

**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

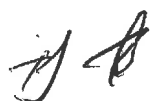
THE DIRECTOR: DEVELOPMENT MANAGEMENT

(REGION 1), LOCAL GOVERNMENT, ENVIRONMENTAL

AFFAIRS & DEVELOPMENT PLANNING, WESTERN

CAPE PROVINCIAL GOVERNMENT

Fourth Respondent



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

PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT

Fifth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned,

TAURIQ JENKINS

do hereby make oath and state as follows:

1. I am the Supreme High Commissioner of the Goringhaicona Khoi Khoin Traditional Indigenous Council under Paramount Chief Aran.
2. In my capacity as Supreme High Commissioner of the second applicant, I have been duly authorised to depose to this affidavit on behalf of the second applicant. A copy of the relevant resolution dated 27 July 2021 is attached marked "TJ1".
3. I also a member of the management committee of the first applicant. I have lived in Observatory since 2003 and have participated actively in the Observatory Civic Association ("OCA") since about 2009. I currently hold the Arts and Culture Portfolio on the management committee of the OCA but in the past I have held the positions of secretary, vice-chairperson and chairperson.
4. The contents of this affidavit are true and correct. Unless I indicate otherwise, or the contrary appears from the context, they are within my personal knowledge and



belief. Legal submissions contained herein are made on the advice of the second 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.

5. I am also qualified to speak with authority on issues of oral history and the intangible cultural heritage of the San and Khoi peoples affected by the proposed River Club development by virtue of my academic qualifications and experience.

5.1. I hold a Master of Fine Arts Degree from Columbia University, an alumna of the International Fellows Program (IFP) at the School of International Public Affairs at Columbia University.

5.2. I am an alumna of the International Leadership Programme at International House, New York. I was a recipient of the Merit Award in Oral History at the Graduate School of Arts and Sciences at Columbia University.

5.3. I chair the AIXARRA Restorative Justice Forum, which is based at the Centre of African Studies at the University of Cape Town. This forum has various commissions that focus on heritage protection, restorative justice, language recognition, ethics, repatriation of sacred human remains and indigenous human rights. I convene the Indigenous Human Rights (C19 monitoring), Land, Ethics and Sacred Human Remains Commission. I am the Community Engagement Strategist for the San and Khoi Unit at the University of Cape Town. As an oral historian I engage interviews and am responsible for ethical framework of research and community engagement



for the San and Khoi Digital Archive, which focusses on the preservation and restoration of endangered languages of the San and Khoi.

- 5.4. I was a member of the academic review process of the first KhoeKhoegowab language course introduced by the University of Cape Town to communities and affiliates of the University.
- 5.5. I have represented the Goringhaicona on various regional and national forums dealing with issues of restitution and unity. I am currently engaged in the development of a framework for a truth and reconciliation commission for the San and Khoi.
- 5.6. I am also an accredited Section 11 monitor for the South African Human Rights Commission.
- 5.7. I am a Convener of the C19 People's Coalition, a coalition of 400 civil organizations in Southern Africa responding to the pandemic. I convene the Anti-Repression Working Group which has a focus on monitoring repression, unlawful evictions, police and military brutality, issues on gun control, reporting human rights abuses and data analysis of repression and human rights violations.
- 5.8. On 14 January 2021, as a Convenor of the C19 Peoples' Coalition I made a presentations on *Integrating human rights in sustainable and resilient recovery from the Covid-19 Pandemic*, to the United Nations Inter-sessional



Meeting for Dialogue and Communication on Human Rights and the 2030 Agenda for Sustainable Development.

- 5.9. I have submitted report to parliament and portfolio committees, on considerations around Indigenous Knowledge Systems, examining how heritage assessment should be done for communities that have been subjected to ethnic genocide, and language loss.
6. I have read the founding affidavit of Professor Leslie London and confirm that the statements in that affidavit concerning the second applicant are true and correct.
7. I have also read the expert affidavits of Deirdre Prins-Solani and Bridget O'Donoghue that will be filed with this affidavit and confirm that I concur with their opinions regarding the inadequacies of the heritage impact assessment ("HIA") reports on which the decisions being reviewed, were based. Furthermore, from the perspective of the Goringhaicona People, I confirm:
- 7.1. that the HIA process that was followed in respect of the proposed development did not adequately assess or take account the intangible heritage associated with the site; and
- 7.2. that the HIA reports that were submitted denigrate the Goringhaicona and distort our history (I deal with this more fully in paragraphs 64 to 69, and 69 to 71, below).
8. In this affidavit, as in the founding affidavit:



