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

CASE NO: 12994/21

In the matter between:

OBSERVATORY CIVIC ASSOCIATION	First Applicant
GORINGHAICONA KHOI KHOIN	Second Applicant

And

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

JUDGMENT DELIVERED ELECTRONICALLY ON 18 MARCH 2022

GOLIATH DJP

Introduction

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

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

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

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

2.2 The decision taken by the fifth respondent ("the Minister") on 22 February 2021 in terms of section 43 (6) of NEMA to dismiss the appeals lodged against the Director's decision and to grant environmental authorisation for the proposed development ("the Minister's decision").

2.3 The decision taken by the City of Cape Town Municipal Planning Tribunal ("MPT") on 30 September 2020 to approve the proposed development application in terms of section 98 of the Municipal Planning By-Law, 2015 ("the MPT's decision).

2.4 The decision taken by the seventh respondent ("the Mayor") on 18 April 2021 to dismiss various appeals against the MPT's decision in terms of section 108 of the By-Law and to confirm the MPT's decision to approve the proposed development ("the Mayor's decision").

Factual Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chronology

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

18.1 On 18 January 2018 Hart and Townsend submitted a draft heritage impact assessment in respect of the development to HWC and the Western Cape Department of Environmental affairs and Development Planning (DEADP). The draft invited comments from interested and affected parties.

18.2 The developer's land use application was accepted by the City on 27 March 2018, and was published for public comment. The application was circulated to various City departments for consideration. This included detailed comments and analysis from the City's Environmental and Heritage Management in a 21-page report.

18.3 On 20 April 2018 HWC published a provisional report recording that the River Club site was protected for a maximum period of two years from date of publication.

18.4 On 1 July 2019 following input from various interested and affected parties Hart and Townsend revised the heritage impact assessment.

On 13 September 2019 HWC furnished its interim comment on the second HIA and requested the developer to further engage with the First Nations in respect of the property's heritage resources.

18.5 On 25 September 2019 AFMAS submitted the TRUP First Nations Report to the Western Cape Provincial Department of Transport and Public Works.

18.6 In November 2019 AFMAS concluded the River Club First Nations Report. In December 2019 Hart and Townsend prepared a supplement to the second HIA.

18.7 On 19 December 2019 the developer submitted its application for environmental authorisation to the Western Cape Provincial authorities. On 13 February 2020 HWC issued its final comment on the development, including its assessment of the December 2019 supplement to the heritage impact assessment. HWC indicated that the heritage impact assessment does not comply with section 38(3) of the NHRA, and it was therefore not in a position to endorse the development proposal.

18.8 In April 2020 the developer's consultants completed the Final Basic Assessment Report, setting out the environmental impact assessment of the development. On 20 August 2020 the Provincial Director (Fourth Respondent) issued the environmental authorisation for the development.

18.9 On 18 September 2020 the City's Municipal Planning Tribunal ('the MPT") considered the land use application. On 30 September 2020 the

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

18.10 On 22 February 2021 the Provincial Minister dismissed the appeals against the environmental authorisation and varied the conditions of approval. At this stage the LLPT still required a water use licence in terms of the National Water Act, 36 of 1998 ("NWA") to proceed with construction.

18.11 On 10 June 2021 the OCA received notification from the Department of Water and Sanitation that it had issued a water use licence to the LLPT. On 21 June 2021 the OCA lodged an appeal against the Minister's decision to issue the water licence. Observatory residents observed earthmoving vehicles move onto the site the weekend of 20 and 21 June 2021. On 29 June 2021 the attorneys for LLPT applied to the Minister to have the suspension lifted.

18.12 On 7 July 2021, the OCA was informed by the Department of Water and Sanitation that the LLPT had submitted a request to the Minister of Water and Sanitation in terms of section 148(2)(a) of the NWA for the

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

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

Applicants' delay in instituting legal proceedings

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

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

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

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

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

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

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

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

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

Applicants' Submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LLPT Submissions

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

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

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

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

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

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

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

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

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

44.3 Retaining approximately 60% of the River Club property as publicly accessible open space, with 25% of the River Club property being made available for recreational activities, including lawned areas, foot and cycling paths, and an ecological corridor.

44.4 Rehabilitating the Liesbeek Canal to function as a natural watercourse, with a 40m setback buffer which will include riverine vegetation to allow faunal movement, grassed banks and walking and cycling trails.

44.5 Infilling the unlined course of the Liesbeek River, treeing the infilled area, providing for bioretention swales and incorporating standing water ponds or "pocket wetlands" along the "swale area" to retain stormwater in early summer and support Western Leopard toad breeding cycles.

44.6 Infilling portions of the site above the 1:100 year floodplain.

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

45.1 Infrastructure to be constructed by LLPT: (1) a 2-lane extension of Berkley Road over the Black River; (2) a new bridge linking the site to the Liesbeek Parkway at Link Road over the original course of the Liesbeek River; and (3) the widening of the Liesbeek Parkway into the original course of the Liesbeek River, between Station Road and Link Road.

45.2 Infrastructure to be constructed by the City: (1) the "dual" Liesbeek Parkway between Link Road and Malta Road; and (2) the upgrade of the Berkley Road Extension to the River Club property, including widening the proposed Berkley Road Bridge over Black River, and extending Berkley Road to link Berkley Road (and M5) with Malta Road and Liesbeek Parkway at some point in future.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Third, Sixth and Seventh Respondents Submissions

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

(i) it lacks urgency;

(ii) the grant of an interdict will cause massive prejudice while its refusal will cause none;

(iii) the applicants make out no *prima facie* right that is threatened by irreparable harm;

(iv) the applicants make no case for a review;

(v) the provisional protection order has expired; and

(vi) the applicants have another satisfactory remedy.

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The Mayor allegedly dismissed all the *"considered and well-substantiated views by its own internal experts."*

(iii) It was allegedly *"procedurally irrational"* for the Mayor to prefer the assessments by the expert procured by the developer over the City's own environmental management department.

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

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

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

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

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

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

Fourth and Fifth Respondents' Submissions

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

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

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

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

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

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

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

[81] Ultimately, and after unsuccessfully attempting to seek further clarification from IACom and resolve the differing opinions between them and the heritage specialists as to whether the section 38(3) requirements had been met, the Director, as the consenting authority in terms of section 38(8), had to take his decision. He found that section 38(3) of the NHRA had been complied with and that HWC's "*concerns raised have been adequately responded to*".

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

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

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

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

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

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

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

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

Eight Respondent's Submissions

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

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

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

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

89.4 The Foundation Nation Restoration; and

89.5 The Cape Khoi San Labour Forum.

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

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

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

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

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

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

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

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

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

Amicus Submissions

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

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

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

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

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

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

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

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

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

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

99.5 Article 11(1) of UNDRIP provides:

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

99.6 Article 13(1) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

[115] The Court continued in paragraph 47:

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) The Khomani San led by Petrus Vaalbooi;

(b) The Khwe Bushmen led by King Tier;

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

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

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

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

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

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

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

(j) !Xun led by King Tier; and

(k) The Ubiqua led by Prins Lieffie.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

145.2 The three applications to strike are dismissed.

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

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

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

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DEPUTY JUDGE PRESIDENT GOLIATH

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