

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

Case No.: 12994 / 2021

In the matter between:

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

EXPERT'S REPLYING AFFIDAVIT

I, the undersigned,

DEIRDRE PRINS-SOLANI



do hereby make oath and state as follows:

1. I am an independent consultant and practitioner specialising in the fields of intangible heritage, education, and community-based inventorying.
2. I deposed to the expert affidavit which was filed on behalf of the first applicant as part of the founding papers in these proceedings ("my previous affidavit").
3. The contents of this affidavit are true and correct. Unless I indicate otherwise, or the contrary appears from the context, they are within my personal knowledge and belief. The legal submissions in this affidavit are made on the advice of the First Applicants' legal advisors, which advice I believe to be correct. Where I rely upon information conveyed to me by others, I state the source, which information I likewise believe to be true and correct.
4. It is not my intention to deal with each of the Respondents' allegations. Any allegation that is not specifically dealt with herein should be taken as denied, unless that denial is inconsistent with what is set out elsewhere in this affidavit.
5. In this affidavit I reply to the averments in the Respondent's answering affidavits to the effect that the conclusions reached in my previous affidavit are irrelevant or irrational because I did not consider certain documents which are alleged to constitute an adequate expert assessment of the relevant intangible heritage.
6. I also explain in more detail why such physical changes will damage intangible cultural heritage ("ICH") because of the inextricable link between the physical landscape and ICH (paragraphs 40 to 50). I have done so because the

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Respondents have argued that the physical alterations of the landscape that have commenced on the River Club site will not damage intangible heritage and consequently the court should refuse to grant an interim interdict.

REPLY TO FIRST RESPONDENT

AD PARAGRAPH 318

7. Mr Aufrichtig's affidavit indicates that his response to my previous affidavit is based on advice from Messrs Townsend, Hart and Arendse (para 318; R:912). It is important to note that neither Townsend, Hart nor Arendse is an expert in assessing intangible heritage. HWC pointed this out in relation to Townsend and Hart and indicated that such a specialist should be appointed. As I explain below in response to paragraph 336.1, Mr Arendse is not a specialist in intangible heritage.
8. Mr Aufrichtig complains that I did not consider any of the documents submitted by the heritage consultants subsequent to HWC's interim comments. (paragraph 318.6 ;R: 913). Those documents are: Mr Arendse's AFMAS Report, the December 2019 HIA Supplementary report of Messrs Townsend and Hart and their documents of March and September 2020 which intended to rebut HWC's final comment and HWC's appeal against the environmental authorisation.
9. I confirm that I considered both the interim and final comments of HWC in respect of the 2019 HIA prepared by Messrs Townsend and Hart for the purposes of preparing my previous affidavit. I have now also considered the other documents which Mr Aufrichtig refers to in paragraph 318.6.

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- 9.1. In their December 2019 supplementary HIA report, Mr Hart and Dr Townsend do not attempt to address any of the inadequacies which was raised by HWC in respect of the July 2019 affidavit and merely restate their July 2019 findings.
- 9.2. The replies of Messrs Townsend and Hart to both HWC's final comments and their appeal (annexures JA15 and JA16 to Mr Aufrichtig's answering affidavit) do not contain new information, instead they rely on existing information in an (unsuccessful) attempt to rebut HWC's critique of the HIA.
- 9.3. The AFMAS Report (as I explain below) does not constitute an assessment of ICH and certainly does not cure the defects in the assessment of intangible heritage identified by HWC. However it is apparent from the replying affidavits of the Respondents that they place reliance on the AFMAS Report as an assessment of ICH and consequently I have explained below why any such reliance is misplaced.
10. In short, for the reasons set out more fully below, none of the statements made in Mr Arendse's AFMAS Report, the December 2019 HIA Supplementary report of Messrs Townsend and Hart or in their rebuttal documents of March and September 2020 to HWC's final comment and HWC's appeal against the environmental authorisation has:
 - 10.1. changed my assessment of the July 2019 HIA by Messrs Townsend and Hart;
 - 10.2. resolved the failure of Messrs Townsend, Hart and Arendse's to assess the intangible heritage associated with the site and TRUP area; or

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10.3. changed the conclusions reached in my initial affidavit in respect of the failures of the heritage impact assessment by the specialists of the First Respondent, as set out in paragraph 40 of my previous expert affidavit (R: 795).

