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

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

GORINGHAICONA KHOI KHOIN
INDIGENOUS TRADITIONAL COUNCIL

and

JODY AUFRICHTIG N.O.

JAMES OTTO TANNEBERGER N.O.

NICHOLAS SCOTT FERGUSON N.O.

ALLAN JAMES FLYNN MUNDELL N.O.

ADAM JOHN BLOW N.O.

CITY OF CAPE TOWN

CASE NO:

PRIVATE BHATST Applicable
CAPE TOWN 8000

2022 -07= 0.8

Second Applicant
GENERAL OFFICE

WESTERN CAPE HIGH COURT

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE

Eighth Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that application will be made on behalf of the abovenamed Applicants on **Tuesday 12 July 2022**, at 10.00 or as soon thereafter as counsel may be heard, for an order in the following terms:

- That this application be heard as one of urgency in terms of rule 6(12)(a) and condoning the Applicants' failure to comply with the time limits and forms of service in the Uniform Rules.
- Ordering that a rule *nisi* be issued calling on the First to Fifth Respondents to show cause, on a date to be determined by this Court, why an order should not be made in the following terms:
 - 2.1 Declaring that in terms of paragraph 1.1 of the order [paragraph 145.1 of the judgment] handed down by Goliath DJP on 18 March 2022 under case number 12994/2021 ("the order"), read with her judgment and order on the Respondents' application for leave to appeal from the order, the First to Fifth Respondents are not permitted to undertake or progress any construction of any building or structure, or any earthworks or any other work on erf 151832 in respect of or in connection with the River Club, pending the final determination of the review proceedings in Part B of the main application.
 - 2.2 Interdicting the First to Fifth Respondents from undertaking or progressing any construction of any building or structure, or any earthworks or any other work on erf 151832 in respect of or in connection with the River Club pending the final determination of the review proceedings in Part B of the main application.
 - 2.3 Declaring the First to Fifth Respondents to be in wilful contempt of paragraph 1.1 of the order.

- 2.4 Declaring the construction work conducted on erf 151832 since 27 June 2022 to be in breach of paragraph 1.1 of the order, read with the judgment and order on the Respondents' application for leave to appeal from the order.
- 2.5 Ordering the First to Fifth Respondents to deliver to the Applicants' attorneys of record, within 5 days, a statement setting out in detail all of the work that has been undertaken on erf 151832, Observatory subsequent to the granting of the order.
- 2.6 Granting the Applicants leave to approach this Court, on the same papers, duly supplemented, for an order committing the First to Fifth Respondents to imprisonment for contempt of court, in the event of future violations of paragraph 2.3 above.
- 2.7 First alternative prayer. Declaring that the order is an interlocutory one as provided for in terms of section 18(2) of the Superior Courts Act and is not suspended by the Respondents' applications for leave to appeal to the Supreme Court of Appeal.
- 2.8 <u>Second alternative prayer.</u> Declaring in terms of section 18(3) of the Superior Courts Act that, pending the final determination of the review proceedings in Part B of the main application, the order continues in operation notwithstanding the applications for leave to appeal against it.

- 2.9 That the First to Fifth Respondents are liable for the costs of this application, jointly and severally, on the attorney-client scale, together with any other Respondents opposing the relief sought.
- 3 Directing that paragraph 2.2 above shall operate as an interim interdict pending the return day of the rule *nisi*.
- 4 Granting such further and/or alternative relief as this Court may deem meet.

TAKE NOTICE FURTHER THAT that if you intend opposing the relief sought, you are required to notify the Applicant's attorneys in writing by 12.00 on Monday 11 July 2022 and: (i) to appoint in such notice an address, within 15 (fifteen) kilometres of the office of the Registrar of the court, at which you will accept notice and service of all process in these proceedings; and (ii) file any answering affidavits by 09.00 on Tuesday 12 July 2022.

TAKE NOTICE FURTHER that the Applicants have appointed CULLINAN AND ASSOCIATES INCORPORATED of 18A Ascot Road, Kenilworth, Cape Town as the address at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that the affidavits of LESLIE LONDON and TAURIQ

JENKINS will be used in support hereof.

KINDLY PLACE THE MATTER ON THE ROLL FOR HEARING ACCORDINGLY.

DATED at CAPE TOWN this & day of JULY 2022.

CULLINAM & ASSOCIATES

Attorneys for the Applicants

8/A Ascot/Road

Kenilworth

CAPE TOWN

Ref.: Hercules Wessels

Tel: 021 671 7002

hercules@greencounsel.co.za

c/o Thomson Wilks Attorneys 18th Floor, Number 2 Long Street

CAPE TOWN

Ref: Anel Bestbier / Mbali Zikode

mbali@thomsonwilks.co.za

To:

THE REGISTRAR

Western Cape High Court

CAPE TOWN

And to: JODIE AUFRICHTIG N.O

First Respondent

1A Logies Bay

Llundudno

CAPE TOWN

C/O Norton Rose Fullbright South Africa Inc,

9th Floor, 117 on Strand, 117 Strand Street

CAPE TOWN

And to: JAMES OTTO TANNENBERGER N.O.

Second Respondent

26 Albion Road

Bryanston

GAUTENG

C/O Norton Rose Fullbright South Africa Inc,

9th Floor, 117 on Strand, 117 Strand Street

CAPE TOWN

And to: NICHOLAS SCOTT FERGUSON N.O.

Third Respondent

7 Dawn Road

Constantia

CAPE TOWN

C/O Norton Rose Fullbright South Africa Inc,

9th Floor, 117 on Strand, 117 Strand Street

CAPE TOWN

And to:

ALLAN JAMES FLYNN MUNDELL N.O.

Fourth Respondent

41 Grosvenor Crescent

Durban

KWAZULU-NATAL

C/O Norton Rose Fullbright South Africa Inc,

9th Floor, 117 on Strand, 117 Strand Street

CAPE TOWN

And to:

ADAM JOHN BLOW N.O

Fifth Respondent

16 Valley Road

Kennilworth

CAPE TOWN

C/O Norton Rose Fullbright South Africa Inc,

9th Floor, 117 on Strand, 117 Strand Street

CAPE TOWN

And to:

CITY OF CAPE TOWN

Sixth Respondent

c/o

The Municipal Manager,

3rd Floor, Tower Block

Civic Centre

12 Hertzog Boulevard

And to:

MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING IN THE WESTERN CAPE PROVINCIAL GOVERNMENT

Seventh Respondent

c/o

THE STATE ATTORNEY

4th Floor

22 Long Street

CAPE TOWN

And to:

THE FIRST NATIONS COLLECTIVE

Eighth Respondent

c/o

BASSON AND PETERSEN ATTORNEYS

36 Long Street

CAPE TOWN

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

CASE NO:

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

GORINGHAICONA KHOI KHOIN

INDIGENOUS TRADITIONAL COUNCIL

Second Applicant

and

JODY AUFRICHTIG N.O.

First Respondent

JAMES OTTO TANNEBERGER N.O.

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NICHOLAS SCOTT FERGUSON N.O.

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ALLAN JAMES FLYNN MUNDELL N.O.

Fourth Respondent

ADAM JOHN BLOW N.O.

Fifth Respondent

CITY OF CAPE TOWN

Sixth Respondent

THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE

Eighth Respondent

APPLICANTS' FOUNDING AFFIDAVIT

I, the undersigned,

LESLIE LONDON,

do hereby make oath and state:

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- I am a professor at the University of Cape Town and Head of the Division of Public Health Medicine in the University's School of Public Health Family Medicine. I have been duly authorised to depose to this affidavit in my capacity as the chairperson of the first applicant. A copy of a resolution authorising me to do so is attached marked "LL1.".
- The contents of this affidavit are true and correct. Unless I indicate otherwise, or the contrary appears from the context, they are within my personal knowledge and belief. Legal submissions contained herein are made on the advice of the applicants' legal advisors, which advice I believe to be correct. Where I rely upon information conveyed to me by others, I state the source, which information I likewise believe to be true and correct.

OVERVIEW

- This application concerns a substantial development known as "the River Club" ("the development"), which is presently under construction on erf 151832, Observatory ("the River Club site"), as well as several adjacent properties owned by the sixth respondent.
- On 18 March 2022, Goliath DJP granted an order interdicting the first to fifth respondents (hereafter referred to collectively as "the LLPT") from undertaking any further construction in furtherance of the development on erf 151832 ("the order").



- The order was granted following the hearing of an application brought by the applicants in these proceedings for an interim interdict pending the hearing and final determination of review proceedings brought in part B. The decisions sought to be set aside in part B are development approvals granted in terms of the National Environmental Management Act, 107 of 1998 ("NEMA") and the Cape Town Municipal Planning Bylaw ("the Planning Bylaw").
- On or around 27 June 2022, the LLPT recommenced construction of the development contrary to the order. They have adopted the stance that their conduct is lawful because the order is suspended in terms of section 18(1) of the Superior Courts Act by reason of their application for leave to appeal against the interim interdict in terms of section of section 16(1)(a)(i) read with section 17(2)(b) of the Superior Courts Act.
- 7 The applicants now seek to hold the first to fifth respondents in contempt of court, together with certain remedial orders.
- Should this Court find that the applicants have failed to establish the requisites for contempt of Court, the applicants seek alternative relief in the form of an order declaring that the interim interdict is interlocutory and is therefore operative in terms of section 18(2) of the Superior Courts Act.
- In the unlikely event that this Court finds that the interim interdict does in fact amount to final relief, the applicants seek alternative relief in the form of an order in terms of section 18(3) directing that the interim interdict has not been suspended.



PARTIES

- The first applicant is the **OBSERVATORY CIVIC ASSOCIATION**, a voluntary association established to provide a forum for the community of Observatory to express their concerns and opinions about the range of civic issues affecting residents, with offices at 60 Trill Road Observatory.
- The second applicant is the GORINGHAICONA KHOI KHOIN INDIGENOUS

 TRADITIONAL COUNCIL, a voluntary association set up as a structure to promote cohesion among the Goringhaicona people.
- The applicants bring this application in the public interest, in the interests of protecting the environment, in the interests of First Nations groups whose intangible cultural heritage stands to be irreparably harmed by the recommencement of construction and who were not consulted in the course of assessing the heritage impacts of the development, and in the interests of their members.
- The first respondent is the **JODY AUFRICHTIG N.O.**, cited in his representative capacity as a trustee of the Liesbeek Leisure Properties Trust (the "LLPT") with trust no. IT 248/2015(N), who is an adult male businesmann, with identity number 7305295242081, and currently residing at 1A Logies Bay Llundudno, Western Cape Province, who will be served care of his attorneys, Norton Rose Fullbright South Africa Inc, with address 9th Floor, 117 on Strand, 117 Strand Street, Cape Town South Africa.



- The second respondent is **JAMES OTTO TANNEBERGER N.O.**, cited in his representative as a trustee of the LLPT, who is an adult male with identity number 7310255060085, and currently residing at 26 Albion Road, Bryanston, Gauteng, who will be served care of his attorneys, Norton Rose Fullbright South Africa Inc, with address 9th Floor, 117 on Strand, 117 Strand Street, Cape Town South Africa...
- The third respondent is **NICHOLAS SCOTT FERGUSON N.O.**, cited in his representative as a trustee of the LLPT, who is an adult male with identity number 7105165080086, and currently residing at 7 Dawn Road, Constantia, Western Cape, who will be served care of his attorneys, Norton Rose Fullbright South Africa Inc, with address 9th Floor, 117 on Strand, 117 Strand Street, Cape Town South Africa.
- The fourth respondent is **ALLAN JAMES FLYNN MUNDELL N.O.**, cited in his representative as a trustee of the LLPT, who is an adult male with identity number 6206145136005, and currently residing at 41 Grosvenor Crescent, Durban North, Kwazulu Natal, who will be served care of his attorneys, Norton Rose Fullbright South Africa Inc, with address 9th Floor, 117 on Strand, 117 Strand Street, Cape Town South Africa.
- 17 The fifth respondent is **ADAM JOHN BLOW N.O.**, cited in his representative as a trustee of the LLPT, who is an adult male with identity number 6601165087080, and currently residing at 16 Valley Road, Kenilworth, Western Cape, who will be served care of his attorneys, Norton Rose Fullbright South Africa Inc, with address 9th Floor, 117 on Strand, 117 Strand Street, Cape Town South Africa.





- The sixth respondent is the CITY OF CAPE TOWN (the "City"), a metropolitan municipality established in terms of the Local Government: Municipal Structures Act, 117 of 1998 (the "Structures Act"), care of the Municipal Manager at 3rd floor, Tower Block, Cape Town Civic Centre, 12 Hertzog Boulevard, Cape Town. No relief is sought against the City.
- The seventh respondent is the MINISTER FOR LOCAL GOVERNMENT,
 ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN
 CAPE PROVINCIAL GOVERNMENT ("the Minister"), with offices at 9th floor, 1
 Dorp Street, Cape Town. No relief is sought against the Minister.
- The eighth respondent is the WESTERN CAPE FIRST NATIONS COLLECTIVE, a voluntary association of First Nation structures and organisations, who's address is unknown to the applicants and is cited care of one of its members who is also an attorney, Mr Deon Peterson of Basson & Petersen Attorneys Inc, with address suite no. 6A, Bellpark Building, De Lange Street, Bellville, Western Cape. No relief is sought against the Western Cape First Nations Collective.

RELEVANT FACTUAL BACKGROUND

The High Court's order

21 The High Court handed down its judgment and order in the part A proceedings on 18 March 2022. A copy of the judgment is attached hereto marked "LL2". Paragraph 1 of the order reads as follows:

"[The LLPT] is interdicted from undertaking any further construction, earthworks or other works on erf 151832, Observatory, Western Cape to implement the River Club

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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 Bylaw, 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."
- For reasons which will become clear, it is relevant to note that the applicants have abandoned paragraph 1(a) of the order by delivery of a notice in terms of rule 41(2) on 13 April 2022.
- The order was premised on the Court's ultimate finding (at paragraph 143 of the judgment) that the applicants had made out a *prima facie* case that continued construction of the River Club development threatened fundamental rights to heritage and culture enjoyed by San and Khoi First Nations Peoples. This conclusion was expressed in the following terms:

"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 the construction of the River Club development should stop immediately, pending compliance with this fundamental requirement. I am satisfied that the Applicants have established a prima facie right, and a reasonable apprehension of irreparable and imminent harm if an interim interdict is not granted."

