

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

Case No.: _____

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

**GORINGHAICONA KHOI KHOIN
INDIGENOUS TRADITIONAL COUNCIL**

Second Applicant

and

**TRUSTEES FOR THE TIME BEING OF
LIESBEEK LEISURE PROPERTIES TRUST**

First Respondent

HERITAGE WESTERN CAPE

Second Respondent

CITY OF CAPE TOWN

Third Respondent

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

Fourth Respondent

BN

**THE MINISTER FOR LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS & DEVELOPMENT**

PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT

Fifth Respondent

EXPERT AFFIDAVIT

I, the undersigned,

BRIDGET ELIZABETH O'DONOGHUE

do hereby make oath and state as follows:

1. I am an independent heritage consultant and registered heritage assessment practitioner.
2. The facts contained in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.

INTRODUCTION

3. I have more than 20 years of experience, as a heritage consultant and heritage assessment practitioner. I also have Bachelors degrees of Architectural Studies and Bachelor of Architecture, and a Masters of Philosophy (Environmental) degree from the University of Cape Town, and an Architectural and Urban Conservation

BW

short course at the University of Cape Town (UCT). Details of my qualifications, training and experience are set out in the attached copy of my *curriculum vitae* ('BD1.'). I respectfully submit that I am qualified by my qualifications, training and experience to express the expert opinions which are set out in this affidavit.

4. The first applicant in this matter requested me to review, and provide my expert opinion on, the following reports which form part of the final environmental impact report for the proposed development:

4.1. the October 2016 Draft Baseline Heritage Study for Two River Urban Park prepared by Melanie Atwell and Associates and Arcon Heritage and Design;

4.2. the October 2017 Supplementary Report on Two River Urban Park, submitted to Heritage Western Cape in terms of the additional requirements of HWC's Interim Comment of 3 May 2017, prepared by Melanie Attwell and Associates and ARCON Heritage and Design for Heritage Western Cape of behalf of the Provincial Government of the Western Cape (Department of Transport and Public Works) in partnership with the City of Cape Town;

4.3. 2 July 2019 Heritage Impact Assessment prepared in terms of Section 38 of the National Heritage Resources Act, by Steven Townsend and Tim Hart, as well as the supplementary report of 4 December 2019 to the Heritage Impact Assessment report of 2 July 2019, also prepared by Townend and Hart; and

BWS

- 4.4. comments made by Heritage Western Cape during the course of the environmental impact assessment conducted by SRK Consulting on behalf of the developer.
5. And in addition, the environmental authorisation granted by the Third Respondent to the First Respondent as well as the appeal decision of the Fourth Respondent in so far as it is relevant to compliance with the National Heritage Resources Act, 1999.
6. In the course of preparing this affidavit I have also reviewed and considered the National Heritage Resources Act, 1999 and the National Environmental Management Act, 1998, and Deidre Prins-Solani's expert affidavit.
7. At the outset, I make the following disclosures regarding my past and present association with the development in question. I was employed by SRK Consulting on behalf of the First Respondent to prepare a Heritage Impact Assessment (HIA) for the proposed development on the River Club site. Archaeologist Jonathan Kaplan of the Agency for Cultural Resource Management, was a subconsultant to my appointment for the assessment of the site's archaeological resources. The HIA Phase 1 report, prepared by myself and Mr Kaplan, was submitted for public comment and subsequently submitted to Heritage Western Cape (HWC). HWC's Impact Assessment Committee (IACOM) decided to assess the TRUP application before the application for River Club development, and the HIA Phase 1 was therefore not assessed by HWC. Subsequently due to my non-support for the proposed concept design, and that I was asked to work on the HIA with Dr Stephen

BWD

Townsend, I resigned from the project. All my fees were paid in full by the LLPT. I am currently commissioned by SVA International on behalf of their client Western Cape Government, to prepare a HIA for the Oude Molen site which is within the Two Rivers Urban Park ("TRUP").

8. In this affidavit:

- 8.1. "NHRA" means the National Heritage Resources Act, 1999;
- 8.2. "the developer" means the First Respondent;
- 8.3. "the proposed development" means the modern megadevelopment known as "the River Club" ("the proposed development").
- 8.4. "the 2016 Draft Baseline Heritage Study", unless otherwise indicated, refers to the October 2016 Draft Baseline Heritage Study for Two River Urban Park prepared by Melanie Atwell and Associates and Arcon Heritage and Design;
- 8.5. "the 2017 Supplementary Heritage Report", unless otherwise indicated, refers to the October 2017 Supplementary Report on Two River Urban Park, submitted to Heritage Western Cape in terms of the additional requirements of HWC's Interim Comment of 3 May 2017, prepared by Melanie Attwell and Associates and ARCON Heritage and Design for Heritage Western Cape of behalf of the Provincial Government of the Western Cape (Department of Transport and Public Works) in partnership with the City of Cape Town;