AD PARAGRAPH 336.1

11. Mr Aufrichtig expresses the view that Mr Arendse's experience in preparing the TRUP First Nations Report dated 27 September 2019 made Mr Arendse "a leading authority in that particular history and narrative, with particular reference to intangible heritage significance" (para 336.1, R:926). This conclusion is not supported by the facts.

11.1. Mr Arendse's curriculum vitae annexed to the AFMAS Report, which indicates that he holds an honour's degree in Social Anthropology and no formal qualifications in heritage; in particular, no qualifications in matters of intangible heritage which would allow him to present himself as an expert in intangible heritage.

11.2. The methodology used by Mr Arendse to compile the AFMAS Report was deeply flawed (see paragraphs 25 to 30 below) and betrays a failure to appreciate the ethical norms that should be applied to such studies (paragraphs 31 and bias).

11.3. The AFMAS Report is not an assessment of the intangible heritage associated with the TRUP area and River Club site. For example, as I explain below, the AFMA's Report: decontextualises intangible heritage (see paragraphs 12 to 14 below), does not appreciate the intrinsic link between the sense of place and



the landscape of the River Club site and surrounding area (paragraphs 15 to 17), and is divisive rather than inclusive which distorts the First Nations narrative (paragraphs 18 to 24).

Decontextualisation of intangible heritage

12. Living heritage is understood to be dynamic and changes over time. In the documentation process existing practices and beliefs which have been sustained over generations would need to be reflected to have it regarded as ICH. While the brutalisation of cultural heritage has reverberated through centuries of colonisation and apartheid rule, there is evidence of forms of practice which have continued (see the works of Bam, J, Mellet, P, Worden, N). A duly conducted ICH inventorying process would elicit such data. This data is absent from the report of Mr Arendse.
13. The AFMAS Report does not identify the discrete inter-relationship between heritage resources such as ICH and place (ICOMOS guidelines, UNESCO 2003 Convention Article 14 which states; "promote education for the protection of natural spaces and places of memory whose existence is necessary for expressing the ICH"). This set of discrete inter-relationships would articulate the relationship between the landscape as a whole and the ICH. The absence of a detailed identification of ICH resources and their inter-relationship challenges the conclusion of the report as it is based on insubstantial and insufficient data.
14. The proposal for a museum and garden disaggregates the values of the site and associated ICH. ICH is safeguarded through practice and its transmission. Dislocating ICH from the landscape in which the values are imbued, decontextualizes ICH and does not necessarily lead to safeguarding or

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improvement of ICH (as the Mayor argued in its answering affidavit, paragraph 15.3, R: 1438). An example of de-contextualisation which have impacted negatively on ICH is that of the El Festival de Los Voldares in Mexico, where the ICH associated with the site, was negatively impacted through tourism pressures, or the museumification or documentation of ICH which freezes and essentialises practices within a building and material form, dislocating the ICH from place.

Sense of place

15. While the AFMAS Report raises specific themes such as resistance, freedom, cosmology, land and people and waterways, the report does not sufficiently address the significance of the sense of place and the landscape of the River Club site and surrounding area, in particular the confluence of the two rivers, as intrinsically linked to the intangible heritage associated with the land. The landscape itself, its ecology, the two rivers and the river confluence cannot be separated from intangible heritage elements, practices, or meanings that are linked with the space and its sense of place.
16. The very elements which are linked with the site and its sense of place are currently being destroyed by the construction and earthworks processes, and in response to which an urgent interdict is being sought to avoid further destruction while the court resolves the matter. Differently put, the altering and destruction of tangible heritage resources identified at the site and the TRUP, in effect alters the sense of place as experienced, and ultimately harms the living heritage associated with the site (as living heritage associated with a site

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is directly influenced and understood in the context of the site's "sense of place").

