilities which the LLPT will suffer make it all but certain that the development as planned and approved will not go ahead.

This, in turn, will mean that the members of the First Nations Collective and their future generations will be deprived of the only feasible prospect of manifesting their intangible cultural heritage at the River Club property, thereby endangering transmission of their cultural legacy; and the broader community will lose the significant socio-economic and environmental benefits which would have flowed from this development. Given the applicants' failure to demonstrate (i) any intangible cultural heritage resource which had not been identified and assessed by the respective decision-makers; and (ii) the inadequacy of the wide-ranging protection mechanisms included in the respective conditions of approval, the court failed to consider that the harm that the LLPT and the wider local community would bear if an interdict were granted was severe, irreversible and out of all proportion to that which might be sustained by the applicants. Applicants contended that the court erred in finding that the applicants did not have any other alternative.

[20] Fourth and Fifth Respondent contended that 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. Respondents further It is submitted that the court failed to undertake the exercise of weighing the balance of convenience, as it should have. They stated that 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 Peoples. Respondents noted that the language used in arriving at this conclusion was not appropriate in the context of an application for an interim interdict.

[21] Eighth Respondent stated that in fact, by stopping the development, the orders have the effect of causing irreparable harm to the first real opportunity that has arisen in almost two decades to honour the significant cultural heritage associated with the site. There is a real risk that if the development is halted, the development opportunity will be lost and with it any possibility of rehabilitating the site in order to allow First Nations Peoples' cultural heritage to be celebrated. Consequently, not only will the interim interdict cause irreparable harm to the cultural rights of First Nations Peoples, but the court failed properly to weigh up where the balance of convenience rests by not properly considering the probable impact of the restraining order on the first realistic opportunity to honour the cultural heritage of First Nations Peoples.

[22] Respondents argued that the court failed to give proper consideration to the development's overwhelming positive impact on the public interest, including the environmental and heritage features; direct investment of R4,5 billion and an increase in economic output of more than R8,5 billion; the creation of 5,239 construction jobs and 19,000 employment opportunities; tens of millions of Rand in public transport infrastructure; a significant component of new residential opportunities, including affordable housing; a boost to investor confidence; and a much-needed economic stimulus to facilitate Cape Town's recovery from the economic devastation as a result of the Covid-19 pandemic. Respondents stated that the court closed its mind to substantial economic, infrastructural and public benefits by holding that they

'can never override the fundamental rights of First Nations Peoples'.

[23] The City submitted that there are reasonable prospects that the court of appeal will differ from this court's conclusions in respect of some or all the grounds of appeal, particularly given that those grounds are supported by authority from the Constitutional Court and the Supreme Court of Appeal. There are, furthermore, compelling reasons why the appeal should be heard, as contemplated in section 17(1)(a)(ii). These include the substantial importance of this matter for municipal governance; the public interest of the residents of Cape Town; and the impact of the Court's judgment on future administrative decisions. The decision sought on appeal will have a substantial practical effect or result (as contemplated by section 17(1)(b) in that it will determine whether the Part B proceedings can proceed.

[24] Applicants disputed the Respondents contention that there are exceptional circumstances in which the interests of justice require that they be granted an appeal. Applicants submitted that there is not a single factor present in this case which would justify a departure from the ordinary rule that appeals do not lie against interlocutory orders of this nature. Applicants submitted that it would not be in the interests of justice to grant leave to appeal the interim interdict for the following reasons:

24.1 Crucially, there is no challenge whatsoever to the court's finding that the developer proceeded with the development in the face of and with full knowledge that, judicial review proceedings (which would inevitably be accompanied by an application for an interim interdict if the requests not to proceed with the development were ignored) were going to be launched against the various authorisations. It voluntarily assumed the

risk of those proceedings, including interim interdict proceedings, being decided against it. In these circumstances, it cannot complain when on a proper adjudication of the application, interim relief is granted against it. Complaints of irreparable harm and inconvenience must, with respect, be judged in the context of the voluntary assumption of risk.

24.2 There is no compelling evidence that irreparable harm will eventuate if leave to appeal is not granted. It is not possible to determine from the record what degree of harm the LLPT will suffer as a result of the interim interdict, let alone whether or not it will be irreparable.