BW

- 8.6. "the 2019 Heritage Impact Assessment or 2019 HIA", unless otherwise indicated, refers to the July 2019 Heritage Impact Assessment prepared in terms of Section 38 of the NHRA by Steven Townsend and Tim Hart on behalf of the LLPT, (including the December 2019 Supplementary Report prepared by Townsend and Hart) which was submitted as part of the Environmental Impact Assessment for approval of the proposed development.
- 8.7. "HWC interim comments" mean the comments submitted by Heritage Western Cape on 19 September 2019 in respect of the 2019 HIA, and submitted as appendix E1 to the final environmental impact assessment report submitted in June 2020; and
- 8.8. "HWC final comments" means the comments submitted by Heritage Western Cape 13 February 2020 in respect of the 2019 HIA and submitted as appendix E1.b to the final environmental impact assessment report submitted in June 2020.
9. This affidavit consists of the following 5 parts:
- 9.1. Part One confirms the importance of intangible heritage in South African heritage law and practice;
- 9.2. Part Two explains why intangible heritage resources must, in terms of the NHRA, be properly identified and assessed in a HIA prepared in terms of

Section 38 of the NHRA, as well as the potential impacts on such resources of development;

- 9.3. Part Three considers whether or not the 2019 HIA by Townsend & Hart, submitted by the developer as part of the environmental impact assessment, meets the requirements of an HIA in terms of the NHRA;
- 9.4. Part Four considers and assesses the value of the 2020 comments provided by Heritage Western Cape on the 2019 HIA;
- 9.5. Part Five presents an opinion, in my capacity as an independent expert and qualified and registered heritage assessment practitioner, regarding the lawfulness of the DEA&DP approval of the 2019 Heritage Impact Assessment.

PART 1: INTANGIBLE HERITAGE IN SOUTH AFRICAN HERITAGE LAW AND PRACTICE

10. Definitions of Intangible Cultural Heritage, or Living Heritage, are provided in the expert affidavit of Deirdre Prins-Solani and these definitions and understandings of Intangible Heritage and its value also apply to this affidavit.
11. South African law, as well as international best practice, are clear regarding the critical importance of intangible heritage to the management and safeguarding of the National Estate, as it is defined in Section 3 of the NHRA.

14. Section 3(2) of the NHRA provides a comprehensive list of what (without limitation) comprises the National Estate: in other words, what might qualify as a “heritage” resource. For the purposes of this case, Section 3(2)(a), (b) and (d) are particularly important:

(a) places, buildings, structures and equipment of cultural significance;

(b) places to which oral traditions are attached or which are associated with living heritage; ...

(d) landscapes and natural features of cultural significance.

15. Section 3(3)(a) to (i) of the NHRA further expands the definition of the National Estate to include places or objects which meet the listed criteria for significance. Of particular importance to this case and for this affidavit are Section 3(3)(a), (b), (c) and (g) of the NHRA:

(a) its importance in the community, or pattern of South Africa’s history;

(b) its possession of uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage;

(c) its potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage;

(g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons.

16. In the 2016 Baseline Heritage Study as well as the 2017 Supplementary Heritage Report, the extraordinarily high intangible heritage significance of the Two Rivers Urban Park area as a whole is recognised and affirmed. These reports are clear that although no physical or tangible remnants of the pre-colonial past (such as human remains, structures or archaeological material) have yet been found here, this does not negate the high heritage significance of the land, including the River Club and surrounds.

PART 2: INTANGIBLE HERITAGE REQUIREMENTS IN TERMS OF THE NHRA

17. In order to be legally compliant with the NHRA, a HIA must meet the minimum requirements of section 38(3). A Heritage Impact Assessment prepared in terms of section 38(8) of the NHRA, while exempt from the provisions of Section 38 in general, must still comply with the minimum standards laid out in Section 38(3). In other words, it must be legally compliant with the NHRA, whether the HIA is being presented to the heritage authority in terms of the NHRA or to the DEA&DP in terms of the National Environmental Management Act, 1998 ("NEMA").
18. Section 38(3) provides seven requirements for an HIA to be considered legally compliant. Of particular interest to this affidavit are requirements (a), (b), and (c):
- (a) The identification and mapping of all heritage resources in the area affected;*
 - (b) an assessment of the significance of such resources in terms of the heritage assessment criteria set out in section 6(2) or prescribed under section 7; and*
 - (c) an assessment of the impact of the development on such heritage resources.*