17. The AFMAS Report's lack of serious engagement with the relationship between intangible heritage and place is apparent in (but not limited to) the following aspects of the report.

17.1. In their representations on this matter, the Second Applicant noted that the River Club precinct was the site of the 1510 battle of the Goringhaiqua in which the Portuguese were defeated. This claim is disputed by the First Nations Collective on the basis that the entire TRUP was the site of the battle and this is based on a claim that this is "not borne out by any historical record or evidence". This is a puzzling claim as the historical record recognises that the River Club land was in the path of movement of the Portuguese as their forces moved inland during the raids of 1510. This statement in the AFMAS report thus appears to be a faulty rationalisation intended to strip the River Club land from any historical significance, in order to bolster the argument that intangible heritage is not affected by the development.

17.2. Even if this were not the case, it is not disputed that the River Club land was part of the fortified Dutch colonial frontier. In fact, Figures 24-26 of the AFMAS report, intended to support the argument that the Varschedrift crossing was not on River Club land, visually confirm that the River Club was part of this frontier and was fortified under Dutch rule. Irrespective of whether or not the 1510 battle or parts of the battle took place on River Club land, the historical record is clear that the site was an integral part of colonial conflict and resistance, which is a strong informant of the intangible heritage and collective memory associated

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with the site. There is no clear rationale or historical evidence for Mr Arendse's AFMAS report to attempt to excise the River Club land from this historical memory and intangible heritage associations. This misrepresentation does, however, suggest that the intention at the outset of the report was to find grounds for justification of the development in exchange for the promise of the cultural centre and indigenous garden to be managed by the Eight Respondent. The report effectively attempts to strip the River Club land of historical significance, in order to make a case in favour of development.

- 17.3. Furthermore, the AFMAS report ignores some of its own data that confirms the that the river confluence cannot be separated from intangible heritage elements and its sense of place. For example it cites the following statements:

"Places where rivers are coming together, are special places. Those rivers are connected with people and memory. ... because of the rivers coming together there. So that space holds a huge memory." (R: 1098)

and

"The Khoi and the San have the most exquisite symbiotic relationship with the soil, with the river, with the stars, with IKaggen, who's the mantis. And, when you look at the Liesbeeck River, the flow of that river and the land next to it..."

(R: 1096)

Divisiveness and distortion of the First Nations Narrative

18. The AFMAS 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 Two River area negates the premise for social cohesion through culture.

19. Mr Arendse prepared both the report titled "Two Rivers Urban Park First Nations Report" (the "TRUP Report") for the Western Cape Government Department of Transport and Public Works ("DTPW") and AFMAS Report, as he confirms in paragraph 6 of his confirmatory affidavit. A substantive difference between the two reports, which illuminates the divisive nature of the AFMAS Report, in addition to the "pro-development" nature of the AFMAS Report, can be ascribed to Mr Arendse's decision to include only certain Khoi groups in his study which culminated in the AFMAS Report.
20. There were 8 Khoi groups interviewed in the TRUP Report, but only 5 Khoi groups interviewed in the AFMAS Report regarding their accounts of the First Nations Narrative. Of the 8 Khoi groups in the TRUP Report, only 3 groups are interviewed in the AFMAS 2019 Report supplemented by a San and Griqua group. That means that more than half of the groups that participated in the TRUP project were not involved or present for conducting interviews with Mr Arendse to explain how the proposed development will impact on their heritage, considering their respective First Nation Narratives.
21. This lack of inclusivity was noted by Heritage Western Cape as a problem (see paragraph 97 of HWC's Final Comments of February 2020, R:278). In my expert opinion, this exclusion is contrary to standard practice of community based inventorying, which promotes inclusion. If an adequate standard of community based inventorying were followed, a holistic account of the First

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Nations Narrative with regards to the site and how the development will impact their heritage would have been evident from the AFMAS Report 2019. However, a tailored First Nations Narrative was presented to decision makers and ultimately made it impossible for decision makers to take into account relevant considerations with respect to the impacts of the development.