24 This core finding was based on evidence that emerged from the affidavits filed of record in part A, dealing with the review relief that will ultimately be determined in the part B proceedings.



Relevant aspects of the applicants' case in part A

- 25 It is primarily the arguments and evidence raised in relation to the review of the NEMA decisions that are necessary context for consideration of the High Court's judgment and order.
- The applicants contend that the NEMA decisions were defective for want of compliance with sections 38(3) and 38(8) of the National Heritage Resources Act, 25 of 1999 ("NHRA").
- 27 Read together, sections 38(3) and 38(8) of the NHRA required the NEMA authorities take their decisions on the basis of (among other considerations) a heritage impact assessment report which (a) provided an impartial assessment of the anticipated impact of the development on heritage resources; and (b) met the requirements of the responsible heritage resources authority (in this case, Heritage Western Cape "HWC"); and (c) contained, at minimum, the information identified in section 38(3).
- The item specified in section 38(3)(e) is "the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources."
- The section 38(3)(e) requirement took on particular prominence in the context of the LLPT's application for environmental authorisation because the River Club site has special significance for members of certain Khoi and San groups.





- 30 It was common cause amongst all parties to the part A proceedings that the Khoi and San have a deep, sacred linkage to the site through lineage and collective memory and that it is an associative cultural landscape with known historical associations of great socio-political import.
- A key element of the applicants' case was (and continues to be) that the heritage impact assessment report submitted by the LLPT did not meet the requirements of section 38(3)(e) because the information supplied in this regard originated from a fatally flawed process, which was partisan and exclusionary by design.
- The evidence adduced in the founding papers in support of this challenge was the following:
 - 32.1 The environmental impact assessment for the development was initiated in late 2015.
 - A draft phase one heritage impact assessment report prepared by the LLPT's appointed heritage specialist, Ms. Bridget O'Donoghue was submitted to HWC for comment in February 2017.
 - 32.3 A phase two heritage impact assessment prepared by heritage specialists Stephan Townsend and Timothy Hart was submitted to HWC in July 2019. It is common cause that Ms. O Donoghue's mandate had by this point been terminated and that significant differences of opinion had arisen between her on the one hand and Townsend and Hart on the other in relation to the appropriate scale of the development. Townsend and Hart were proponents of a significantly more substantial development on the site.





- Townsend and Hart's heritage impact assessment report ("the HIA") was submitted to the HWC in or around July 2019.
- In September 2019, the HWC furnished an "interim comment" on the HIA which recorded inter alia that certain aspects of the HIA appeared to be intended to "post-rationalize a pre-conceived development concept", and that "it was clear ... that there had been a lack, or avoidance, of a meaningful consultation with First Nations groups".
- 32.6 Following receipt of the HWC's interim comment, the LLPT appointed Rudewaan Arendse of AFMAS Solutions to conduct a consultation process with persons associated with the "First Nations" ("the AFMAS process"). The AFMAS process culminated in a report entitled *The River Club First Nations Report* ("the AFMAS report").
- 32.7 The "consultation" conducted pursuant to the AFMAS process was structured around engagement with an entity known as "the First Nations Collective", which had been formed just two months earlier with the apparent objective of engaging with the LLPT on matters related to the River Club development.
- 32.8 The First Nations Collective was elevated by Arendse as the sole and authoritative voice on the views of Khoi people in relation to the development. Participants who held dissenting views were marginalised and denigrated. This is evidenced by passages in the AFMAS report likening the refusal of the second applicant to join the First Nations Collective as "a self-imposed exile" and extracts from the



diaries of Jan van Riebeek describing the Goringhaicona tribe in pejorative terms in order to legitimise their marginalisation.

- The AFMAS process ultimately produced a "social compact" between the First Nations Collective and the LLPT which required the LLPT to implement certain "place-making mechanisms" provided for in a revised development proposal (for example, an indigenous garden for medicinal plants) and also entailed a commitment by the LLPT to ensure that members of the First Nations Collective are prioritised in procurement processes in the construction of the development.
- 32.10 Arendse was himself a director of a company called "Western Cape First Nations Collective (Pty) Ltd" from 2 December 2020 to 15 July 2021.
- The AFMAS report was incorporated into a supplementary heritage impact assessment report ("the supplementary HIA") prepared by Hart and Townsend, in which Arendse's conclusions were endorsed in the following terms:

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



- 32.12 On 20 February 2020, the HWC furnished its final comment on the HIA and supplementary HIA. The comment records *inter alia* that:
 - "...the scope of the engagement resulted in a number of groups electing to not participate fully; the research process was contested by the participants in the engagements; there were doubts about the impartiality of the research questions; and the methodology for the engagement does not appear to follow accepted oral history interviewing protocols."
- 32.13 The decision of the seventh respondent to grant an environmental authorisation to the LLPT for the development were informed by the HIA and supplementary HIA.
- 33 The evidence set out above weighed heavily with the High Court and ultimately served as the basis for the High Court's conclusion (at paragraph 130 of the judgment) that Arendse was conflicted and his position as an objective expert to facilitate meaningful consultations with those opposed to the development was compromised; and the AFMAS report is consequently tainted and cannot serve the purpose for which it was intended. These findings served as the basis for the relief granted in terms of paragraph 1(a) of the order.
- 34 Since the High Court judgment the applicants have filed supplementary founding papers in the Part B proceedings which include 17 affidavits from representatives of Khoi and San Groups whose intangible cultural heritage will be irreparably harmed by the River Club development, who are opposed to the development, and who were not consulted by Mr Rudewaan Arendse in the course of preparing the AFMAS Report and consequently whose views were not before the decision-makers who made the decisions under review in the Part B Proceedings. By way



of example, I attach hereto an affidavit deposed to by Daniel Bolton, the Chief Administrative Officer of the Cochoqua Royal Traditional Authority marked "LL3" and an affidavit deposed to by Gaob: Martinus Frederiks of the !Aman Traditional Authority marked "LL4".

Subsequent developments

On or around 21 March 2022 (the next working day following the handing down of the order), the LLPT ceased construction on both the River Club site and the adjacent properties owned by the City of Cape Town.

Applications for leave to appeal

- The sixth to eighth respondents applied for leave to appeal against the order.

 The LLPT'S application was lodged on 28 March 2022.
- 37 These applications were heard by Goliath DJP on 14 April 2022.
- One of the main issues in contention at the hearing was the appealability of the order in light of its essentially interlocutory character. It is trite that a purely interlocutory order, especially one directed at preserving a particular state of affairs pending the main trial, is not appealable.
- 39 The LLPT sought to overcome this hurdle by declining to recognise the applicants' abandonment of paragraph 1(a) of the order and arguing that because this part of the order amounted to final relief, the interim interdict in its entirety was rendered final because it was underpinned by the same findings.





This argument was expressed at paragraphs 7 and 8 of the LLPT's heads of argument as follows:

"The order in paragraph [1(a)] is final both in form and effect. The Courtdirected consultation with First Nations Peoples must be completed prior to the hearing of the Part B review proceedings. The remedy is neither provisional nor temporary and it will in the nature of things not come up for reconsideration in the review proceedings.

Moreover, the orders in paragraphs [1(a) and 1(b)] are informed by the same findings in respect of inadequate consultation with certain groups of First Nations Peoples. As the same findings cannot operate finally and definitively in respect of the relief in paragraph [1(a)], but only on a provisional basis in respect of paragraph [1(b)], the order in paragraph [1(b)] is also final in effect. Put simply, the findings of the deficits in the engagement and consultation process are res iudicata."

- 41 Goliath DJP refused the applications for leave to appeal in a written decision provided to the parties on <u>5 May 2022</u>. A copy of this decision is attached hereto marked "LL5".
- She held inter alia that the applicants' abandonment of the order in paragraph

 1(b) was deemed effective and that the order was an interlocutory one. She
 expressed herself as follows on these points:

"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." (at paragraph 16)

"The main thrust of the application for leave to appeal was on the final effect of the 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 part B." (at paragraph 36)

By operation of the principle of issue estoppel, these findings and conclusions are authoritative and binding in any inquiry as to the effect and character of the order, unless Goliath DJP's judgments are overturned by the Supreme Court of Appeal.

Recommencement of activities on the site

- On or around 16 May 2022, the LLPT recommenced work on the properties owned by the City of Cape Town which were not technically included in the interdict.
- I pause here to mention that, although the reasoning of Goliath DJP set out in the interdict judgment evidences a clear intention to halt construction of the development in totality, the interdict was technically applicable only to erf 151832 due to the delimitation of the relief in both the notice of motion and the order.
- The LLPT explained its decision to do so in a Facebook post published that same day on its page "The River Club", which I quote in full below:

Critical work will commence today in the Black River, Liesbeek River and Liesbeek Canal, and on the tapestry of City of Cape Town-owned immovable properties that surround the River Club site (which is erf 151832 Cape Town) in Observatory, Cape Town, in order to mitigate potential environment and public health and safety risks impacting on these areas ahead of the rainy season. The current interdict pertains only to Erf 151832 Cape Town which has halted the construction of the 4.6 billion redevelopment since Mid-March.





The work that will begin today will be undertaken strictly in compliance with the approved Environmental Management Programme (EMPr) in place for the rehabilitation and upgrade of the area as signed off by a Freshwater Ecologist, Surface Water Hydrologist and the Environmental Control Officer (ECO) assigned to the project, and will include:

Removing the temporary platforms on both the western and eastern banks of the Black River and returning the river to its original channel shape and dimensions.

Excavation of a drainage channel in Western Arm of the Liesbeek at Link Road Crossing and Malta Crossing to facilitate through-drainage and prevent backing up of water into the storm water culverts from Observatory during significant rain events in order to reduce the risk of flooding in those areas.

Removal of gabion stone and completion of unfinished gabions in the Canal / Eastern Arm of the Liesbeek River, and

Planting of rye grass to stabilize the excavated faces of the Eastern Arm of the Liesbeek River to mitigate against erosion.

This will provide some much needed income for a few workers who were sent home when the interdict came into effect on 18 March 2022. However, the current interdict is causing massive harm to the people of Cape Town who stand to lose significant economic, social, heritage and environmental benefits, as does the bulk of the workforce who remain without work in a time when unemployment is at the highest level this country has ever seen.

Consequences of the interdict include immediate loss of income and potentially permanent loss of 6000 direct and 19 000 indirect jobs (including the 750 construction workers who had been working on the site when the interdict ruling was delivered) and the Cape Peninsula Khoi being unable to memorialise and celebrate their cultural heritage associated with the much broader area, including the establishment of a First Nation Heritage, Cultural and Media Centre. The provision of developer subsidised inclusionary housing and the provision of safe and accessible green parks and gardens that will be open to the public will also all be lost.

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LLPT, as owner and developer of the project, is currently finalising an application for leave to appeal to be instituted shortly in the Supreme Court of Appeal against the whole of Judge Goliath's judgment and order in the interdict.

This follows Judge Goliath's recent dismissal of the four applications for leave to appeal argued before her on 14 April 2022 by LLPT, the Western Cape Government, the City of Cape Town and the Western Cape First Nations Collective. Her judgment dismissing the applications for leave to appeal was delivered last Thursday, 5 May 2022.

47 It bears noting that the wording of the underlined portion of this statement is in accordance with the general impression which obtained up to that date which is that the LLPT considered itself bound to cease entirely any construction on the broader development site.

Application for leave to appeal to the Supreme Court of Appeal

- 48 All of the respondents in these proceedings have lodged urgent applications with the Supreme Court of Appeal for leave to appeal against the interim interdict in terms of section 16(1)(a)(i) read with section 17(2)(b) of the Superior Courts Act. These applications are still to be determined.
- 49 The LLPT's application was lodged on 1 June 2022.
- 50 The grounds of the LLPT's application to the SCA evidence a clear understanding on the part of the LLPT's attorney Nicholas Smith (who deposed to the supporting affidavit on 31 May 2022) that the order had had the immediate effect of interdicting construction on the River Club site, notwithstanding the applications for leave to appeal. He says the following with respect to alleged





misdirections on the part of the High Court in relation to the balance of convenience:

"72. As a result of the High Court's approach, severe and irreversible harm to the LLPT, which is out of all proportion to that which might be sustained by the applicants, was entirely overlooked.

73. As detailed in the main judgment at paragraph 58 – 59, the interdict will likely result in non-compliance with the LLPT's obligations under the development agreement to achieve practical completion of the work by November 2022 and handover to the anchor tenant by December 2023. The delays would not only result in the termination of the development agreement and crippling financial liabilities and losses in excess of R386 million, but also the loss of the development and the very significant socio-economic, environmental and heritage benefits of the development as approved.

...

76. The prohibition of construction in paragraph 145.1 of the judgment renders it all but certain that the development as planned and approved will not go ahead."

- These passages reveal a clear understanding that the applications for leave to appeal (and any appeal which may follow) has had no effect on the operation of the interdict.
- Given that the LLPT is pursuing an expedited review in part B and anticipates a hearing by November 2022 (Mr. Smith states as much in his affidavit), and accepting that the envisaged appeal process would likely take some months to conclude, the impact which Mr. Smith describes (and particularly the quantum of the penalties) would only eventuate if the interdict continued in operation.



- This impression is all but confirmed when one considers subsequent sections of the affidavit dealing with urgency:
 - "81. I have already detailed irreparable harm which LLPT and the broader community will suffer with each passing day that the interim interdict persists.
 - 82. While the review application will not dispose of the matter, it is in any event unlikely that part B will be set down before November 2022. The Rule 53 records of the City and the Provincial decision-makers were only filed on 29 April 2022 and 17 May 2022, respectively [further detail concerning the volume of the record and the likely date of the applicants supplementary founding affidavit].
 - 83. Given that the High Court's order in paragraph 145.1(b) expressly provides for the operation of the interdict pending "final determination" of part B, it is further unlikely that the matter will conclude with the judgment of the High Court in part B."

Re-commencement of construction on erf 151832

- The LLPT recommenced construction on erf 151832 (i.e. the property in respect of which the interdict operates) on or around 27 June 2022. It's attorney, Mr. Smith, conveyed its intentions in this regard in a letter of the same date, addressed to the applicants, a copy of which is attached marked "LL6".
- 55 The letter advises that:
 - The LLPT had over the preceding month undertaken "environmental rehabilitation work" on the City of Cape Town's riverine properties.
 - 55.2 The LLPT had over the course of the preceding week undertaken "environmental work of the same nature ... on erf 151832 too, as well



as certain remedial work on the incomplete structures on the latter property".