1810

19. As noted in Part 1 (paragraph 14), the term “heritage resources” is *not* limited to tangible resources, such as buildings or archaeological resources. The National Estate, also includes places of cultural significance, places to which oral traditions are attached or which are associated with living heritage, and landscapes and natural features of cultural significance. An assessment of “heritage resources”, as part of an HIA, which does not comprehensively assess these elements as defined in the NHRA, would not be legally compliant with the provisions of the NHRA.
20. If an HIA does not adequately identify or assess the significance of such intangible resources as allowed for in the legislation, it has not fulfilled the requirements of Section 38(3)(a), and consequently cannot fulfil the requirements of Section 38(3)(b), (c), or indeed the rest of this section of the NHRA.
21. If the heritage resource is not accurately identified, clearly the potential impacts of development on the heritage resource cannot be assessed. This applies to intangible heritage elements as much as it does to buildings, human remains, or archaeological sites.

PART 3: THE 2019 HERITAGE IMPACT ASSESSMENT

22. In the 2019 Heritage Impact Assessment prepared for the developer by Townsend and Hart, the heritage resources on the River Club site are identified, in summary, as follows.
 - 22.1. The area at the confluence and between the Liesbeek and Black Rivers is identified as significant primarily on the basis of its history as an early

BW

colonial frontier; its links to early settler farming; and the consequent loss of “grazing land” by the First Nations/ Khoi pastoralists. The river confluence itself is identified as particularly high in historical significance.

- 22.2. However, Townsend and Hart argue that “the site itself has no tangible traces of early pre-colonial or colonial historic events”, other than the presence of the river confluence and the transformed landscape in its surrounds.
- 22.3. On the basis of the above, Townsend and Hart conclude that “*there are no heritage resources on the site that require intervention*” (see page 4 of the July 2019 HIA, appendix G5, Part 1, to the final EIA). In other words, the primary significance of the site is considered to be vested in its role as a colonial frontier and the site of early Dutch farming activity; and the absence of tangible remnants of this history, or of conflict between the Dutch and the Khoi, means that *no heritage resources are on the site*. In effect, the argument states, there is nothing here to protect, besides possibly the river confluence itself.
- 22.4. As a result of these conclusions regarding the presence of “heritage resources” on the site, Townsend and Hart argue, development on the site is possible, even desirable, provided the riverine corridor is “restored” and that allowance is made for a “commemorative area”. With these conditions, the writers argue, there will be no “unacceptable impacts on heritage resources or their significances.”

BMS

23. Returning to the definitions, stipulations and requirements of the NHRA listed in the sections above, it is clear that the 2019 Heritage Impact Assessment mis-identifies both the nature of what qualifies as a “heritage resource”; and, consequently, does not adequately engage with the remainder of the provisions of Section 38(3).
24. Paragraph 14 above points to the definitions of heritage resources, i.e. “the national estate”, provided by the NHRA. These definitions quite clearly include places of cultural significance, under the definitions of Section 3(3); landscapes of cultural significances; and, specifically, *places associated with living heritage*.
25. Therefore to claim that the absence of material remains indicates that no heritage resources are present, is inconsistent with the NHRA.
26. This is a particularly curious oversight given:
 - 26.1. the attention paid to intangible heritage in the 2016 and 2017 Baseline Heritage Studies;
 - 26.2. the clear links made by a wide range of Khoi and First Nations groups and individuals of the site to oral history, popular memory, living heritage, and indigenous knowledge systems; and
 - 26.3. the availability, as pointed out in Deirdre Prins-Solani’s expert affidavit, of systematic and adaptable international best practice standards for identifying, researching and assessing intangible heritage.

PART 4: HERITAGE WESTERN CAPE COMMENTS ON THE 2019 HERITAGE IMPACT ASSESSMENT

27. In its final comments, HWC finds that the requirements of Section 38(3) of the NHRA have not been met by the 2019 HIA.
28. The HWC final comment notes that, on the basis of the 2017 Baseline Heritage Study of the broader Two Rivers Urban Park area, it was clear that the entire TRUP area has extremely high heritage significance; and that no one element of this area, such as the River Club, can meaningfully be assessed outside of the context of the broader area.
29. In terms of the heritage significance of the Two Rivers Urban Park landscape, HWC is clear that the broader area possesses multiple and intersecting forms of heritage significance; and that many of these are related to intangible heritage (for example: memory, identity, sense of place and oral history). It also identifies the River Club area as an integral part of a "highly significant cultural landscape", an identification rooted in the idea of a landscape shaped by human activity and imbued with significance by both material change and by intangible practices and associations.
30. HWC further commented that Section 38(3) of the NHRA is not complied with by the 2019 Heritage Impact Assessment. In my expert opinion the comments of HWC are correct.