- 8.1. “the developer” means the First Respondent;
 - 8.2. “the proposed development” means the River Club Development; and
 - 8.3. “the River Club site” means the site on which the developer intends to undertake the proposed development.
9. This affidavit consists of the following five parts:
- 9.1. Part One describes the various Indigenous Peoples groups that claim an interest in the heritage resources affected by the proposed development.
 - 9.2. Part Two gives a brief overview of the world view or cosmology of the Goringhaicona Khoi Khoin and related Indigenous Peoples;
 - 9.3. Part Three sets out a brief overview of the River Club site, the importance of this place to Indigenous Peoples, and the living heritage associated with it;
 - 9.4. Part Four explains why the Goringhaicona Khoi Khoin Indigenous Council and other related First Nations Peoples are concerned about the potential impact of the proposed development on cultural heritage despite the measures that the developer proposes taking to mitigate those impacts and describes the measures that we have taken in an attempt to protect this heritage;
 - 9.5. Part Five deals with our concerns about the HIA process that has been undertaken and the consequences of allowing the proposed development



to proceed without an adequate consideration of the heritage impacts, particularly for Indigenous Peoples.

PART 1: DIRECTLY AFFECTED FIRST NATIONS GROUPS

Khoi and San culture

10. It is important to appreciate that because of the centuries of genocides and ethnocides carried out against Khoi and San Peoples in Southern Africa, and particularly in the Western Cape, and the attempts to obliterate our cultures and histories, the available information about our cultural heritage is incomplete. What remains is derived in part from oral histories, cosmologies and traditions passed down by example and word of mouth from one generation to another, and in part from written archives in which third parties (often European colonials) recorded their interactions with, Indigenous Peoples. Most of the written records were compiled by colonial authors and reflect a colonial perspective that is often hostile to Indigenous Peoples. (In paragraphs 60 to 62 below, I cite an example of how these colonial narratives are being used to perpetuate hostility towards the Goringhaicona.)
11. Narratives about the histories and cultures of First Nations Peoples are often contested on various grounds. For example, on the basis that there is insufficient evidence to support or "prove" the narrative, on the basis that the known facts could support different narratives, and for political or other reasons. As I explain later in this affidavit, the heritage impact assessment practitioners engaged by the



developer have used this technique in an attempt to discredit our opposition to the proposed development.

Indigenous Peoples of the Cape Peninsula

12. The Khoikhoi (or Khoekhoe) peoples are usually categorized as falling within either the Northern Khoikhoi (i.e. the Nama or Namaqua) or the Southern Khoikhoi (Cape Khoi). These groups include the Oorlam and Griquas and various diverse Khoi groups that moved from the Western Cape and across the country and into Namibia.
13. The Southern or Cape Khoi inhabit the Western Cape and Eastern Cape Provinces, and are further divided into 4 subgroups: the Eastern Cape Khoi, Central Cape Khoi, Western Cape Khoi and Peninsular Cape Khoi.
 - 13.1. The Peninsular Cape Khoi include the following tribes: the Goringhaicona, the Goringhaiqua, the Gorachouqua, the Korana and the Cochoqua.
 - 13.2. The Western Cape Khoi include the Hessequa, Chainoqua and Chairiguriqua.
 - 13.3. Historical and living recognition is owed to the following, the Guriqua, Attaqua, Cauqua, Houtuqua, Omaqua, Chamaqua, Hamcumqua, Cobuqua, Eniqua Damasqua, Gamtoos, Inqua, Gonqua
14. These groups moved around over time and consequently the “footprints” of groups frequently overlap. For example, the territorial footprint of the Korana also includes

the Cape Peninsula and overlaps with the footprint of the four Peninsular Khoi Tribes referred to above. It is important to note that the San historically share these footprints, and have had a presence in the Cape during and before the arrival of the Khoi.