- The LLPT intended re-commencing construction activities on erf 151832 "this week".
- The judgment and order handed down by Goliath DJP in part A are suspended in effect and operation pending the final determination of the LLPT's application for leave to appeal.
- Cullinan and Associates responded in a letter dated 28 June 2022 in which they: confirmed their view that the order was not suspended; requested precise details of the nature of the work that had been undertaken on the site during the operation of the interim interdict; requested clarity regarding the LLPT's position as to what constituted "remedial work"; and indicated that if an undertaking was not furnished before 1 July 2022 that no further works would be undertaken on erf 151832, the applicants would institute contempt proceedings.
- On 29 June 2022 the Mr. Smith sent a further letter to Cullinan and Associates. It did not provide any clarity on the matters raised in the letter of 1 July 2022, but simply stated that there was a difference of opinion between the parties regarding the interpretation and effect of Goliath DJP's judgment and order handed down on 18 March 2022 and that they did not intend arguing the merits by exchange of correspondence. A copy of that letter is attached marked "LL7".
- 58 On 5 July 2022, Cullinan and Associates addressed a response to Mr. Smith which, inter alia, noted that the LLPT had failed to provide the undertaking sought



in Cullinans' letter of 28 June 2022, and had since recommenced construction, which constituted a deliberate and mala fide action in contempt of court. A copy of that letter is attached marked "LL8".

- On 6 July 2022, Nick Smith Associates replied denying that the LLPT was deliberately defying the interim interdict; alleging that the LLPT was "doing no more than proceeding as it is entitled to do" and that "in the circumstances there is no basis for instituting contempt of court proceedings"; and stating that the LLPT would oppose any contempt of court proceedings and seek an appropriate special costs order. A copy of that letter is attached marked "LL9".
- On 7 July 2022 Cullinan and Associates replied stating and asking Mr. Smith to confirm that he would accept electronic service on behalf of the first to fifth respondents. A copy of that letter is attached marked "LL10".
- Mr. Smith responded by email on the evening of 7 July 2022, indicating that the LLPT would be represented by Norton Rose in the envisaged contempt proceedings and that electronic service was acceptable.
- 62 I attach marked "LL11" photographs taken on 29 June 2022 and 1 July 2022 confirming that the LLPT has indeed recommenced construction.

SUBMISSIONS IN SUPPORT OF THE CONTEMPT ORDER

To obtain an order holding a respondent in contempt of Court, an applicant must establish: (i) the existence of the order, (ii) service or notice of the order on the respondent, (iii) non-compliance with the order and (iv) that the non-compliance



was wilful and *mala fide*. If the requisites in (i), (ii) and (iii) are established, it is presumed that the respondents' conduct is both wilful and *mala fide* and it falls to him or her to adduce evidence to rebut this conclusion.

- On the facts set out above, there can be no question that the LLPT is aware of the order and that, despite this, it has re-commenced construction on erf 151832.
- 65 Consequently, there are only two issues that arise for determination in respect of the issue of contempt, they are:
 - whether the LLPT is correct in its contention that its conduct is lawful because the order has been suspended in terms of section 18(1) of the Superior Courts Act due to the respondents' pending applications for leave to appeal to the SCA; and
 - 65.2 if the answer to paragraph 52.1 is no, whether the LLPT breached the order with the requisite state of mind.

The order has not been suspended

Section 18(1) of the Superior Courts Act applies to final orders. The status of an interlocutory order is provided for in section 18(2) of the Superior Courts Act. It reads:

"Subject to section 18(3), unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which the subject of an application for leave to appeal or of an appeal is not suspended pending the decision of the application or appeal."



- The High Court's order is principally directed at preserving the status quo pending the final determination of the review. There can be no genuine dispute concerning its interlocutory character.
- The LLPT's argument that the order in paragraph 1(a) directing the LLPT to undertake consultation renders the entire order final is not correct for the reasons which follow.
- 69 <u>First</u>, it is clear the High Court intended the findings in the judgment to stand as provisional findings. I say so because:
 - 69.1 The Court specifically contemplated that the lawfulness and adequacy of the consultation process would be revisited by the review court in part B. This is clear from the following passage:1

"I am accordingly satisfied that all 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.

69.2 Later in the judgment, the High Court goes on to expressly characterise the right identified by the High Court as a <u>prima facie</u> one:²

"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 the River Club development should



¹ Para 131 of the judgment.

² Para 143 of the judgment.

stop immediately, pending compliance with this fundamental requirement. I am satisfied that the applicants have established a prima facie right, and a reasonable apprehension of irreparable and imminent harm if the interdict is not granted."

69.3 To the extent that any ambiguity exists in the judgment a quo, Goliath DJP has clarified her intentions in her subsequent reasons handed down in the respondents' application for leave to appeal, which state that:3

> "I am satisfied that the issue of meaningful consultation has 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 be finally determined by the Review Court in part B."

70 Second, the arguments advanced by the LLPT in its application for leave to appeal in the High Court establish that the order in paragraph 1(a) is effectively a nullity. I refer in this regard to the following passages of the LLPT's heads of argument in its first application for leave to appeal:

> "32.2 None of the persons or groups which the applicants a quo argued were excluded (based on Mr. Jenkins allegation of "opposition") were parties before the Court and the applicants a quo only alleged locus standi on the basis that they were acting in the interest of their respect members. They did not claim to be acting in the public interest or in the interests of a group of persons.

> 32.4 The order is vague and unenforceable for failure of any parameters or procedure."

J.

³ Para 14 of the leave to appeal judgment.

- An order that is void *ab initio* cannot operate as binding on future courts seized with the same question and accordingly the LLPT's arguments regarding the difficulties presented by the binding character of paragraph 1(a) fall away.
- 172 If the LLPT had proceeded in good faith (rather than expediently), it would have applied for the recission of the order in paragraph 1(a) based on the very challenges that it has levelled in its envisaged appeal. Instead, it has insisted on preserving this part of the judgment in order to prosecute a moot appeal.
- Finally, the character of the order as interim has been pronounced upon by Goliath DJP in her judgment on the applications for leave to appeal. The principles of issue estoppel apply and unless Goliath DJP's judgment is overturned by a higher court, it is authoritative and binding.

The LLPT's conduct is both wilful and mala fides

- In my respectful submission, the state of mind of the trustees of the LLPT fall to be evaluated in light of the following facts and circumstances:
 - 74.1 From approximately 21 March to 27 June 2022, the LLPT caused the cessation of construction on the site in compliance with the order. The unavoidable inference is that the trustees understood the order to have the effect of suspending further construction on the site.
 - 74.2 The trustees of the LLPT have from the outset been advised by a team of lawyers, including very experienced senior counsel. To the best of my knowledge, this continues to be the case. Given the circumstances set out in paragraphs 66 to 73 above, there is no realistic prospect that





the trustees have now, contrary to their earlier belief, erroneously arrived at a sincere conclusion that the order is in fact suspended in terms of section 18(1) of the Superior Courts Act.

The statements made by Nicholas Smith in his affidavit in support of the LLPT's application for leave to appeal to the SCA are instructive as to the advice that has been received by Mr. Aufrichtig and the other trustees of the LLPT.

Remedy

- The applicants seek urgent interim relief in the form of a rule *nisi* interdicting the first to fifth respondents from undertaking any further construction on erf 151832, pending a return date prescribed by the Court to determine the issues that arise for final determination viz. whether the interdict is in effect and, if so, whether the LLPT has willfully breached its terms.
- 76 I am advised and submit that the applicants have established all of the requisites for an interim interdict. More particularly:
 - 76.1 For the reasons canvassed above, the applicants have a clear, alternatively, a *prima facie*, right to the enforcement of the interdict, which was intended by Goliath DJP to enter immediately into force and to continue in operation notwithstanding any appeals lodged against it.
 - Given that the applicant's have a clear right, the requirement of a well grounded apprehension of irreparable harm if the interim relief is not granted, falls away. In any event, if it is found that the applicants only

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have a *prima facie* right, the irreparable harm requirement is satisfied. This question was resolved in the proceedings before Goliath and, with respect, this Court is bound by her finding in this regard. Over and above this, the applicants are suffering new and irreparable harm by reason of the continuing disregard of a court order granted in their favour.

- The applicants have, we submit, established a clear right and the balance of convenience accordingly has a limited role to play in this inquiry. Nonetheless, we submit that the balance of convenience favours the grant of the interim relief. The issues arising for determination are not complex and the interval between the grant of the rule *nisi* and the return date need not be protracted. Any harm to the LLPT in the form of delays or construction penalties cannot, we submit, be elevated above the rule of law. This Court should not permit its orders to flouted with impunity.
- 76.4 The applicants have no alternative remedy.
- In the event that the applicants are found to be entitled to final relief, we seek no more than is necessary to vindicate the authority of this Court and to compel the LLPT's compliance with the order, more particularly declaratory and mandatory relief which confirms the willful breach of the interdict, and directs future compliance. A prayer granting the applicants to approach this Court for order of committal is requested in the event of future violations of the order, for purposes of ensuring effective relief.



The applicants furthermore request an order declaring that the construction work conducted on the site since 27 June 2022 is in breach of the orders granted by Goliath DJP in this matter.

ALTERNATIVE RELIEF

First alternative prayer

- 79 If this Court finds that the applicants have failed to establish contempt of court on the part of Mr. Aufrichtig and/or the LLPT, the applicants seek a declaratory order: (i) confirming that paragraph 1 of the 19 March 2022 order is interlocutory; and (ii) declaring that paragraph 1 of the order is not suspended in terms of section 18(1) of the Superior Courts Act.
- 80 I in this regard, I repeat my submissions in paragraphs 67 to 73 above.

Second alternative prayer

- If this Court is inclined to conclude that the order is a final one and therefore suspended in terms of section 18(1), the applicants seek an order in terms of section 18(3) of the Superior Courts Act directing that Goliath DJP's order remains in operation pending the outcome of all applications for leave to appeal and the final determination of those appeals.
- 1 am advised and submit that an order in terms of section 18(3) is justified in view of the facts and circumstances set out below.

The circumstances are exceptional

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- 83 The interim interdict was issued for the express purpose of preserving the status quo pending the outcome of part B of the main proceedings.
- 84 The LLPT has sought to exploit an error by the Court in the formulation of the relief in order to characterise the entire order as final and consequently inoperative. If this argument is found to be correct, it must be accepted that the situation which now obtains is contrary to what was intended by Goliath DJP. This in and of itself is an exceptional situation.
- 85 The SCA is now seized with the question of the finality or otherwise of the order and it is desirable that, pending the final determination of the applications for leave to appeal and any appeals that may be allowed, the clearly expressed intention of Goliath DJP's orders is given effect to.

The applicants will suffer irreparable harm if the order is not suspended

86 The question of irreparable harm to the applicants has already been resolved by the Court in part A and the principles of issue estoppel are again applicable. The Court's finding in this regard appears at paragraph 143 of the judgment where it is stated "I am satisfied that the applicants have established a prima facie right, and a reasonable apprehension of irreparable and imminent harm if an interim interdict is not granted." In any event, the irreparable harm that will be suffered by the applicants has been set out in this affidavit.

The LLPT will not suffer irreparable harm if the order is suspended





- At the time of deposing to this affidavit, the LLPT's legal representatives are pursuing a directive from the Judge President to facilitate the expedited conduct of part B of the main proceedings. The email correspondence in this connection is attached marked "LL12". Although no directive has yet been issued, in the circumstances it seems likely that the hearing of part B will occur before the end of 2022.
- In the circumstances, we say that the harm which the LLPT will suffer by reason of a suspension of the order is limited.
- The LLPT's stance is that the harm occasioned by the grant of the part A relief would be catastrophic for the LLPT and likely result in the failure of the development. The first respondent put forward the following evidence in support of this position in his answering affidavit in part A:
 - 89.1 The LLPT has concluded infrastructure and development facility agreements ("the facility agreements") with Rand Merchant Bank in terms of which the latter will finance the first phase of the development.
 - The facility agreements were concluded on the strength of a development agreement and associated lease agreement entered into with Amazon Development Centre (Pty) Ltd ("ADC").
 - The development agreement with ADC requires the LLPT to achieve "practical completion" (as defined) of precinct 2A of the development (in respect of which the lease agreement has been concluded) by November 2022. ADC is entitled to cancel the development agreement





and the lease agreement in the event of it becoming likely that practical completion will not be achieved by November 2022.

- Mr. Aufrichtig specifically alleged in his answering affidavit (at paragraph 79) that "ADC has made it clear that it cannot and will not tolerate any further significant delay" and intimated that ADC would almost certainly terminate the agreements if the part A relief was granted.
- 89.5 Mr. Aufrichtig further alleged that the granting of the part A relief would entitle Rand Merchant Bank to cancel the facility agreements.
- 90 This evidence must be treated with extreme circumspection.
- 91 Firstly, almost four months have elapsed since the interim interdict was granted and the development, demonstrably, has not failed.
- 92 Secondly, Mr. Aufrichtig's evidence set out above was subsequently shown to be at least partially untrue (the degree of untruth is unclear). The relevant facts and circumstances are the following:
 - 92.1 When called upon to produce the facility agreements in terms of rule 35(12), all that was provided was a term sheet which lapsed on 31 May 2021 (before the main proceedings even commenced).
 - 92.2 The LLPT's counsel disclosed in oral argument that the development facility agreement is yet to be concluded.



93 In the circumstances, it is entirely unclear how the first phase of the development is being funded.

URGENCY

This application is inherently urgent by virtue of its subject matter. This is apparent from the urgent appeal sought by the Respondents in the SCA and the urgency with which the parties seek to have the Part B relief determined. In the circumstances, there can be no question of the Applicants obtaining a satisfactory remedy at a hearing in due course.

CONCLUSION

The applicants pray that relief is granted in accordance with the notice of motion, including the costs of two counsel. A punitive, attorney-client costs award is sought against the LLPT trustees in view of their egregious conduct.

LESLIE LONDON

I certify that:

- 1. the Deponent acknowledged to me that :
 - A. he knows and understands the contents of this declaration;
 - be has no objection to taking the prescribed oath;
 - C. he considers the prescribed oath to be binding on his conscience;
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on July 2022.