24.3 In an answering affidavit on behalf of LLPT, it was stated that precinct 2A of the River Club development is being funded in terms of a development facility agreement with FirstRand Bank Limited. LLPT failed to produce this agreement when called upon to do so in terms of Rule 35 (12). It is therefore unclear how the development of precinct 2A is being funded, and therefore impossible to evaluate LLPT's assertion that the interim interdict renders the failure of the development a foregone conclusion.

[25] Applicants argued that there is nothing extraordinary in the rights and interests that are impacted by the interim interdict. Any temporary interdict that is granted pending the review of development approvals for a substantial construction project will carry with it significant cost implications for the respondent. Notwithstanding this, such interdicts are not only commonplace, but are considered in this division to be a desirable intervention in circumstances where a strong *prima facie* right has been established.

[26] Applicants argued that the order will be fully susceptible to reconsideration in Part B of the application. Applicants stated that the interim interdict is clearly a simple interlocutory order. The policy considerations which underlie the non-appealability of such orders are relevant to and must be weighted by the court in considering what is in the interests of justice. The Applicants contended that they have strong prospects of success in part B of the proceedings.

[27] Applicants argued further that applying section 17(1)(c) to the present matter, the intended appeal will not lead to a just and prompt resolution of the real issues between the parties. It will not dispose finally of any of the issues in the case, nor would it offer any prospect of a just and prompt resolution of the dispute. Applicants pointed out that the real issue between the parties is whether or not the authorisations granted by the provincial and municipal authorities stand to be reviewed and set aside under PAJA. None of those issues will be decided in the appeal. In the circumstances, there can be no suggestion whatsoever that any factual or legal issue has been finally disposed of. The granting of leave to appeal, rather than bringing about the just and prompt resolution of the real issues, will prolong the dispute between the parties and result in a piecemeal determination of the remaining issues in contention. The Superior Courts Act does not permit an appeal in these circumstances.

[28] With reference to **Nova Property Group Holdings Ltd and Others v Cobbet and Another** 2016(4) SA 317 (SCA) the Applicants submitted that the manner of approach that is required is apparent from the judgment of the Supreme Court of Appeal. In this matter the court applied the interests of justice criterion in the application of section 17(1)(a)(ii) and still separately applied and required compliance

with section 17(1)(c). The correct application of section 17(1)(c) is demonstrated by the judgment. The court found that that the judgment subject to appeal, whilst of an interlocutory nature, still disposed of the main issue in the underlying matter, which was a question of interpretation as to whether or not a publisher and a journalist were entitled to the securities register of a company under section 26(2) of the Companies Act on an unqualified or unconditional basis, or subject to the exercise of a discretion by the Court.

[29] An interim order is a temporary order pending a final hearing. Generally, such orders are not appealable. The underlying rationale for this general principle is based on the fact that orders of this nature are not final and it is not in the interests of justice for interlocutory orders to be subject to appeal as this would defeat the very purpose of that relief. (See: **Mathale v Linda and Others** 2016 (2) SA 461 (CC); 2016 (2) BCLR 226 (CC) at paragraph 25; **Philani-Ma Afrika v Mailula** 2010 (2) SA 573 (SCA); **Machele and Others v Mailula and Others** 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) at paragraph 22).

[30] In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC) at 77-78 the Constitutional Court explained that:

> *"if the grant of a temporary interdict were generally appealable the normal effect of granting leave to appeal would be that the temporary order would be stayed. That stay would destroy the main object of a temporary interdict to maintain the status quo until the main case is finalised. The stay in turn may lead to an application for leave to execute, to put the order into operation again. In this*

inquiry, the court of first instance would have to determine harm and the balance of convenience on possibly incomplete information and later be asked to make findings that would contradict the effect of its original findings."

[31] In **International Trade Administration Commission v SCAW South Africa (Pty) Ltd** 2012 (4) SA 618 (CC) at paragraph 50 the Constitutional Court articulated the general position as follows:

"Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes."

[32] In **City of Tshwane Metropolitan Municipality v Afriforum and Another** 2016 (6) SA 279 (CC) at para [40] the Constitutional Court made it clear that even when an interim order is not final in effect and does not dispose of a substantial portion of the issues in the main application, it may nevertheless be rendered appealable if the interests of justice so require. Both the Constitutional Court and the SCA have therefore affirmed that the proper test of appealability in respect of interim orders is the interests of justice standard. A court has a wide general discretion in granting leave to appeal in relation to interim interdicts. (See: **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** 1977(3) SA 534 (A) at 545B-546C, cited with approval in **Economic Freedom Fighters v Gordhan and Others** 2020 (8) BCLR 916 (CC) at para [50]).