22. Notwithstanding the failure to include those important First Nations Narratives in the AFMAS Report, Mr Arendse failed to provide an adequate explanation for the exclusion of those groups from the AFMAS Report. This is despite the fact that data in the AFMAS Report include comments made by members of Khoi groups who were participants in the TRUP project and TRUP Report, but who did not participate in the HIA of the proposed development. Section 5.H (R: 1082 to 1085) included in AFMAS Report, under the heading "First Nations Collective" attempts to justify why the narratives of other Khoi groups were excluded from the narrative being portrayed in Arendse's report in support of the development. However, this section does not reflect any sense of consideration as to what the exclusion of the aforementioned Khoi groups mean for the "First Nations Narrative" Arendse generated in the AFMAS Report.

23. Instead, three of the total of four pages which purports to be the rationale for excluding the Khoi groups focusses on denigrating and casts aspersions on Paramount Chief Aran of the Second Applicant. Mr Arendse simply presents an unchallenged set of allegations over three pages without context or checking as if these are data that reflect a set of facts (and I would argue that decision makers who had considered these unchallenged allegations were undoubtedly

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influenced by them in their respective decision-making processes, resulting in irrelevant considerations being taken into account).

23.1. I pause to note that it is unacceptable for an independent consultant to make use of social media posts of Chief Aran as data without attempting to exercise any critical engagement as to why this specific information was presented by the Eight Respondent. In the absence of such critical engagement, the Eight Respondent, who supports the development, were given the opportunity by Mr Arendse to disparage Khoi groups who are opposed to the development.

24. Over and above the condescending rationalisation which Mr Arendse provides for excluding the Second Applicant from the AFMAS Report and the consequent "First Nations Narrative" as portrayed by him, Mr Arendse includes further information which is plainly offensive towards the Second Applicant and its members.

24.1. For example, a memorandum from Jan Van Riebeeck which describes the Goringhaicona as 'ugly' beggars and thieves is included. There is no context to this entry and no effort to analyse the racism or political intent of such an entry (R: 1109).

24.2. The references to Patric Mellet's work present the Goringhaicona as "drifters and outcasts" and "neither a tribe nor a clan but a totally new creation." A closer reading of Mellet will see that he does not deny or downplay the Goringhaicona as lacking authentic indigenous roots; indeed they are "kin" who are disparaged

for having “left us”¹. However, Mr Arendse juxtaposes this statement against the claim that the Gorinhaliqua were the traditional custodians of the land, implying that Goringhaicona objections have no standing. This is a deliberate attempt to dismiss an alternative Khoi narrative, one that has been ignored throughout the report.

25. Mr Arendse would have been well aware of the different perspectives expressed about the River Club land and the wider Two River area by entities other than the FNC during the application process, and not just the Second Applicant. However, no effort was made to seek out these narrative nor capture the full Khoi Narrative.

Methodology

26. The methodology used to produce the AFMAS Report written by Mr Arendse is not the methodology one would expect from an independent and competent specialist. Mr Arendse uses interviews and extracts with representatives from the communities concerned to make a case for positional power and ‘ownership’ of the land rather than investigating the intangible cultural heritage, whereas this inventorying process is meant to be a systematic and careful documentation of all of the ICH identified by communities concerned. An adequate inventorying process involves a detailed description for each of the elements identified, as well as documentation of how it has changed over time, transmission practices and resources required to continue them.