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-COMMISSIONER OF OATHS

Designation and Area:

Full Names:

Street Address:

PRACTISING ADVOCATE
56 KEEROM STREET
CHAMBERS
4" FLOOR
CAPE TOWN
8001

Cuper Hendrik Jacobur Marea
C.H.J. MAREE

CAPE BAR

56 KEEROM STREET TEL: (021) 424-5090

RESOLUTION

OF THE MANAGEMENT COMMITTEE OF THE OBSERVATORY CIVIC ASSOCIATION

(passed at the duly constituted meeting held in Observatory on 27 July 2021)

- WHEREAS the Constitution of the Observatory Civic Association (OCA) states that the OCA's objectives are (inter alia):
 - to identify, express and address the concerns of the community within the boundaries of the Association;
 - to represent the interests of the community in civic matters; and

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- to promote an active interest in, and to consider the policies and affairs of the City of Cape Town
 and of the sub-council of which Observatory is part; and
- 2. WHEREAS on 20 August 2020 the Department of Environmental Affairs and Development Planning (DEADP) granted an environmental authorisation for the proposed River Club Development on erf 151832, Liesbeeck Parkway, which is bounded by Liesbeeck Parkway and Observatory roads, (DEA&DP Reference Number: 16/3/3/1/A7/17/3001/20); and
- 3. WHEREAS on 18 September 2020 the City of Cape Town's North Western Municipal Planning Tribunal (MPT) resolved to approve the application for rezoning, approval of council and deviations from City policies in terms of the Municipal Planning By-law, 2015, to enable the proposed River Club Development to proceed (case number 70396369); and
- 4. WHEREAS on 8 June 2021 the Department of Water and Sanitation granted a Water Use Licence (DWS Ref. No. 16 / 2 / 7 / G22 / A / 11) to the Liesbeek Leisure Property Trust ("LLPT") in terms of the National Water Act, 1998, to enable the commence of activities for purposes of the National Water Act, 1998, at the site of the proposed River Club Development; and
- 5. WHEREAS the OCA views the River Club development as harmful to the interests of the members of the OCA and consequently:
 - (a) lodged an appeal against the environmental authorisation on 9 September 2020; and
 - (b) instructed attorneys (Cullinan and Associates Incorporated) to lodge an appeal against the MPT's decision, on behalf of the OCA, to the City of Cape Town Planning Appeals Panel, which appeal was lodged on the 26th October 2020; and

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- (c) instructed attorneys (Cullinan and Associates Incorporated) to lodge an appeal against the Department of Water and Sanitation's decision, on behalf of the OCA, to the Water Tribunal, which appeal was lodged on the 21st of June 2021; and
- 6. WHEREAS the OCA appeals against the environmental authorisation and the appeal to the City of City of Cape Town Planning Appeals Panel were unsuccessful, and it is now necessary to institute a High Court review application and / or an interdictory application to the High Court to prevent the River Club Development from going ahead as soon as reasonably possible, and that it may be necessary to instruct attorneys urgently to take the necessary action to safeguard the interests of the OCA, the heritage significance of the site and the environment; and
- 7. WHEREAS the Management Committee will ensure that funding to support any such legal action will have been secured or is likely to have been secured by the time court action begins; and
- 8. NOW THEREFORE the OCA Management Committee, acting pursuant to the resolution adopted at the AGM of the OCA on 14 November 2020,

RESOLVES:

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- a. to reaffirm the OCA's opposition to the River Club development as damaging to the environment, destructive of the heritage significance of the site and a violation of civic democracy; and
- b. to ratify the decision of Mr Leslie London and the Management Committee to instruct Cullinan and Associates Incorporated to lodge the appeal to the Water Tribunal on behalf of the OCA, to deal with LLPT's request to the national Minister of Human Settlements, Water and Sanitation to lift the automatic suspension of its water use licence and act as the OCA's attorneys for purposes of the appeal to the Water Tribunal, in addition to any subsequent litigation in respect of the decisions of the National Minister or Water Tribunal in relation to the OCA's appeal; and
- c. to authorise Mr Leslie London of the OCA to engage the paid services of Cullinan and Associates Incorporated as attorneys for the OCA, and to give them the necessary instructions:
 - i. to advise on the prospects of succeeding in any proposed High Court Review of the MPT's decision to approve the rezoning application for the River Club Development and/or, the DEADP Environmental Authorisation for the River Club



Development and/or decisions to dismiss the appeals in relation to the authorisations necessary for the River Club development; and

- ii. to advise on and institute any legal proceedings to stop the River Club Development as may, in the opinion of the Management Committee, be expedient and desirable, and to continue with that litigation until it is finally concluded;
- iii. to institute proceedings for the judicial review of the decisions to grant the authorisations required for the River Club development and the decisions to dismiss the appeals against those authorisations, and to institute any interdict or other ancillary legal proceedings that may be necessary or desirable;
- iv. to advise on any ancillary legal matters which might arise in relation to the OCA's opposition to the River Club Development; and
- d. to authorise Mr Leslie London of the OCA:
 - to depose to the affidavits in respect of such interdict and review proceedings and any other ancillary legal proceedings; and
 - to grant any power of attorney and sign any documents on behalf of the OCA as may be necessary or desirable to give effect to this resolution.

Signed at Observatory on July 2021

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Leslie London (Chairperson of the Management Committee)

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(Management Committee member/ Secretary)

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

CASE NO: 12994/21

In the matter between:

OBSERVATORY CIVIC ASSOCIATION First Applicant

GORINGHAICONA KHOI KHOIN Second Applicant

And

TRUSTEES FOR THE TIME BEING OF
LIESBEEK LEISURE PROPERTIES TRUST

First Respondent

HERITAGE WESTERN CAPE Second Respondent

CITY OF CAPE TOWN Third Respondent

DIRECTOR: DEVELOPMENT MANAGEMENT Fourth Respondent

(REGION 1), ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE

PROVINCIAL GOVERNMENT

THE MINISTER FOR LOCAL GOVERNMENT, Fifth Respondent

CHAIRPERSON OF THE MUNICIPAL PLANNING Sixth Respondent

EXECUTIVE MAYOR, CITY OF CAPE TOWN Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE Eight Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 18 MARCH 2022

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GOLIATH DJP

Introduction

- This is an application in terms of which the Applicants, the Observatory Civic [1] Association (OCA) and Goringhaicona Khoi Khoin Indigenous Traditional Council ("GKKITC") seek interim interdictory relief to restrain Liesbeek Leisure Properties Trust ("LLPT") from carrying out further construction works in relation to the development of the River Club, pending review of the relevant environmental and land use authorisations. In order to proceed with the development, the developer had to obtain, among other things, an environmental authorisation from provincial authorities and a land use planning authorisation from the City of Cape Town. After a public participation process and scrutiny, those authorisations were duly granted, subject to numerous conditions. The application has two parts. This matter concerns part A of the proceedings, in terms of which the Applicants seek an urgent order interdicting the developer from acting on the environmental and land use authorisations to commence construction, pending final determination of the review. In Part B of the application, the Applicants seek to review and set aside the two authorisations, as well as appeal the decisions that confirmed the authorisations.
- [2] In the review application to be heard in due course, the Applicants seek to set aside four decisions taken in connection with the River Club development namely:
 - 2.1 The decision taken by the fourth respondent ("the Director") on 20 August 2020 to grant environmental authorisation for the proposed

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

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

Factual Background

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

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

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

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

- [5] A Baseline Heritage Study for the TRUP commissioned by the Western Cape Provincial Government Department of Transport and Public Works in October 2016 concluded that the entire TRUP site could be regarded as being of outstanding historical, symbolic, scenic and amenity value or a Grade II site in terms of its heritage status as provided for in section 7 of the National Heritage Resources Act, 25 of 1999 ("NHRA"). A grade II heritage grading signifies that the resource can be considered to have special qualities which renders it significant within the context of a region or province.
- [6] On 20 April 2018, Heritage Western Cape ("HWC") declared the development site a provisional protected area for a period of two years in terms of Section 29(1) of the NHRA. The LLPT, Department of Environmental Affairs and Development Planning ("DEADP"), Department of Transport and Public Works and the City all submitted appeals against the decision in terms of section 49 of the NHRA. The appeal process was concluded approximately a year later, and the appeals were dismissed. The provisional protection lapsed on 20 April 2020, and the heritage status of the site was never clarified and concluded. HWC described the significance of the River Club as follows when the provisional protection was approved and gazetted:

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

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

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

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



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

- [8] It is evident that there are divisions within the First Nations Groups, since a group in favour of the development was established under the umbrella of the "First Nations Collective" ("FNC") after finalisation of the TRUP First Nations Report. Second Respondent, the GKKTIC, terminated its engagement with Arendse during the consultation process at some stage.
- [9] The approved development is known as the "Riverine Corridor Alternative" and is based on the assessment of the heritage practitioners' assessment which concluded that the presence of the Liesbeek River and its history was the most important characteristic establishing the River Club's site's sense of place. For this reason, the heritage practitioners concluded that the historical significance of the site could be reclaimed through the proposed recovery of the riverine corridor (together with ecological functionality). The project therefore involves the rehabilitation of the riverine corridor along the route of the existing Liesbeek Canal running adjacent to the eastern boundary of the site, while the "old" Liesbeek River Canal on the western edge of the site, the residue of the original course of the Liesbeek River, will be largely infilled and landscaped with a vegetated stormwater swale. The whole of the building will be infilled in order to lift the development approximately three metres higher out of reach of floodwater, as the River Club site is coextensive with the Liesbeek flood plain.

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

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

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

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

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

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

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

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

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

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

Chronology

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

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- On 13 September 2019 HWC furnished its interim comment on the second HIA and requested the developer to further engage with the First Nations in respect of the property's heritage resources.
- 18.5 On 25 September 2019 AFMAS submitted the TRUP First Nations Report to the Western Cape Provincial Department of Transport and Public Works.
- 18.6 In November 2019 AFMAS concluded the River Club First Nations Report. In December 2019 Hart and Townsend prepared a supplement to the second HIA.
- 18.7 On 19 December 2019 the developer submitted its application for environmental authorisation to the Western Cape Provincial authorities.

 On 13 February 2020 HWC issued its final comment on the development, including its assessment of the December 2019 supplement to the heritage impact assessment. HWC indicated that the heritage impact assessment does not comply with section 38(3) of the NHRA, and it was therefore not in a position to endorse the development proposal.
- 18.8 In April 2020 the developer's consultants completed the Final Basic Assessment Report, setting out the environmental impact assessment of the development. On 20 August 2020 the Provincial Director (Fourth Respondent) issued the environmental authorisation for the development.
- 18.9 On 18 September 2020 the City's Municipal Planning Tribunal ('the MPT") considered the land use application. On 30 September 2020 the

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

- 18.10 On 22 February 2021 the Provincial Minister dismissed the appeals against the environmental authorisation and varied the conditions of approval. At this stage the LLPT still required a water use licence in terms of the National Water Act, 36 of 1998 ("NWA") to proceed with construction.
- 18.11 On 10 June 2021 the OCA received notification from the Department of Water and Sanitation that it had issued a water use licence to the LLPT.

 On 21 June 2021 the OCA lodged an appeal against the Minister's decision to issue the water licence. Observatory residents observed earthmoving vehicles move onto the site the weekend of 20 and 21 June 2021. On 29 June 2021 the attorneys for LLPT applied to the Minister to have the suspension lifted.
- 18.12 On 7 July 2021, the OCA was informed by the Department of Water and Sanitation that the LLPT had submitted a request to the Minister of Water and Sanitation in terms of section 148(2)(a) of the NWA for the

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

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

Applicants' delay in instituting legal proceedings

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

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

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

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

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

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

- [24] The review proceedings were launched three and a half months after the last decision-making process. Applicants may be criticised for not commencing with review proceedings at that stage, but considering the fact that a water use licence prevented construction, I do not consider that it can be said that the Applicants' inordinately delayed instituting review proceedings. At this stage the Applicants were already in the process of preparing papers in the review application. It is evident that LLPT did not inform the Applicants of its intention to invoke the provisions of the National Water Act 36 of 1998 to suspend the effect of the appeal relating to the water licence. LLPT averred that the Applicants should have been aware of these provisions, and anticipated that their appeal could be rendered ineffective to stop construction on the site. In the absence of any notification by the LLPT I do not believe that the Applicants should be penalized in such circumstances.
- [25] The proceedings were instituted seven days after the lifting of the suspension of the water use licence during an appeal process, which occurred on 26 July 2021.

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

Applicants' Submissions

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

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

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

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

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

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

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

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

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

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

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

- [33] Jenkins elaborated and explained the historical, spiritual and ritual significance of the TRUP area and the importance of the confluence of the Liesbeek and Black Rivers as a place of confluence of various First Nations Groups. Jenkins confirmed that Mr Rudewaan Arendse interviewed him for purposes of a report, and he was concerned that the interview procedure did not comply with even minimal ethical standards. After the publication of the TRUP First Nations Report a number of people interviewed by Arendse formed the "First Nations Collective" who announced that they intended to engage with the developer. According to Jenkins those opposed to the development were subsequently vilified and abused. Following interim comment by HWC it came to his attention that Arendse had been engaged by the developer, which he considered to be a conflict of interest. He subsequently perused Arendse's report entitled "River Club First Nations Report" in which the proposed development was portrayed as a victory for First Nations Peoples.
- [34] Jenkins expressed reservations about the contents of the report, *inter alia*, the fact that it sought to elevate the First Nations Collective as the authoritative voice of First Nations Peoples, undermined the standing of the Chief of the Goringhaicona in relation to the development, de-legitimized the view of the Second Applicant and downplayed the significance of the River Club site and its associated heritage to the Goringhalcona and other Indigenous People.

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

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

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

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

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



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

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

LLPT Submissions

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

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

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



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

- [43] The LLPT submitted that the various development conditions imposed in respect of the development are designed to address concerns raised after an extensive public participation process, and an evaluation of all expert reports in relation to the site. The LLPT stated that the internationally recognised mechanisms for safeguarding intangible heritage were informed by expert advice, and more importantly, the cultural community's aspirations for the site.
- [44] LLPT submitted further that the relevant authorisation processes included meaningful public participation and the impugned decisions incorporate mechanisms which will ensure accessibility of the cultural landscape to the First Nations. The notable additional aspects of the approved development inter alia include:
 - 44.1 Articulating and celebrating the significance of the place and its historical associations to First Nations Groups by establishing an indigenous garden for medicinal plants used by First Nations; establishing a cultural, heritage and media centre, establishing a heritage-eco trail circling the site, and establishing an amphitheatre for use and cultural performances by First Nations Groups and the general public;
 - 44.2 Commemorating First Nations history in the area by: (i) establishing a gateway feature inspired by symbols central to the First Nations

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narrative at the road crossing of the ecological corridor; (ii) incorporating symbols central to the First Nations narrative in detailed design of the buildings; and (iii) naming internal roads inspired by people or symbols central to the First Nations narrative.