[33] In **South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others** 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) the Constitutional Court held that in determining where the interests of justice lie, a court must carefully have regard to, and carefully weigh, all relevant circumstances and factors. The Constitutional Court has stressed that the relevant factors will differ based on the facts of each case and set out a list of non-exhaustive factors. These factors, as enumerated in paragraph 20 include:

33.1 the kind and importance of the constitutional issue raised;

33.2 the potential irreparable harm if leave is not granted;

33.3 whether the interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review;

33.4 whether there are prospects of success in the pending review;

33.5 whether in deciding an appeal against an interim order, the appellate court would usurp the role of the review court;

33.6 whether interim relief would unduly trespass on the exclusive terrain of other branches of government before the final determination of the review grounds; and

33.7 whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs.

[34] Leave to appeal should only be granted against a temporary interdict where, due to special facts and circumstances, the interest of justice demand that the

unsuccessful party is permitted an appeal. The factors that are relevant to this inquiry will vary from case to case, however, the primary consideration is whether irreparable harm will result if leave is not granted.

[35] In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC) the Constitutional Court made it clear that:

> *"if the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that rights exist."*

The rights relied on by second respondent in both part A and Part B are constitutional rights contained in the Bill of Rights. 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. The protection of the constitutional rights of indigenous groups was a crucial consideration in my finding that the interim interdict was appropriate in the circumstances. I am accordingly satisfied that the intrusion imposed by the interim interdict is mandated by the Constitution itself.

[36] The main thrust of the application for leave to appeal was on the final effect of this court's consultation order. In my view pursuing an unwarranted appeal on the basis of an order that was abandoned will serve no purpose other than to prolong the litigation and facilitate piecemeal concurrent litigation in the High Court and the Supreme Court of Appeal, which is in the interests of none of the parties, nor the interests of justice. Having abandoned the consultation order, the interim interdict is no more than an order maintaining the status quo pending the determination of the main proceedings in Part B. I am in agreement with the Applicants that in applying

section 17(1)(c) to the present matter, the intended appeal will not lead to a just and prompt resolution of the real issues between the parties.

[37] Respondents essentially contended that this court should not have halted the construction pending review proceedings. In my view any affected First Nations Peoples should be afforded the opportunity to vindicate their constitutional rights. Such an opportunity should be coupled with protection from the irreparable harm the First Nations Peoples may suffer should the developer build itself into an impregnable position. In my judgment I found that in the absence of an interim interdict, the advanced state of the building construction might render review proceedings a *brutum fulmen*. I am accordingly of the view that in the absence of an interim interdict the relief sought in Part B would in all probability be rendered nugatory if the construction is not stopped pending the review.

[38] Respondents also argued that the court had erred in dismissing the striking-out application in relation to certain matter contained in Applicants' replying papers. In my judgment I found that the Respondents were not prejudiced by the matter sought to be struck. In any event, the Respondents had ample opportunity to approach the court for an opportunity to respond to the alleged new matter, but elected not to do so. With regard to the striking out application it is of crucial importance to note that the Applicant indicated that OCA and GKKITC will file an amended notice of motion and supplementary affidavits in terms of Rule 53 (4). Respondents will therefore be provided an opportunity to file full answering affidavits to that in which they will be able to canvas the affidavits already filed to date and the supplementary affidavits. Replying affidavits will then be filed. The decision in Part B will therefore be made-

38.1 applying a different test, as enunciated in Plascon-Evans, and

38.2 to a completely different factual matrix, and

38.3 in which every conceivable point of law may be raised by the Respondents afresh, including any raised in the interim interdict proceedings.

[39] I have considered the facts of the matter, and the grounds of appeal in the Notice of Appeal, together with the submissions made by the parties. I have carefully reconsidered my judgment and have concluded that the arguments raised by the Respondents are without merit. I have considered whether the appeal would have reasonable prospects of success and I am convinced that there are no reasonable prospects that this appeal would succeed.

[40] In the result, the following order is made:

The application for leave to appeal is dismissed with costs.

DEPUTY JUDGE PRESIDENT GOLIATH

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