¹ For example, see Chapter 2 of THE CAMISSA EMBRACE: Odyssey of an Unrecognised African People by Patric Tariq Mellet. <https://camissapeople.files.wordpress.com/2019/04/2-the-camissa-embrace-chap-2-with-endnote-citations.pdf>

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27. Another aspect of this documentation process requires a careful consideration of all of the risks and threats to the safeguarding and transmission of the ICH, including an exploration of the relationship between ICH elements and the material or tangible resources associated with them. In ICH related research conducted in other development projects, studies have indicated that there can be no real separation between the material and the immaterial in consideration of impacts on ICH (see Eoin, L and King, R 2013; Apoh, W and Gavua, K 2016). For example the study by Nic Eoin and King of the University of Oxford titled "How to develop Intangible Heritage: the case of Metolong Dam, Lesotho" ("the Metolong Study"), considered the adequacy of recording intangible heritage as a mitigation measure for the impacts of building the Metolong Dam on communities in the catchment area. The authors of the Metolong Study conclude that *"almost no 'intangible' heritage is without material correlates"* (p 655) and state:

"Our work at Metolong shows that ICH must be understood materially as well as socially. We contend that 'intangible heritage', as least at Metolong, is actually nothing of the kind: it is simply heritage, and (like all heritage) has a material correlate. When this material correlate is lost, engagement with the ICH becomes impossible for all parties." (p 661)

28. I have not attached this study to avoid overburdening the record it will be available at the hearing if required.

29. The interrelationship between the very broad themes identified by Mr Arendse and the land is not well investigated or reflected in the interviews copied into the report. There is no consideration given to how the change in the physical

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environment at the River Club and the tangible heritage resources, such as the Liesbeek River and the confluence of the Black and Liesbeek Rivers (which act as the material correlates for ICH associated with the River Club site) will affect the ICH associated with the River Club site and the wider Two Rivers area. In other words, there is a disconnect between the data Mr Arendse collected and the inference he made in respect of the impacts of the development on ICH.

30. The failure to investigate the interrelationship between the broad themes identified by Mr Arendse and the interviews he copied into the report and therefore the disconnect between the data collected and inferences made is attributable, in my view, to Mr Arendse's misunderstanding of what constitutes intangible heritage and how it could be impacted by the development.

Ethics

31. Mr Arendse failed to follow relevant ethical standards that are applicable to assessments, especially the SAN Code of Research Ethics ("the SAN Code") published in 2017. The SAN Code was published two years before Mr Arendse conducted the AFMAS Report, and he should have been aware of the SAN Code and followed their standards of ethics in conducting his assessment, especially if he is an expert in indigenous knowledge system as he claims.
32. To the extent that the San and Khoi share ancestral roots, traditional world views and similar experiences of marginalisation and oppression, it is reasonable, in the absence of any latter day alternatives, to consider the SAN Code as being the gold standard for the conduct of research with indigenous people in South Africa. That he does not reference the SAN Code is concerning. It is concerning because if Mr Arendse abided by the SAN Code he would have

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realised that is explicit about consent required from groups or individuals being interviewed and states:

"Prior informed consent can only be based on honesty in the communications, which needs to be carefully documented. Honesty also means absolute transparency in all aspects of the engagement, including the funding situation, the purpose of the research, and any changes that might occur during the process."

33. It is my understanding that Mr Arendse collected information from First Nations informants for purposes of the TRUP Report but then used that information from the informants which was given to him during his work preparing the TRUP Report, in the AFMAS Report. There is no evidence that Mr Arendse sought or obtained permission from the participants in his interviews for the TRUP Report, to use their quotes for the AFMAS Report in support of a private developer.
34. Despite this concern regarding consent being named in a Heritage Appeal Tribunal meeting and noted in HWC final comments (HWC said *"The methodology for the engagement does not appear to follow accepted oral history interviewing protocols (for example. no ethical clearance forms were supplied."* (see paragraph 97(d) of HWC's final comment, R: 278). Mr Arendse claims in his confirmatory affidavit that he *"observed all ethical requirements and protocols with regard to privacy, anonymity, confidentiality, and protection of First Nation participants in the project."* His statement cannot be accepted as correct, because as explained above and below he failed to observe essential ethical requirement to obtain consent from informants, such as Mr Jenkins of the Second Applicant, to use their interviews which were conducted for the

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TRUP Report, in support of the proposed development (as canvassed in the AFMAS Report). The result is that Mr Arendse appears to have no documentation at all of any informed consent. This is entirely contrary to the San Code of Research Ethics which makes it clear that *"Prior informed consent can only be based on honesty in the communications, which needs to be carefully documented."*

35. The SAN Code also states that:

"Honesty requires an open and continuous mode of communication between the San and researchers."