- A4.3 Retaining approximately 60% of the River Club property as publicly accessible open space, with 25% of the River Club property being made available for recreational activities, including lawned areas, foot and cycling paths, and an ecological corridor.
- 44.4 Rehabilitating the Liesbeek Canal to function as a natural watercourse, with a 40m setback buffer which will include riverine vegetation to allow faunal movement, grassed banks and walking and cycling trails.
- 44.5 Infilling the unlined course of the Liesbeek River, treeing the infilled area, providing for bioretention swales and incorporating standing water ponds or "pocket wetlands" along the "swale area" to retain stormwater in early summer and support Western Leopard toad breeding cycles.
- 44.6 Infilling portions of the site above the 1:100 year floodplain.

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

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- 45.1 Infrastructure to be constructed by LLPT: (1) a 2-lane extension of Berkley Road over the Black River; (2) a new bridge linking the site to the Liesbeek Parkway at Link Road over the original course of the Liesbeek River; and (3) the widening of the Liesbeek Parkway into the original course of the Liesbeek River, between Station Road and Link Road.
- 45.2 Infrastructure to be constructed by the City: (1) the "dual" Liesbeek Parkway between Link Road and Malta Road; and (2) the upgrade of the Berkley Road Extension to the River Club property, including widening the proposed Berkley Road Bridge over Black River, and extending Berkley Road to link Berkley Road (and M5) with Malta Road and Liesbeek Parkway at some point in future.
- [46] LLPT submitted that the Applicants did not allege that the impugned decisions are defective for lack of adequate public participation as contemplated in section 6 (2) of the Promotion of Administrative Justice Act 3 of 2000, and Second Applicant opted out of the public participation process. LLPT submitted that it is clear that the Applicants' real complaint is not that the decision-makers failed to take into account a relevant consideration, or that the impugned decisions are not supportable on the facts, but rather that the decision-makers failed to attach adequate weight to the value of the intangible cultural heritage.

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

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

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

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

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

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

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

- [52] LLPT argued that it is apparent from the founding papers that the review of the City's decisions was little more than an afterthought, and that this challenge was tacked on in an attempt to justify the Applicants delay in taking the environmental authorisation decision on review. Instead, the heads of argument now challenge the City's decision on the basis of irrationality, for "dismissing" objections from its Environmental Management Department regarding potential hydrological and biodiversity impacts, and accepting "materials" or expert reports submitted by the LLPT. The new ground of review raised in heads of argument is impermissible and prejudicial to the Respondents.
- [53] LLPT argued that the OCA AGM resolution of 24 November 2020 demonstrates that not only were they aware of the need to institute review proceedings "as soon as reasonably possible" if their internal appeals were unsuccessful, but also that they authorised their management body to instruct attorneys for legal advice on review proceedings to stop the development. When the Provincial Minister published his appeal decision on 22 February 2021, it was incumbent upon the Applicants to institute judicial review proceedings in relation to this decision without unreasonable delay.

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

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



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

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

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



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

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

The Third, Sixth and Seventh Respondents Submissions

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

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

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

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

The City pointed out that the FNC, an association of Indigenous Groups and **[63]** leaders with an interest in the River Club site, partnered with the developer, and assisted to inform how the development can commemorate the site heritage. As a result, the FNC and the developer proposed several commemorative features which includes an indigenous garden for use by the First Nations; a cultural heritage and media centre, an amphitheatre for cultural performances, commemoration initiatives, and a heritage eco-trail. The indigenous garden will allow the First Nations' knowledge of food and medicine to be put into practice, and the cultural, heritage and media centre will allow their history to be recorded and taught. The heritage eco-trail will align with the indigenous aspect of the site's ecology and allow pedestrians to experience that ecology on foot. The garden and amphitheatre will allow for various modes of expression. All these features will enhance the property's heritage. In this regard the FNC was satisfied with the extent to which the proposed development Incorporates heritage resources, which currently accommodated at the River Club site.

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

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



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

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

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

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

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

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

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

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

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- (ii) The Mayor allegedly dismissed all the "considered and well-substantiated views by its own internal experts."
- (iii) It was allegedly "procedurally irrational" for the Mayor to prefer the assessments by the expert procured by the developer over the City's own environmental management department.
- [71] Respondents contended that the new arguments are impermissible since firstly, the arguments are not pleaded in the founding papers, and secondly, the Applicants' heads of argument are supported only with reference to annexures. The City stated that it is impermissible for a party to argue the contents of an annexure, without that particular ground having been fully pleaded in its founding papers. The City also pointed out that none of the arguments for the review of the City's decisions in the Applicants' heads of argument refer to the crucial issue of heritage.
- [72] Respondents argued that the Applicants have abandoned the grounds of review set out in their founding affidavit, and the new grounds disclose no reviewable irregularity and are palpably weak. The City submitted that the interdict application fails to take cognisance of the overwhelming public interest in the development in terms of job creation, billions of Rand in investment, the development of critical transport infrastructure, and providing affordable housing, all while rehabilitating the Liesbeek River.
- [73] Respondents argued that the Mayor had to consider a range of complex and policy-laden factors. The Mayor's extensive reasons indicate that he had discharged

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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 facile 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,

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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

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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.

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Respondents denied HWC's suggestion that the specialist "avoided" [79] 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.

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[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.

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[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.



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

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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 IGaru 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 Niln≠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:

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- 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.

1901 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

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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.

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[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.

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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

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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.

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[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

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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

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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 Goringhalcona 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 IAman Traditional Council under Paramount Chief Martinus Fredericks,

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Ikhoraligaultaes 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 AlXarra 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

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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,

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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

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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

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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

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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

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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 O'Donoghue together with annexures, paragraphs 24-26 of the 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

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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

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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

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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.

DEPUTY JUDGE PRESIDENT GOLIATH

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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.
- (45.02 Tre inger applicationals stake are demissed.
- 145/31. There shall be no program to costs in the striking-out applications.
- 148.4 Costs of this application she to stant over until the finalisation of the review application.
- Ab.5. The parties are granted commission to approach this Court for further Diseasyes to facilitate an expedited review in this matter, and are also herein thereby given leave to amplify or amend the terms of this order so do to alvo practical effect to the orders granted herein.

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

Case No.: 12994 / 2021

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL

Second Applicant

and

TRUSTEES FOR THE TIME BEING OF LIESBEEK LEISURE PROPERTIES TRUST

First Respondent

HERITAGE WESTERN CAPE

Second Respondent

CITY OF CAPE TOWN

Third Respondent

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

Fourth Respondent

THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT

Fifth Respondent

CHAIRPERSON OF THE MUNICIPAL PLANNING TRIBUNAL OF THE CITY OF CAPE TOWN

Sixth Respondent

EXECUTIVE MAYOR, CITY OF CAPE TOWN

Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE

Eight Respondent

AFFIDAVIT



I, the undersigned

Daniel George David Bolton

do hereby make oath and say as follows:

- 1. I am an adult male, also known as Chief Danny in the position of Chief Administrative Officer of the Cochoqua Royal House Traditional Authority which is seated in the area of Mamre, Western Cape Province 19 Groenekloof Street Mamre 7347. The Cochoqua Royal House is a traditional Khoi-Khoin authority in terms of the Traditional and Khoisan Leadership Act no 3 of 2019 and Chapter 12 of the South African Constitution relating to Traditional Affairs.
- I have been mandated the sole legitimate spokesperson for the Cochoqua Royal House Mamre on matters regarding the Two Rivers development. I was duly appointed as Chief Admin Officer of the Cochoqua Royal House by its Paramount Chief David Johannes with effect 1 January 2016 as spokesperson on all juristic matters pertaining to Khoisan administration both locally and nationally. My status as Chief Admin Officer was confirmed in the Royal House minutes dated 23 January 2016.
- 3. The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
- I have read the supporting and replying affidavits of Tauriq Jenkins which he deposed to on 30 July 2021 and 17 September 2021 and confirm the contents



thereof in so far as they relate to me and the Cochoqua Royal House Mamre, and the position I hold in the Cochoqua Royal House Mamre.

- 5. As I explain more fully below, both the Cochoqua Royal House Mamre and I:
 - 5.1. as an interested and affected party, lodged in 2018 its comments with respect to the Draft Phase 1 heritage Impact Assessment for the Site "Two Rivers". In this regard we wish to place on record that we objected to the proposed River club development;
 - 5.2. as an interested and affected party was not listed as such by the City of Cape Town when it advertised the Rezoning LUMS application in 2018;
 - 5.3. as an interested and affected party submitted in October 2019 its comment on the Two Rivers Local Spatial Development Framework but was not consulted by Mr Rudewaan Arendse on the matter;
 - 5.4. as an interested and effected party received notification to attend the Municipal Planning Tribunal in 2020 but was not invited to make a submission;
 - 5.5. are aware that the site of the proposed development is currently on the tentative list of the Department of Art, Culture and Sport proposed to UNESCO as part of a Liberation and Resistance Route commemorating the Frontier wars and the 1510 battle where the Khoi defeated the Portuguese;



- 5.6. are deeply concerned about the negative impacts that the development of the River Club site ("the proposed development") by the First Respondent ("the Developer") will have on our intangible cultural heritage;
- 5.7. are deeply concerned that the proposed development at the River Club is predominantly commercial office blocks with only a 4% affordable housing commitment, with a development footprint of 210 000 m2 on a 15 hectare site, twice the density of Century City, and notwithstanding this that the proposed development is supported by the City of Cape Town and the Western Cape Government (This development will place blocks of between 24m and 47m tall onto the floodplain, on land that is yet to be graded for its heritage significance. Once it is concreted over, there is no recovering lost intangible heritage.);
- 5.8. were not consulted by Mr Rudewaan Arendse in connection with the preparation of his reported titled "River Club First Nations Report" dated November 2019 ("the AFMAS Report") which was submitted by the Developer in support of the proposed development; and
- 5.9. are not members the Western Cape First Nations Collective ("the FNC") which is the Eighth Respondent in this matter, and the FNC is not authorised to speak on our behalf, whether in relation to the proposed development and its impacts on our intangible cultural heritage or any other matters.

Consultations undertaken by Rudewaan Arendse of AFMAS

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- 6. I understand that Mr Rudewaan Arendse was commissioned by the Western Cape Provincial Department of Transport and Public Works to prepare a report on:
 - 6.1. the significance of the Two Rivers Urban Park ("TRUP") to First Nations by identifying intangible cultural heritage ("ICH") specific to the TRUP, through Khoi and San oral history, as articulated by indigenous custodians;
 - 6.2. the collective First Nations aspirations for celebrating First Nation ICH at the TRUP; and
 - 6.3. how the indigenous narrative of the First Nation's ICH can be incorporated into the spatial governance of the TRUP, by developing heritage related design informants (as informed by the indigenous narrative).
- 7. This report culminated in the TRUP First Nations Report ("the TRUP Report") of 25 September 2019. Mr Rudewaan Arendse did not consult the Cochoqua Royal House during the preparation of that report, even though I and the Cochoqua Royal House, as an interested and affected party, participated and submitted comments on the development of the Two Rivers Local Spatial Development Framework by the Western Cape Provincial Department of Transport and Public Works.
- 8. According to his brief in the River Club First Nations Report ("the AFMAS Report"), Mr Rudewaan Arendse was subsequently commissioned by the Developer to:

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"...engage the First Nations (the Khoi and San)2, interchangeably referred to as Indigenous people, or the Indigene, with regard to their intengible cultural heritage in terms of the River Club project site."

and

- "1. Understand the significance of the River Club site to the First Nations by identifying Indigenous intangible cultural heritage specific to the River Club.
- 2. Locate the River Club site within the Indigenous narrative of the broader TRUP cultural landscape.
- Identify First Nations aspirations with regard to Indigenous cultural heritage and the River Club site.
- 4. Implement the recommendation of the TRUP First Nations report that "acknowledging, embracing, protecting and celebrating the Indigenous narrative be a heritage related design informant that informs" planning and development of the River Club site." (Vol. 3, R. 1079)

Setting the record straight regarding Cultural Organizations

9. Distinction between the membership of the FNC which is the Eighth Respondent in this matter and the Goringhaicona Khoi Khoin Indigenous Traditional Council which is the Second Applicant: The FNC is a group containing Khoisan cultural organizations and Khoisan activists, which, in terms of the Traditional and Khoisan Leadership Act no 3 of 2019, are not

recognized as representing true traditional leadership which are supported by their respective Khoisan communities within a specific geographical area. The FNC favoured the development unilaterally. These "traditional leaders" are:

- 9.1. Chief !Garu Zenzile Khoisan of the Gorinhaiqua Cultural Council;
- 9.2. Chief Hennie of the Gorachoqua Cultural Council;
- 9.3. Chief Johnnie Jansen of the Cochoqua Cultural Council which is not linked to the Cochoqua Traditional Authority seated in Mamre; and
- 9.4. Chief Tania Kleinhans-Cedras of the cultural organization titled IRASA which means "Institute for the Restoration of the Aborigines of SA.
 - 9.4.1. Note that Ms Tania Kleinhans-Cedras's appointment as Cochoqua Chief within the Cochoqua Royal House Mamre was officially withdrawn in 2018 and therefore Ms Tania Kleinhans-Cedras has no mandate to speak on behalf of Paramount Chief David Johannes of the Cochoqua tribe whose royal house is seated in Mamre, Western Cape Province.
- 10. Only two so-called First Nations leaders and a few Khoi-khoin cultural organizations of the above mentioned "FNC", unilaterally and without a mandate from the wider Khoi-khoi tribal chiefs listed hereunder, supported the proposed development. The Developer has interacted with a small minority and grouping of "FNC" leaders who have not been mandated by the majority



of authentic tribal Traditional Authorities/Councils in the Western Cape listed hereunder.