B10

- 30.1. Specifically, HWC notes in this comment that the limitation of “heritage resources” to only tangible resources is inadequate and not in keeping with the provisions of the NHRA (see page 5 of the HWC’s interim comments); and that therefore the requirement for identification and mapping of all heritage resources on the site has not been met (also see page 5).
- 30.2. HWC also notes that the HIA does not adequately provide an assessment of the significance of identified heritage resources. Drawing on Section 3(3) of the NHRA, HWC finds that the criteria in this section have not been applied to the assessment of significance; and, in particular, that there has been no assessment of intangible heritage resources in light of these criteria.
- 30.3. A similar critique is levelled at the supplement to the HIA and the associated First Nations report, which HWC finds “has not fully unpacked the significance of the site to a broad Community that has a recognised and direct, deep and sacred linkage to the site through lineage and collective memory.” (see paragraph 60 of the final comments of HWC).
- 30.4. Also in the final comments of HWC, it found that the HIA tailored the significance of the heritage of the site for the rationalisation of the given design proposed by the developer, and to arrive at mitigation for the development rather than an actual assessment of significance of the site (see paragraph 67).

BWD

- 30.5. HWC also notes that because the sense of place of the site has been transformed over the past 80 years, it does not result in it being acceptable for the proposed development to destroy the remaining degree of sense of place which is left of the site (see paragraph 79 of the HWC final comments).
- 30.6. HWC's comments also note that the 2019 HIA locates the significance of the site primarily in its ecological value, and not in its cultural heritage value; and argue that this limitation is short-sighted and inaccurate, particularly given the existing previous studies and the recognised high significance of the great TRUP area.
- 30.7. The HWC final comments raise several concerns about the 2019 HIA's assessment of the impact of the proposed development on the heritage resources of the site. Critically, HWC notes that "the HIA fails to assess the impact of the development on the most important heritage resource: the site's open, green qualities as a remnant of a landscape that has considerable intangible historic and cultural heritage significance." (see page 7, paragraph 77 of the final comments). Again, the mis-identification of what qualifies as a "heritage resource" in terms of the law has precluded an accurate and legally compliant assessment of impact.
31. The HWC comments on the 2019 HIA are thorough and comprehensive, and I am in agreement with the critiques made of the 2019 HIA by Heritage Western Cape.

BND

PART 5: CONCLUSIONS

32. On the basis of the above, my conclusions and opinion regarding the compliance of the Townsend and Hart 2019 Heritage Impact Assessment are summarised below.

32.1. The 2019 HIA misidentifies and limits that nature of a “heritage resource” as defined in the NHRA.

32.2. The NHRA makes clear reference to intangible heritage as a critical component of the national estate, and there is nothing in the NHRA itself to exclude this or to limit understandings of heritage significance to physical or material objects or structures.

32.3. The Heritage Western Cape assessment of the 2019 HIA is comprehensive and accurate, and I am in general agreement with it.

32.4. I concur with HWC’s view that the 2019 HIA does not comply with the provisions of Section 38(3) of the NHRA.

32.5. The law is clear that an HIA undertaken in terms of Section 38(8) of the NHRA must be compliant with the minimum requirements of Section 38(3). The 2019 Townsend and Hart HIA does not meet these requirements.

33. In my expert opinion, any decision regarding the heritage impacts of the proposed development that is based on the 2019 HIA will be unsound. A new HIA should be undertaken which:

BN

- 33.1.1. fulfils the legal criteria of the NHRA as per Section 38(3)
- 33.1.2. fully and comprehensively engages with the findings of existing previous reports and studies, particularly those dealing with the broader TRUP area; and
- 33.1.3. follows international best practice standards to identify, assess and record the intangible heritage significances of the site, as well as the potential impact on these of development.

Bridget O'Donoghue

BRIDGET ELIZABETH O'DONOGHUE

I certify that:

- I. the Deponent acknowledged to me that :
 - A. He knows and understands the contents of this declaration;
 - B. He has no objection to taking the prescribed oath;
 - C. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on 2021-07-30 2021.

P-2 Ngqekwe

COMMISSIONER OF OATHS

Designation and Area: *Constable, Claremont*

Full Names: *Anakama Ngqekwe*

Street Address: *60 main Haron Ross
Claremont
CAPE TOWN*

SUID-AFRIKAANSE POLISIEDIENS GEMEENSKAPDIENSSENTRUM
30 JUL 2021
COMMUNITY SERVICE CENTRE CLAREMONT K.P / C.P.
SOUTH AFRICAN POLICE SERVICE