36. There was no continuous communication between the Khoi participants and the Mr Arendse, except for those who chose to support the development (later to be known as the First Nations Collective).

37. The SAN Code further states:

"We have encountered lack of honesty in many instances in the past. Researchers have deviated from the stated purpose of research, failed to honour a promise to show the San the research prior to publication, and published a biased paper based upon leading questions ..."

38. It is the case that all elements of honesty lacks in this report. Firstly, the researcher collected information for one purpose and then went ahead to use for a different purpose (i.e. Mr Arendse used data he gathered for the TRUP Report to support the findings he made for purposes of the AFMAS Report (and by extension the development). Secondly, the Mr Arendse did not show participants his AFMAS Report prior to releasing it (or gave them a chance to



comment thereon). If Mr Arendse did invite the Khoi groups view and comment on the AFMAS Report before it was released, it must only have been shown to the participants who supported the development, as I am of the view the Second Applicant would have requested that Mr Arendse removed the harmful statements made of it in the AFMAS Report (but I am also doubtful as to whether he would have removed the statements even if he were requested to do so).

AD PARAGRAPH 318.10

39. Mr Aufrichtig mentions that I made no effort in my affidavit to identify any intangible heritage associated with the site or the wider Two Rivers area. As per paragraphs 34 to 38 of my previous expert affidavit (R: 791 - 793), I described the living or intangible heritage inventorying process and mention that this was missing from the 2019 HIA by Messrs Townsend, Hart and Arendse. Had an adequate inventory process been followed, the information would have provided decision makers with all the relevant information in so far as determining the extent to which intangible heritage will be impacted by the proposed development. There are therefore potentially aspects of intangible heritage which has not been properly assessed. However, there are aspects of intangible heritage associated with the site and the greater Two Rivers area which will be affected by the proposed development such as the open spaces of the site, the sense of place associated therewith and historical significance of the site and associations of historical events with the site.



40. Historical significance and association with historical events is one aspect of intangible heritage, and the links between intangible heritage and place, but intangible heritage is not limited to historical association alone. Intangible heritage cannot meaningfully be separated from the sense of place of the land in question, or from the sense of historical continuity that land and sense of place represents in terms of history, memory, culture, practice, cosmology, and spirituality. These terms are acknowledged by all parties, including in the AFMAS Report, as aspects of intangible heritage, however, the AFMAS Report fails to engage with these in terms of what this means for the River Club land itself. The suggestion that the River Club does not carry historical significance worthy of protection is addressed above, as is the conflation of “intangible heritage” and “historical significance”.
41. Following this, a key question is: does destroying the sense of place of this land reasonably equate to an irreversible destruction of intangible heritage associated with the land? The LLPT argues that it does not; but this argument does not stand up to scrutiny. “Sense of place” can broadly be understood to refer to attachments and relationships that people have to a place, including the meanings of place and the way that space is experienced. (see: <https://www.thenatureofcities.com/2016/05/26/sense-of-place/> ; and <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100454793>).
42. In the case of the River Club land, it is accepted that the appearance and much of the physical nature of the land has changed over time – one would hardly expect it to be identical in appearance to the time of 17th century Dutch

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fortification or expect this to be a qualifying measure for protection. Nonetheless, it retains a sense of openness and greenery; the original river course remains visible; the highly significant and sacred river confluence remains in existence; and visual links between the land, the river and the mountain remain apparent. All of these qualities, as well as the association of indigenous spirituality and memory with the land surrounding the River Club (although somehow curiously excising the River Club itself from this assessment) are acknowledged in the AFMAS report.