- 11. The Constitution of SA, Act 108 of 1996, Chapter 12, obligates Provincial and Local Governments to take cognisance of the roles of Traditional Leaders and the role which all spheres of Government must play in alignment to the amended Municipal Systems Act (Act of 2000, as amended in 2011).
- 12. The Traditional and Khoisan Leadership Act no 3 of 2019 compels the three spheres of government to involve acknowledged traditional leaders and constituted traditional authorities in decision making processes regarding service delivery, and economic development and land matters.
- 13. According to my knowledge only two (2) provinces, namely the Western Cape
 Provincial Government and Northern Cape Provincial Government have not
 yet complied with the provisions as provided for in the Traditional and Khoisan
 Leadership Act no 3 of 2019, such provisions being the recognition of
 traditional leaders, institution, status and role of traditional leadership
 according to customary law as directed in Chapter 12 of the Constitution of
 the Republic of South Africa. Chapter 12 Section 211 (3) directs that "The
 courts must apply customary law when that law is applicable, subject to the
 Constitution and any legislation that specifically deals with customary law".
- 14. The following Traditional Authorities are recognized Tribal leadership structures and are opposed to the Two Rivers Development in its current form:



- 14.1. the Goringhaicona Khoi Khoin Indigenous Traditional Council which is an established traditional authority. It is not a community or cultural organization but is recognised under the Traditional and Khoisan Leadership Act no 3 of 2019;
- 14.2. the Cochoqua Royal House Traditional Authority Mamre: Paramount Chief David Johannes;
- 14.3. the Nama Traditional Authority: Paramount Chief Matinus Fredericks;
- 14.4. the San/Xam Traditional Authority: Chief Cedas Kleinsmith;
- 14.5. the Hessequa Traditional Authority: Chief Lanville Cupido;
- 14.6. the Gainoqua Traditional Authority: Paramount Chief Kenneth Hoffman;
- 14.7. the Kei Korana Transfrontier Traditional Authority: Khoebaha Melvin Arendse.
- 15. I confirm that I was notified by Mr Rudewaan Arendse on 4 July 2019, by way of email, of an impending participation regarding the River Club and that that he <u>intends</u> engaging First Nations groups regarding their intangible cultural heritage associated with the River Club site. I was not familiar with the abbreviation AFMAS and asked him to explain. He indicated that "AFMAS was just a name we made up for the company". I found his explanation rather concerning because I was not sure of his impartiality in the TRUP matter. I attach the email as Appendix A.



- 16. I can confirm that after that notification, Mr Rudewaan Arendse did not engage me further regarding our intangible cultural heritage associated with the River Club site or how the development will affect my intangible cultural heritage associated with the TRUP, and consequently neither myself nor the Cochoqua Royal House Mamre were consulted by Mr Arendse in relation to the AFMAS Report.
- 17. I confirm that I made it known to Mr Arendse on 4 July 2019 that both I and my Cochoqua Royal House Mamre want to participate in this process; however, we were not thereafter consulted by Mr Arendse in relation to the AFMAS Report.
- The Developer and Mr Arendse were well aware that both I and the Cochoqua Royal House Mamre wished our view in relation to the proposed development and its potential negative impacts on the environment and on our cultural heritage, to be taken into consideration by the authorities responsible for deciding whether or not to authorise the proposed development. My reasons for saying this appear below.
 - 18.1. I represented the Cochoqua Royal House Mamre as an interested and affected party ("I&AP") during the provisional protection appeal proceedings, under case number 1511 2504 WD 1217E in which the Developer as an appellant and Mr Arendse participated. My name appears from the list of I&APs as is evident in the record.
 - 18.2. My group has an email address and contact number which are easily traceable. As explained above, Mr Arendse did, in fact, contact me on

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the 4th July 2019 so he did have my contact details. He should have used this information to communicate with us and arrange for us to participate in the consultation which culminated in his AFMAS Report.

19. Consequently, I can confirm that neither I nor the Cochoqua Royal House Mamre were consulted by Mr Arendse regarding the proposed development nor how the proposed development will impact on our intangible cultural heritage. We also do not approve of or support the proposed development by of the Developer, nor are we represented by the FNC.

Cultural and heritage significance of the site and TRUP area

- 20. The site at which the River Club development will take place and the larger TRUP, has cultural and heritage significance to my traditional authority which is the Cochoqua Royal House Mamre. The site and the TRUP area are sacred to us, and a significant part of our intangible cultural heritage is associated with the site and the TRUP, for the following reasons.
 - 20.1. Indigenous rituals took place at the site and the TRUP, such as coronations (!Nau's), Cultural/religious/political and ceremonial practices such as traditional wedding ceremonies, took place there and still takes place there today.
 - 20.2. The Cochoqua tribe had a seasonal presence and Kraal in the area of the TRUP where their large numbers of livestock would come to graze and, in this regard, it was envisaged to restore and re-establish the historical location of a Kraal close by to the site.

- 20.3. The confluence of the Black and Liesbeek River is important in the sense that was historically a sacred open space with a very important history to our indigenous Khoi and San peoples; At the equinox the sun sets on Lions Head from that spot. It is also situated next to the SAAO which is a significant place in understanding the universe, a place our indigenous people understood to be significant before colonialism.
- 20.4. The confluence of the Black and Liesbeek River is also important because this is the area where land was stolen for the first time after the arrival of Jan van Riebeeck. This is also the area where the Freeburghers farms were established and fenced off. This is the area where the first forced removal took placed followed by genocide
- 20.5. The infilling of the Liesbeek River can be regarded as a "heritage crime" and the development of the Two Rivers has already resulted in a reoccurrence of historical trauma and pain at the sight of excavations and infill of the River.
- 21. We do not regard any of the conditions to the respective authorisations to be sufficient for purposes of safeguarding our intangible heritage associated with the site. In our view, the aspects of the Development which the Developer claims will give expression to, and celebrate, our intangible cultural heritage (i.e. the proposed indigenous gardens, cultural and media centre, amphitheatre, and "heritage eco-trail") do no such thing.

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22. Had I or Paramount David Johannes of the Cochoqua Royal House Mamre been meaningfully consulted by Mr Arendse in respect of the River Club development, we would have contributed important information relevant to the decision-making process (including the information in this affidavit) which should have been made available to the decision-makers (whether by inclusion in the AFMAS Report or otherwise).



Daniel George David Bolton

I hereby certify that the deponent has acknowledged that he/she:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on her conscience.

Thus, signed and sworn to before me, at

on 7 June 2022

COMMISSIONER OF OATHS

72271299

NAME: S. may DA

CAPACITY: CST

ADDRESS: OS VOORTREKKER RO

AREA: BELLVILLE





dgdbolton@gmail.com

From: Sent: To: Subject:	Daniel Bolton <dgdbolton@gmail.com> Monday, 23 May 2022 00:27 dgdbolton@gmail.com Invite to TRUP First Nation Workshop</dgdbolton@gmail.com>	"A"
Forwarded message From; < > Date: 4 Jul 2019 18:50 Subject: Re: Invite to TRUP First N To: "Rudewaan Arendse" < Cc:	ation Workshop >	
Thanks Rudewaan Sent via my BlackBerry from Voda	ncom - let your email find you!	
From: Rudewaan Arendse < Date: Thu, 4 Jul 2019 17:47:08 +0 To: Daniel Bolton< Subject: Re: Invite to TRUP First N	>	
Hi Daniel,		
AFMAS is just a name we made u	p for our company.	
Regards, Rudewaan		
On Thu, Jul 4, 2019 at 4:19 PM Da	nniel Bolton < > wrote:	·
Dear Rudewaan		
Thank you for the invitation rece	ived.	
Can you please clarify the abbre	viation AFMAS?	
Regards		
Daniel Bolton	ı	6

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I, the undersigned

GAOB: MARTINUS FREDERICKS

do hereby make oath and say as follows:

- 1. I am an adult male, also known as Gaob: Martinus Fredericks and am the "Gaob / Supreme Leader" of the! Aman Traditional Authority RSA.
- I am a direct descendant in the IAman/ //Aes Royal family of Namibia and South Africa, I have been duly appointed by Gaob: David Fredericks in his capacity as the Supreme Leader of the IAman // Aes within the Greater Namaqualand (now referred to as Namibia) who historically had their head office in Goudini in the Worcester Breede River valley to hold this position and to speak on behalf of the !Aman// Aes (Nama people) in South Africa (See Addendum A).
- The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
- I have read the supporting and replying affidavits of Tauriq Jenkins which he 2. deposed on 30 July 2021 and 17 September 2021 and confirm the contents thereof in so far as they relate to me, and the position I hold in !Aman // Aes and the !Aman Traditional Authority.
- As I explain more fully below, both the "!Aman Traditional Authority" and I: 3.

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

Case No.: 12994 / 2021

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

GORINGHAICONA KHOI KHOIN
INDIGENOUS TRADITIONAL COUNCIL

Second Applicant

and

TRUSTEES FOR THE TIME BEING OF LIESBEEK LEISURE PROPERTIES TRUST

First Respondent

HERITAGE WESTERN CAPE

Second Respondent

CITY OF CAPE TOWN

Third Respondent

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

Fourth Respondent

THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT

Fifth Respondent

CHAIRPERSON OF THE MUNICIPAL PLANNING TRIBUNAL OF THE CITY OF CAPE TOWN

Sixth Respondent

EXECUTIVE MAYOR, CITY OF CAPE TOWN

Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE

Eight Respondent

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- 3.1. are deeply concerned about the negative impacts that the development of the River Club site by the First Respondent ("the Development") will have on our intangible cultural heritage;
- 3.2. are opposed to the Development;
- 3.3. were not consulted by Mr Rudewaann Arendse in connection with the preparation of his reported titled "River Club First Nations Report" dated November 2019 ("the AFMAS Report"); and
- 3.4. are not members of the Western Cape First Nations Collective ("the FNC") which is the Eighth Respondent in this matter, and the FNC is not authorised to speak on our behalf, whether in relation to the Development or any other matters.

Consultations undertaken by Rudewaan Arendse of AFMAS

- 4. I understand that Mr Rudewaan Arendse was commissioned by the Western Cape Provincial Department of Transport and Public Works to prepare a report on:
 - 4.1. the significance of the Two Rivers Urban Park ("TRUP") to First

 Nations by identifying intangible cultural heritage ("ICH") specific to
 the TRUP, through Khoi and San oral history, as articulated by
 indigenous custodians;
 - 4.2. the collective First Nations aspirations for celebrating First Nation ICH at the TRUP; and

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- 4.3. how the indigenous narrative of the First Nation's ICH can be incorporated into the spatial governance of the TRUP, by developing heritage related design informants (as informed by the indigenous narrative).
- 5. This report culminated in the TRUP First Nations Report ("the TRUP Report") of 25 September 2019. [Mr Rudewaan Arendse did not consult my !Aman Traditional Authority during the preparation of that report.
- According to his brief in the River Club First Nations Report ("the AFMAS Report"), Mr Rudewaan Arendse was subsequently commissioned by the First Respondent ("the Developer") to:
 - "...engage the First Nations (the Khoi and San)2, interchangeably referred to as Indigenous people, or the Indigene, with regard to their intangible cultural heritage in terms of the River Club project site."

and

- "1. Understand the significance of the River Club site to the First Nations by identifying Indigenous intangible cultural heritage specific to the River Club.
- Locate the River Club site within the Indigenous narrative of the broader TRUP cultural landscape.
- 3. Identify First Nations aspirations with regard to Indigenous cultural heritage and the River Club site.

- 4. Implement the recommendation of the TRUP First Nations report that "acknowledging, embracing, protecting and celebrating the Indigenous narrative be a heritage related design informant that informs" planning and development of the River Club site." (Vol. 3, R. 1079)
- 7. I confirm that neither I nor my !Aman Traditional Authority were notified by Mr Rudewaan Arendse or engaged with regarding our intangible cultural heritage associated with the River Club site or how the development will affect my intangible cultural heritage associated with the TRUP, and consequently neither myself nor my !Aman Traditional Authority were consulted by Mr Arendse in relation to the AFMAS Report.
- 8. The Developer and/or Mr Arendse / AFMAS were well aware that both I and lAman Traditional Authority wished our view in relation to the Development and its potential negative impacts on the environment and on our cultural heritage, to be taken into consideration by the authorities responsible for deciding whether or not to authorise the Development. My reasons for saying this appear below.
 - 8.1. I represented the !Aman Traditional Authority as an interested and affected party ("I&AP") during the provisional protection appeal proceedings, under case number 1511 2504 WD 1217E in which the Developer as an appellant and Mr Arendse participated. My name appears from the list of I&APs as is evident in the record.
 - 8.2. My group has contact details which are easily traceable. AFMAS andMr Arendse should have used this information to communicate with

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us and arranged for us to participate in the consultation which culminated in his AFMAS Report.

9. I confirm that neither I nor the !Aman Traditional Authority were consulted by Mr Arendse. Nor do we approve of or support the development by the First Respondent, nor are we represented by the Eight Respondent (the Western Cape First Nations Collective also known as the "FNC").

Cultural and heritage significance of the site and TRUP area

- The site at which the River Club development will take place and the larger TRUP, is of significant cultural and heritage significance to my lAman Traditional Authority. The site and the TRUP area is sacred to us and a significant part of our intangible cultural heritage is associated with the site and the TRUP, for the following reasons:
 - 10.1. The area is a site of first resistance and Frontier Wars fought in 1659. It is where land was taken by the Dutch colonial authorities in 1657.
 - 10.2. It is a place where Inau ceremonies, and various other traditional and sacred practices of ritual take place.
 - 10.3. It forms part of National Khoi and San Liberation and Resistance that was approved by the Cabinet in 2020.
 - 10.4. The 1510 Battle which we believe occurred on the precinct had a ripple effect across all the San and Khoi formations, including the Nama, because at that time there were no colonial boundaries, and

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the fact it prevented Portuguese conquest in the area had vast significance across the region.

- 10.5. In the 1600's, the Nama groups are recorded as some of the indigenous groups that visited the Castle of Good Hope on a regular basis, which re-affirms the Nama's presence in the peninsula. As such the confluence area at the Two Rivers was known as an important precinct for peninsular Khoi that the Nama significantly engaged with socially, spiritually and economically.
- 10.6. This spiritual significance and memory is a shared phenomena among people to the extent that one cannot de-link the Nama and its origins from the Western Cape, including this area.
- 10.7. The destruction of the river is a disconnect with our ancestral ties with !Tsui Goab (supreme being) whose expression in Nama cosmology is linked to the stars.
- 11. We do not regard any of the conditions to the respective authorisations to be sufficient for purposes of safeguarding our intangible heritage associated with the site. In our view, the aspects of the Development which the Developer claims will give expression to, and celebrate, our intangible cultural heritage (i.e. the proposed indigenous gardens, cultural and media centre, amphitheatre, and "heritage eco-trail") do no such thing.
- 12. Had I or my !Aman Traditional Authority been meaningfully consulted by Mr

 Arendse in respect of the River Club development, we would have contributed important information relevant to the decision-making process

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(including the information in this affidavit) which should have been made available to the decision-makers (whether by inclusion in the AFMAS Report or otherwise).

GAOB: MARTINUS FREDERICKS

I hereby certify that the deponent has acknowledged that he:

- (a) knows and understands the contents of this affidavit;
- (b) has no objection to taking the oath;
- (c) considers the oath to be binding on his conscience.

Thus signed and sworn to before me, at ATLANTIS on

June 2022.

COMMISSIONER OF OATHS

NAME: Coull Soulle

CAPACITY: CONSTABLE

ADDRESS: AflowA.8

AREA: SAPS

SOUTHA SERVICE
CID

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FREDERICK ROYAL HOUSE, /HOA-/ARAN

FREDEICK ROYAL HOUSE & IAMAN PEOPLE OF /GUI-‡GANDES Bethaule, P. O. Box 123, Chief Cornellus Frederick Avenue





GAOB JAKOBUS FREDERICK

GAOB JAN FREDERICK,

GAOB JOSEF FREDERICK I.

GAOB DAVID CHRISTIAN FREDERICK,

GAOB JOSEF FREDERICK II,

GAOB CORNELIUS FREDERICK

GAOB PAUL FREDERICK,

GAOB EDWARD FREDERICK,

GAOB JOSEF FREDERICK III.

GAOB DAVID FREDERICK Gaob Martinus Frederick
The !Aman Traditional Authority (RSA)
31 Montague Street
Saxon Sea, Atlantis7349

Re: Mandatory letter to formalize the IAman Community in South Africa

Honorable Gaob,

We trust that this communique finds you in good health and welfare.

It is our distinct honor to reinforce the bonds of our people living in both Namibia and South Africa. The Royal Family wish to implore the !Aman community in the Republic South Africa to re-organize themselves and follow established Traditional Structures and take up members of the Richter's Feld in the leadership structures to ensure that this part of our !Aman People are represented in the Great !Aman Community and as such be recorded in the Royal House Book of Records.

I, Daniel Timotheus Frederick, Patriarch of the Royal Family therefore mandate Gaob Martinus Fredericks as the Official Representative and leader of the IAman in the RSA to Lead all processes necessary as a Sister body of the Great IAman Community in Namibia, to re-unite and rebuild the Clan that was separated as a result of colonial legislation, displacement and genocide committed against us.

I wish the !Aman Community in the RSA God's Grace, peace and prosperity in the strive to re-unite with their families in Namibia and elsewhere.

Yours Truly

FREDERICK ROYAL HOUSE /HOA-JARAN IAMAN //AES

2021 -10- 19

P O Box 123 · BETHANIE · NAMIBIA +264 63 283 134 frederickroyalhouse@gmail.com

CHANIEL TIMOTHUES FREDERICK frederickroyalho
THE PATRIARCH of FREDERICK ROYAL FAMILY
+264 81 156 3997

FREDERICK ROYAL HOUSE * /HOA-/ARAN * !AMAN //AES
frederickroyalhouse@gmail.com* Chief Cornelius Frederick Avenue* erf. 12
P O Box 123 * Bethanie Namibia





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

Fourth Respondent

PROVINCIAL GOVERNMENT

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

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- 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."
- 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

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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.
- 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

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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

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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

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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.

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.

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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

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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.

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[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

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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]).

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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.

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

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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.

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-

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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

In the result, the following order is made:

prospects that this appeal would succeed.

[40]

The application for leave to appeal is dismissed with costs.

DEPUTY JUDGE PRESIDENT GOLIATH

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Cullinan and Associates

Attention: Mr. Hercules Wessels

By email:

hercules@greencounsel.co.za

Our ref: NDS/sg/L38-001

Your ref:

27 June 2022

Dear Sirs

RE: OBSERVATORY CIVIC ASSOCIATION AND ANOTHER V LIESBEEK LEISURE PROPERTIES TRUST AND OTHERS (CASE NUMBER: 12994/2021 IN THE WESTERN CAPE DIVISION OF THE HIGH COURT)

- 1. We refer to your letter of the 22nd instant.
- Our instructions are as follows:
- 2.1. Our client's environmental rehabilitation work over the past month was initiated and undertaken on the City of Cape Town's riverine properties as described in and authorised by the environmental authorisation dated 22 February 2021. You and your clients were aware of that work from its inception and had no complaint in that regard then. That was for good reason, in that the aforesaid work is not impacted in any way by the judgment handed down by Goliath DJP on 18 March 2022 given that the relief your clients sought in Part A was confined to construction activities on erf 151832.
- 2.2. Over the course of the past week our client has undertaken environmental rehabilitation work of the same nature as described immediately above and on erf 151832 too, as well as certain remedial work on the incomplete structures on the latter property. None of the activities undertaken in at or near the riverine environment is prohibited by the terms of the judgment and order handed down by Goliath DJP. The same applies to the remedial work undertaken to date on erf 151832.
- 2.3. This week our client intends re-commencing construction activities on erf 151832. The judgment and order handed down by Goliath DJP in Part A are, as your client will be aware, suspended in effect and operation pending the final determination of our client's application for leave to appeal.

Nicholas Smith - BA (Hons) LLB ADL LLM (Marine & Environmental Law)



Yours faithfully, NICHOLAS SMITH ATTORNEYS Per:



NICHOLAS SMITH

Copies to:

Heritage Western Cape

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Basson Petersen Attorneys Inc.

Attention: Mr. Petersen

By email: Bpinc.law@gmail.com

Legal Resources Centre on behalf of the Forest Peoples Programme (amicus curiae)

Attention: Ms. Lelethu Mgedezi By email: <u>lelethu@lrc.org.za</u>

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Cullinan and Associates

Attention: Mr. Hercules Wessels

By email: hercules@greencounsel.co.za

Our ref: NDS/sg/L38-001 Your ref: O 023-002

29 June 2022

Dear Sirs

RE: OBSERVATORY CIVIC ASSOCIATION AND ANOTHER V LIESBEEK LEISURE PROPERTIES TRUST AND OTHERS (CASE NUMBER: 12994/2021 IN THE WESTERN CAPE DIVISION OF THE HIGH COURT)

- We refer to the above matter and to your letter of the 28th instant.
- 2. In our letter to you on Monday this week we set out our client's position regarding the aspects traversed in your letter under reply.
- There is a difference of opinion between us regarding the interpretation and effect of Goliath DJP's judgment and order handed down on 18 March 2022 in Part A of your clients' application.
- 4. We do not intend arguing the merits or effect of the DJP's decision in Part A by exchange of correspondence with you. To the extent necessary and relevant we will respond to the assertions you make in your letter in due course, and as might be necessary.
- 5. Our client's rights are and remain reserved.

Yours faithfully, NICHOLAS SMITH ATTORNEYS Per:

NICHOLAS SMITH

Nicholas Smith - BA (Hons) LLB ADL LLM (Marine & Environmental Law)

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Copies to:

Heritage Western Cape

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Legal Resources Centre on behalf of the Forest Peoples Programme (amicus curiae)

Attention: Ms. Lelethu Mgedezi By email: <u>lelethu@lrc.org.za</u>

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TRANSMITTED BY EMAIL

Date:

5 July 2022

TO:

Nicholas Smith Attorneys

ATT:

Mr Smith

FROM:

Hercules Wessels

Total pages:

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nicks@nsmithlaw.co.za

hercules@greencounsel.co.za

Our ref:

O 023-002

The information contained in this document is confidential and intended for the exclusive attention of the addressee. Unauthorised disclosure or distribution of the information is prohibited. Please advise us immediately should you have received this document in error.

Dear Sir

RECOMMENCEMENT OF CONSTRUCTION ON ERF 151832

- 1. We refer to the recent correspondence in this matter and specifically to your letter dated 29 June 2022 in which you decline to answer the questions posed in our letters of 22 and 28 June 2022.
- 2. In our letter of 28 June 2022 we explained in some detail: (a) why our view is that the interim interdict has not been suspended, and (b) why our prima facie view was that the activities that your client had undertaken and was intending to undertake on erf 151832 contravene the interim interdict. We did so in order to afford your client an opportunity of explaining its legal position and providing us with information which might have convinced us that our view was misplaced, and so avoid the need for further litigation on this issue. You have declined that opportunity.
- 3. We presume that your singularly unhelpful response was motivated by a desire to place our clients in a position where they will again have to expend more effort and money in going to court to enforce their rights.
- 4. We also note that you did not provide us with the undertaking we sought in paragraph 12 of our letter of 28 July 2022 by the deadline of 9 am on Friday 1 July 2022. On the

Expertise grounded in experience

Cullinan & Associates Incorporated (2001/001024/21)

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contrary, we are instructed that your client recommenced construction late last week. You client is now deliberately defying the interim interdict granted by Goliath AJP, and the inescapable conclusion is that this non-compliance is both intentional and *mala fide* and consequently in contempt of court.

5. All our clients' rights are reserved.

Yours sincerely

CULLINAN & ASSOCIATES INC.

pp: Hercules Wessels

Heritage Western Cape

Attention: Ms. Penelope Meyer

By email: penelope.meyer@westerncape.gov.za

Webber Wentzel Attorneys

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6 July 2022

Our ref: NDS/sg/L38-001

Your ref: O 023-002

Dear Sirs

RE: OBSERVATORY CIVIC ASSOCIATION AND ANOTHER v LIESBEEK LEISURE PROPERTIES TRUST AND OTHERS (CASE NUMBER: 12994/2021 IN THE WESTERN CAPE DIVISION OF THE HIGH COURT)

- 1. We refer to your letter of 5 July 2022.
- In our previous correspondence we set out our client's position, and we also made it plain that our client does not intend to litigate by exchange of correspondence with you.
- 3. We note that in paragraph 3 of your letter (read with paragraph 1) you express the view that our client's refusal to respond in detail to your clients' submissions in your letter of 28 June 2022 is "unhelpful". We understand you to be saying that we ought to set out our client's views in detail in correspondence. We find your suggestion surprising given that our client's position is set out comprehensively in the founding papers filed in our client's application for leave to appeal to the Supreme Court of Appeal. The views of the other applicants seeking leave to appeal are similarly set out in the founding papers they filed. Their views align with what is set out in our client's founding papers.
- 4. The fact that you and your clients profess to hold a different view to that of our client and the other applicants before the Supreme Court of Appeal takes the matter no further. These are issues of law which are dealt with in our client's pending application for leave to appeal, as we have previously pointed out to you.
- 5. The balance of the averments in paragraph 3 of your letter under reply are also categorically denied, there being no basis for them.

Nicholas Smith - BA (Hons) LLB ADL LLM (Marine & Environmental Law)



- 6. We reiterate that the four pending applications for leave to appeal suspend in toto the execution and operation of the judgment and order handed down by Gollath DJP on 18 March 2022 until those applications have been finally determined. Our client is accordingly not in contempt of the DJP's judgment and order as you suggest.
- 7. Furthermore our client is not as you aver in your letter "now deliberately defying the interim interdict granted by Goliath AJP". There is no basis for that submission and it is denied. The same applies to the "inescapable conclusion" you purport to draw in the concluding paragraph of your letter under reply.
- 8. We point out for the sake of completeness that your reference in paragraph 4 to your "letter of 28 July 2022" cannot be correct for the obvious reason that this date lies in the future.
- Our client is doing no more than proceeding as it is entitled to do. It must be obvious to your clients that in the circumstances there is no basis for instituting contempt of court proceedings.
- Notwithstanding what has been set out here and elsewhere, if your clients elect to institute such proceedings the matter will be opposed, and an appropriate special costs order sought.
- 11. We do not intend to respond to every allegation set out in your letter under reply but that is obviously without admitting any of them.

Yours faithfully,

NICHOLAS SMITH ATTORNEYS

Per:



Copies to:

Heritage Western Cape

Attention: Ms. Penelope Meyer

By email: penelope.mever@westerncape.gov.za

Webber Wentzel Attorneys

Attention: Ms. Sabrina De Freitas

By email: sabrina.defreitas@webberwentzel.com

The State Attorney

Attention: Mr. Mark Owen

By email: mowen@justice.gov.za

Basson Petersen Attorneys Inc. **Attention:** Mr. Petersen

By email: Bpinc.law@gmail.com

Legal Resources Centre on behalf of the Forest Peoples Programme (amicus curiae)

A3



Attention: Ms. Lelethu Mgedezi By email: lelethu@lrc.org.za



TRANSMITTED BY EMAIL

Date:

7 July 2022

TO:

Nicholas Smith Attorneys

ATT:

Nicholas Smith

FROM:

Total pages:

Hercules Wessels

3

nicks@nsmithlaw.co.za

hercules@greencounsel.co.za

Our ref:

O 023-008

The information contained in this document is confidential and intended for the exclusive attention of the addressee. Unauthorised disclosure or distribution of the information is prohibited. Please advise us immediately should you have received this document in error.

Dear Mr Smith,

RECOMMENCEMENT OF CONSTRUCTION OF RIVER CLUB DEVELOPMENT

- 1. We refer to your letter of 6 July 2022 in which you reconfirmed that the position of the Liesbeek Leisure Property Trust ("LLPT") is that the interim interdict prohibiting construction pending the determination of the Part B proceedings (Case number: 12994/2021, Western Cape High Court) is currently suspended as a consequence of the lodging of appeals to the Supreme Court of Appeal, and consequently the LLPT is entitled to continue with construction.
- 2. As previously communicated to you, we have been advised that your client recommenced construction late last week and note that you have not denied that.
- 3. As we have communicated in previous correspondence, our clients are of the view that the interim interdict is not suspended and that by recommencing construction, earthworks and other works prohibited by the interim interdict, the LLPT and its trustees are acting in contempt of court. In the circumstances our clients intend to apply to the High Court for an appropriate order compelling compliance with the interim interdict.

Expertise grounded in experience

Cullinan & Associates Incorporated (2001/001024/21)

DIRECTOR: ATTORNEYS: CP Cullinan

M Groenink, K Handley, P King, SD Kvalsvig, R Stone, HD Wessels

CONSULTANTS: B Adams, GD Daniels.