43. It is difficult to see how it can be argued that changing the river course, somehow trying to move a spiritual association from the original river course to a new canal, infilling the floodplain at the sacred confluence with concrete, and permanently altering the sense of place of the land can somehow be disconnected from the intangible heritage associated with the land. (This problem is compounded by the methodological problems with the AFMAS Report and its failure to properly identify the full range of intangible heritage associations with the landscape in the first place.)
44. Simply transferring practices, beliefs and memory into a formalised space like a museum is not an adequate recognition, particularly where intangible heritage is so strongly associated with a particular space and the particular qualities of that space. If we consider this in conjunction with the fact that the AFMAS Report excludes several of the First Nations groups who participated in the earlier TRUP Report, and amends its findings to align with the views of only those groups who had already expressed support for the development, it is clear that the author has fundamentally misunderstood the links between



intangible heritage and place; as well as the internationally accepted best practices for research ethics and intangible heritage inventorying, and ethics applicable to research of the San and Khoi people.

45. Research and cultural resource management practice globally agrees that intangible heritage and cultural meaning is intrinsically linked to land, not just in the cadastral sense but also in the qualities and integrity of that land. This is why it is so critical that an urgent injunction is issued to prevent further destruction of the landscape while the court review is pending: the damage is neither reversible nor recoverable, especially in light of the lack of ethical, methodologically sound, unbiased research into the intangible heritage elements associated with and supported by this landscape. In understanding the irreparable harm which is being done, I agree with authors Rick Budhwa and Tyler McCreary when they state :*“The loss of this distinct sense of place can have significant impact on individuals and communities with such connections”*. (Rick Budhwa and Tyler McCreary, “Reconciling Cultural Resource Management With Indigenous Geographies: The Importance of Connecting Research With People And Place”, in *A Deeper Sense of Place: Stories and Journeys of Indigenous-Academic Collaboration*, edited by Jay T. Johnson.)

46. Mr Aufrichtig also, in his mechanistic and reductionist interpretation, of what constitutes intangible heritage and how it could be irreparably harmed, mentions that I failed to explain how any *“imagined intangible heritage (named, described, qualified and / or quantified) could be adversely affected.”* I pause to note the offensive nature of Mr Aufrichtig’s statement in this regard. To imply



that the significance of First Nations people's intangible heritage associated with the site and the wider Two Rivers area, is "imagined", is totally insensitive to the memories of the ancestors to the very people he and the First Respondent professes to be benefitting with the proposed development.

47. Intangible heritage can be irreparably harmed and / or altered by a number of events. Large scale corporate developments are infamous for changing the sense of place, living memories and intangible heritage associated with a certain place. Once these developments commence, they irreparably alter the intangible heritage associated with a site because the sense of place, living heritage and material forms are intricately related as outlined above. By way of example, the construction works and invasive excavation taking place on the site currently, although physical activities, disturbs the sense of place and this ultimately detracts from and irreparably harms the memories which First Nations associates with the site. The physical transformation of the material correlates of the ICH (e.g. the loss of the open landscape with uninterrupted views of the mountains and the visual sense of the Liesbeek and Black Rivers meandering across a riverine floodplain and marshlands to their confluence) means that future engagement with the associated ICH (including conducting an inventory of it) becomes impossible.
48. Considering the manner in which intangible heritage is affected by the development and inadvertently harmed, it is not possible for the intangible heritage to be restored to its previous state for the reasons explained in paragraph 47 and the Respondents' notions that the intangible heritage

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associated with the site will be unaffected even if the construction goes ahead and the interdict is not granted, cannot be supported.

49. I bring the Honourable Court's attention to an important case study of how intangible heritage has been irreparably harmed and changed in the past by developments. The research in the Metolong Study details how the impacts of the Lesotho government's development of dam, on living heritage in Lesotho and this should serve as critical cautions and recommendations for addressing the safeguarding of ICH and the mitigation of development impacts. In the Metolong Study, the authors highlight not only the obvious forms of living heritage practices, but the discrete and more invisible practices associated with the lands affected, far beyond the boundaries of the geographical area identified by the developer. Irreparable harm was done to the ICH. As the ICH study was only conducted in the latter stages of the dam project, much damage had been done already.