18A Ascot Road Keniiworth 7708 Cape Town info@greencounsel.co.za

> T +27 (0) 21 671 7002 F+27 (0) 21 671 7003

http://cullinans.co.za/

- 4. Please confirm by no later than 14h00 on 7 July 2022 (i.e. today) that you are authorised to accept service of such an application on behalf of the LLPT and each of its trustees, and that we may serve any such application on you electronically.
- 5. If you are no longer authorised to accept electronic service on behalf of all the current trustees of the LLPT, please confirm by no later than **14h00 on 7 July 2022** (i.e. today) whether all the current trustees of the LLPT are listed below, and that their respective addresses set out below are the correct addresses to serve such papers (and if not, advise us of the correct addresses at which they will accept service).

6. LLPT Trustees

6.1. Mundell, Allan James Flynn

41 Grosvenor Crescent

Durban North

KwaZulu Natal

6.2. Tannenberger, James Otto

26 Albion Road

Bryanston

Gauteng

6.3. Ferguson, Nicholas Scott

7 Dawn Road

Constantia

Western Cape

6.4. Blow, Adam John

16 Valley Road

Kenilworth

Western Cape

6.5. Aufrichtig, Jody

1A Logies Bay

Llundudno

Western Cape

R 2

Yours sincerely

CULLINAN & ASSOCIATES INC.

per: Hercules Wessels

Heritage Western Cape

Attention: Ms. Penelope Meyer

By email: penelope.mever@westerncape.gov.za

Webber Wentzel Attorneys

Attention: Ms. Sabrina De Freitas

By email: sabrina.defreitas@webberwentzel.com

The State Attorney

Attention: Mr. Mark Owen

By email: mowen@justice.gov.za

Basson Petersen Attorneys Inc.

Attention: Mr. Petersen

By email: Bpinc.law@gmail.com

Legal Resources Centre on behalf of the Forest Peoples Programme (amicus curiae)

Attention: Ms. Wilmien Wicomb By email: wilmien@lrc.org.za

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PHOTOGRAPHIC EVIDENCE SHOWING BUILDERS ON SITE CONSTRUCTING GRILLES, POURING CONCRETE AND RECOMMENCING STRUCTURAL WORK

The building on 1 June 2022



The same building from the same angle on 29 June:



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Close-up of the scene (29 June)



Concrete mixer pouring concrete into the structure (29 June)

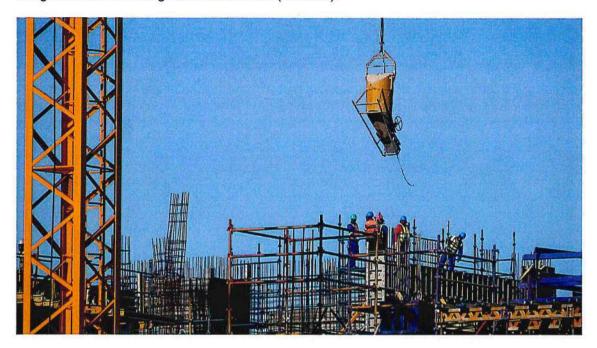


J.

Other images showing many workers on site:



Image of concrete being lifted into the site (29 June):



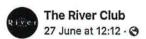
Workers and concrete mixer moving in and out of the site (1 July)







The LLPT (Liesbeek Leisure Property Trust)-controlled Facebook page ("The River Club"), admitting they are continuing work on the site despite the High Court order in place:

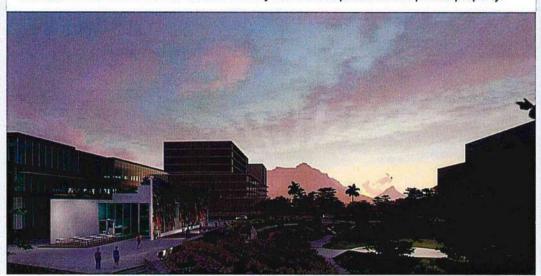


Recommencement of work at the River Club site pending the final determination of the applications for leave to appeal.

Following the initiation, over the past month, of the environmental rehabilitation work undertaken on the City of Cape Town's riverine properties, and the further remobilization of the workforce on the River Club site in Observatory, Cape Town, last week, LLPT will continue to carry out the rehabilitation and remedial work, and weather permitting, recommence today with structural work on the partially constructed first building on the site.

This phase of work will result in 380 construction workers coming back to work and earning an income again, pending the final determination of the applications for leave to appeal the judgment and orders handed down by Western Cape Deputy Judge President Goliath. Those applications suspend the operation and effect of the judgment and orders. Contrary to the recent claims made by the applicants in the media, the 6000 direct jobs and 19 000 indirect jobs that will ultimately be realised as a result of this development proceeding, will not be on a short-term basis, but will be jobs that carry through the lifespan of the development project and into the operational phase on completion.

This is not only good news for construction workers who will be back on site again but also for every South African who stands to benefit from the many economic, social, heritage and environmental benefits that will be delivered by the redevelopment on this private property.





Hercules Wessels

From:

Hercules Wessels

Sent:

Monday, 27 June 2022 08:34

То:

Hercules Wessels

Subject:

FW: Case no.: 12994/2021 - Observatory Civic Association & Another v LLPT and Others

From: Louise Ferreira < |.ferreira@law.co.za>

Sent: Tuesday, 14 June 2022 11:58

To: epotgieter < EPotgieter@judiciary.org.za >

Cc: Nick Smith < nicks@nsmithlaw.co.za >; Sean Rosenberg < rosenberg@capebar.co.za >; adhikari@capebar.co.za ; Ismail Jamie < ianie@capebar.co.za >; Ron Paschke SC < ron@za.legal >; Ashley Pillay < ashley.pillay@capebar.co.za >; Adele Erasmus < adele.erasmus@capebar.co.za >; John Newdigate < iohn.newdigate@capebar.co.za >; Michael Bishop < mjbishop@outlook.com >; Alan Dodson < alandodson@law.co.za >; Jane Blomkamp < iohn.newdigate@capebar.co.za > Subject: Re: Case no.: 12994/2021 - Observatory Civic Association & Another v LLPT and Others

Dear Lizette,

Thank you for your response.

We will discuss a proposed timetable with the other parties and provide the JP with a formal request as soon as possible.

Kind regards,

Louise

Louise Ferreira
Advocate of the High Court of South Africa
Member of the Cape Bar
Suite 604, Keerom Street Chambers
56 Keerom Street
Cape Town

Mobile: 083 26 500 28 Fax: 021 424 9689

From: "epotgieter" < EPotgieter@judiciary.org.za>

To: "I ferreira" < I.ferreira@law.co.za>

, John Newdigate , Michae
Bishop" , "Jane Blomkamp" , "Jane Blomkamp" , "Jane Blomkamp" , "Michae <a href="mailt

Sent: Tuesday, June 14, 2022 11:49:39 AM

Subject: RE: Case no.: 12994/2021 - Observatory Civic Association & Another v LLPT and Others

Dear Louise

The Judge President is not doing any consultations, we word with correspondence.

Please obtain this file and take your file and the correspondence to Zane Booysen who will bring the file to the 3rd floor for the Judge President to give a directive.

Kind regards

LIZETTE POTGIETER

CHAMBERS OF THE HON, JUDGE PRESIDENT HLOPHE

IN THE HIGH COURT OF SOUTH AFRICA
Western Cape Division, Cape Town
OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA



3rd Floor, Room 329 35 Keerom Street Western Cape High Court Private Bag x 9020, Cape Town, 8000

From: Louise Ferreira [mailto:l.ferreira@law.co.za]

Sent: Tuesday, June 14, 2022 10:14 AM

To: Lizette Potgieter < EPotgieter@judiciary.org.za>

Cc: Nick Smith < nicks@nsmithlaw.co.za >; Sean Rosenberg < rosenberg@capebar.co.za >; adhikari@capebar.co.za; Ismail Jamie < iamie@capebar.co.za >; Ron Paschke SC < ron@za.legal >; Ashley Pillay < ashley.pillay@capebar.co.za >; Adele Erasmus < adele.erasmus@capebar.co.za >; John Newdigate < iohn.newdigate@capebar.co.za >; Michael Bishop < mibishop@outlook.com >; Alan Dodson < alandodson@law.co.za >; Jane Blomkamp < isblomkamp@capebar.co.za > Subject: Case no.: 12994/2021 - Observatory Civic Association & Another v LLPT and Others

Dear Lizette,

I refer to the above matter and the order issued by Goliath DJP in Part A of this matter on 18 March 2022, a copy of which is attached for your ease of reference.

As contemplated in paragraph 5 of the order, the First Respondent would like to request a meeting with the Judge President to obtain directives regarding the filing of further papers, heads of argument and a hearing date so as to ensure the expedited prosecution of part B of this application.

I would appreciate it if you could provide me with a few date options, as there are five sets of counsel involved in this matter.

Kind regards,

Louise
Louise Ferreira
Advocate of the High Court of South Africa

R

Member of the Cape Bar Suite 604, Keerom Street Chambers 56 Keerom Street Cape Town Mobile: 083 26 500 28

Fax: 021 424 9689

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

CASE NO:

in the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL

Second Applicant

and

JODY AUFRICHTIG N.O.

First Respondent

JAMES OTTO TANNEBERGER N.O.

Second Respondent

NICHOLAS SCOTT FERGUSON N.O.

Third Respondent

ALLAN JAMES FLYNN MUNDELL N.O.

Fourth Respondent

ADAM JOHN BLOW N.O.

Fifth Respondent

CITY OF CAPE TOWN

Sixth Respondent

THE MINISTER FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS & DEVELOPMENT
PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT Seventh Respondent

WESTERN CAPE FIRST NATIONS COLLECTIVE

Eighth Respondent

CONFIRMATORY AFFIDAVIT

i, the undersigned,

TAURIQ JENKINS,

do hereby make oath and state:

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE

2072 - 07 - 0.7
SUNNYSIDE
SOUTH AFRICAN POLICE SERVICE

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- I am the Supreme High Commissioner of the Goringhaicona Khoi Khoin Traditional Indigenous Council under Paramount Chief Aran. I have been duly authorised to depose to this affidavit on behalf of second applicant. A copy of a resolution authorising me to do so is attached marked as "TJ1".
- The contents of this affidavit are true and correct. Unless I indicate otherwise, or the contrary appears from the context, they are within my personal knowledge and belief. Legal submissions contained herein are made on the advice of the legal advisors of the Goringhaicona Khoi Khoin Indigenous Traditional Council, which advice I believe to be correct. Where I rely upon information conveyed to me by others, I state the source, which information I likewise believe to be true and correct.
- I have read the founding affidavit of Professor Leslie London which will be filed on behalf of the applicants in this application brought for contempt of court by the first to fifth respondents ("the LLPT").
- I confirm that the statements in that founding affidavit concerning the second applicant are true and correct and that the second applicant seek the relief sought in the notice of motion on the same grounds as the first applicant. Should the first to fifth respondents continue with their construction activities in contravention of the order handed down by the honourable DJP Goliath on 18 March 2022, the LLPT will be continuing the destruction of the second applicant's and other first nations groups' cultural heritage associated with the River Club site, the Liesbeek and Black Rivers and the larger Two Rivers Urban Park area.



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5 The second applicant pray that relief is granted in accordance with the notice of motion, including the costs of two counsel.

I certify that:

- t. the Deponent acknowledged to me that:
 - A. he knows and understands the contents of this declaration;
 - В. he has no objection to taking the prescribed oath;
 - he considers the prescribed oath to be binding on his conscience;
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- 111, the Deponent signed this declaration in my presence at the address set out hereunder on つフ July 2022.

Designation and Area: Synnys, Idl Full Names: Street Address: 466 (lyd) Street, Synnys, Idl

SOUTH AFRICAN POLICE SERVICE

CLIENT SERVICE CENTRE

2022 -07- 07

SUNNYSIDE

SOUTH AFRICAN POLICE SERVICE

RESOLUTION

OF THE

GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL

- 1. WHEREAS the Constitution of the Goringhaicona Khoi Khoin Indigenous Traditional Council (GKKITC) states that the GKKITC's mission are (inter alia):
 - to promote the right of self-determination for the Khoi Khoi people by having access to our natural resources;
 - to provide relevant information and cultural awareness to the Khoi Khoi and restore cultural and linguistic practices;
 - to engage National and Provincial government to secure rights to land, resources and the cultural protection for our indigenous products and practices;
 - to ensure the emancipation and restore the dignity of our women, men, youth and vulnerable groups;
 - to broadly promote socio economic development and address poverty eradication, job creation,
 skills development, gender equality, safety, peace and stability;
 - to form a legitimate national body of the Khoi and a global first nations body; and
 - to protect our rivers, flood planes, embankments, eco system and generally nature.
 - Z. WHEREAS the Liesbeek Leisure Property Trust ("the Developer") has been granted permission to develop an area adjacent to the confluence of the Liesbeeck and Black River in Cape Town which is of very great heritage significance to the Goringhaicona Khoi Khoin and other Indigenous Peoples ("the River Club Site") and the proposed River Club Development would dramatically change the River Club Site and cause irreparable damage to that heritage.
 - 3. WHEREAS in order to prevent the River Club Development from proceeding it will be now necessary to apply to the institute a High Court to set aside the environmental and land use authorisations that allow it to proceed and to appeal to the Water Tribunal against the granting of a water use licence for that development.
 - 4. NOW THEREFORE this duly constituted meeting of the National Executive Council held on 27th of _____ July 2021, resolves:
 - a. to instruct attorneys to represent the GKKITC in lodging an appeal to the Water Tribunal and in any High Court litigation that may necessary or desirable to prevent the

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development of the River Club Site in a manner that Is harmful to the cultural heritage associated with it and to the environment; and

- b. to authorise Mr Tauriq Jenkins, the Supreme High Commissioner of the GKKITC:
 - i. to engage the services of the law firm Cullinan and Associates Incorporated: to institute any administrative proceeding (including an appeal to the Water Tribunal) and legal proceedings to stop the River Club Development as may, in his opinion, be expedient and desirable, and to continue with that litigation until it is finally concluded; and to advise on this litigation and any ancillary legal matters which might arise in relation to the GKKITC's opposition to the River Club Development;
 - ii. to grant any power of attorney and sign any affidavits or other documents on behalf of the GKKITC as may be necessary or desirable to give effect to this resolution.

Signed at

Oude Molen, Cape Town

on this 27th day of July 2021

Paramount Chief Aran

Supreme Senior Chief Desmond Dreyer

Supreme High Commissioner Tauriq Jenkins

Supreme Elder, Peter Ludolph.

- Hamqua Patricia Aran

.....

JOHN BY

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