50. In the context of the abovementioned case study, it should be easy for the First Respondent and the other Respondents to understand how the proposed development, which I am advised has already commenced, is irreparably harming the identified intangible heritage associated with the site and the broader Two Rivers area, and could be irreversibly damaging intangible heritage which has yet to be assessed (due to the failure of the First Respondent to conduct a proper assessment of intangible heritage). The radical transformation of the site erases the markers of the interrelationship between the material and the immaterial, thereby obfuscating ICH which has yet to be documented adequately. It also forecloses any opportunities for preserving the

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heritage of the site through careful planning which takes the heritage into cognisance.

REPLY TO THE CITY (THIRD, SIXTH AND SEVENTH RESPONDENTS)

51. I submit that the failure of the 2019 HIA of Messrs Townsend, Hart and Arendse to adequately assess the intangible heritage impacts, as identified in my previous expert affidavit and herein, results in the inability of the City to have taken all relevant considerations in assessing intangible heritage impacts. Considering the aforementioned inadequacies, it would not have been possible for the City to adequately consider the intangible heritage impacts of the development in terms of section 99 of the MPB.
52. I further submit that the City's persistent reliance on the AFMAS Report to justify its proper consideration of the impacts of the proposed development on the intangible heritage and interests of the First Nations groups associated with the site and wider Two Rivers area is misplaced. The Mayor's allegations that the intangible heritage associated with the site will be improved by the proposed development is nonsensical considering the flawed nature of the information on which the Mayor bases his view in this regard.
53. In the affidavit of the Seventh Respondent it is also alleged that I have failed to consider City's decision making process in respect of the heritage impacts and the consideration which the City gave thereto in both the MPT report and the Mayor's appeal decision. I have subsequently considered the relevant sections of the MPT report which sets out the MPT's decision in respect of the heritage impacts and the intangible heritage, and the Mayor's appeal decision to the

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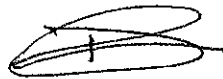

extent which it considers the heritage impacts of the proposed development (as set out in paragraphs 145 to 227 of the Mayor's appeal decision).

54. Accordingly, I submit despite the Mayor's assertions in paragraph 363 of its answering affidavit (R: 1545), the conclusions reached in paragraph 40 of my previous expert affidavit is equally relevant to the decisions the City had made. I am advised that this renders the City's respective decisions reviewable.

CONCLUSION

55. It is clear from what I have stated above, that the intangible heritage associated with the TRUP Area and the River Club site was not adequately assessed, and therefore none of the decision-makers (i.e. the Fourth, Fifth, Six and Seventh Respondents) had the necessary information before them to consider adequately the impacts of the First Respondent's development on ICH.

A handwritten signature or set of initials, possibly 'T.P.', written in black ink. The signature is enclosed within a hand-drawn oval shape.

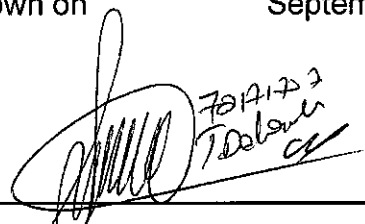


DEIRDRE PRINS-SOLANI

I hereby certify that the deponent has acknowledged that she:

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

Thus signed and sworn to before me, at Cape Town on September 2021.



701173
Thando Dabane

COMMISSIONER OF OATHS

NAME: Thando Dabane
CAPACITY: Constable
ADDRESS: Jan Smuts Drive
AREA: Pinelands SABS

SUID AFRIKAanse POLISDIENST
STASIE PINELANDS
17 SEP 2021
STATION COMMANDER
PINELANDS
SOUTH AFRICAN POLICE SERVICES