15. The Peninsula was also inhabited by the San before the Cape San were exterminated. The IXam San have a number of groups in the Western Cape. Consequently the San also have intangible heritage associated with the River Club site and the wider area now known as the Two Rivers Urban Park ("TRUP") precinct. The genocide of the Cape San has not been fully recognized but is attributable to the process of dispossessing Indigenous Peoples of their land that began on the banks of the Liesbeek and Black Rivers.
16. The Goringhaicona owe our continued existence to our siblings the Korana, Gorachoqua, Cochoqua, Hessequa and the Goringhaiqua, and to those who fought with us in the 16 Frontier wars. Beginning at the confluence of waters of Black River, and the Liesbeek River we sustained the longest resistance against colonial oppression which fanned out across the subcontinent for approximately 180 years. This included 16 Khoi wars, the last five of which were fought together with the AmaXhosa in the East. David Stuurman and prophet leader Makhanda fought side by side and were captured and taken to Robben Island.
17. This history of resistance to colonization strengthened our relationships with other groups, including Nguni-speaking peoples such as the abaThembu and

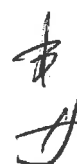


Mpondomisa, and consequently they too have an interest in the site as a key aspect of that history of resistance.

18. It is also important to appreciate that although we are First Nation Khoi (which means men of man), as with other South Africans, we have ancestors from many other parts of the world. Particularly in the Cape, over the centuries the bloodlines of Indigenous Peoples has intermingled with those of peoples from many places such as Java, Madagascar, South East Asia, India, and Europe. From our perspective, the diversity of the inter-relationships and kinships between all these peoples who share deep connections to this place is something to be celebrated and we reject notions of ethno-nationalism (which we regard as a colonial imposition). In other words, we do not support the view that only people of a particular ethnic group have the right to be the authoritative voice on heritage-related issues in relation to a place such as the River Club site and wider TRUP area.

First Nations groups and organizations

19. There are a number of groupings of Indigenous / First Nations Peoples whose cultural heritage is affected by the proposed development. They include:
 - 19.1. groups consisting of direct descendants, or regents, of the tribes and clans of San and Khoi Peoples who inhabited what is now referred to as the Cape Peninsular and adjacent areas, prior to colonization, and who still retain a modified system of chiefs and traditional hierarchies, which I refer to as “sovereign formations” (these include for example, Goringhaicona Khoi



Khoin Traditional Indigenous Council, the Cochoqua, the Hessequa, Nama, the Korana, the Griquas);

- 19.2. cultural organizations which have been established to revive the cultures of First Nations Peoples and advance their interests, but whose emphasis is not necessarily about tracing their ancestry to a specific tribe or clan, rather towards an overarching advocacy for the rights of indigenous peoples and descendants of the San and Khoi which I refer to as “revivalist cultural organizations” (these include for example, the Institute for the Restoration of Aboriginal South Africa and the Camissa Museum, First Peoples Museum);
 - 19.3. collective structures established to represent the interests of their members which I refer to as “revivalist umbrella organizations” (these include, for example: 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);
 - 19.4. more overtly political First Nations organisations with aspirations to contest elections, which I refer to as “political formations” (these include, for example the KKAAP and the New Nation Movement).
20. On 1 April 2021 the Traditional and KhoiSan Leadership Act 23 of 2019 came into effect and a process has commenced to verify and recognize traditional and Khoi and San leadership positions and communities. This process is still to be



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

PART 2: COSMOLOGY OF KHOI AND RELATED PEOPLES

21. In order to communicate some sense of why we are so concerned about the proposed development and its impacts on a place that we regard as both sacred and of great historic importance, it is necessary to provide some insight into the worldview or cosmology of the Khoi.
22. The Khoi peoples have a deep and profound relationship with their ancestral lands. These relationships cannot be encompassed within the Roman Dutch law concept of land as inert property which may be bought and sold and which land owners are free to do with as they please subject only to compliance with the law. For Khoi peoples, the landscapes that we inhabit not only have material value as a source of food, water etc. but also have spiritual and cultural significance.
23. According to the oral history and mythologies of the Khoi, the Universe is animate and populated by many beings. For example, stars are regarded as the souls of people. Major stars like the morning star (known as Dawn) and the evening star (Dusk) have a special significance and our ancestral myths tell of how they came into existence and relate them to key figures in our cosmology. Similarly, water, rain, thunder, lightning, are also beings and TsuillGoab is the personification of the natural forces that produce rain.

24. From our perspective landscapes have a spiritual dimension and our sense of self is so intimately connected with the land, rivers, stars, and animals and the cosmos as whole that they could be characterized as interconnected and inalienable parts of the self. How we live in relationship with these other beings is an essential aspect of Khoi spirituality and impacts on those beings also have impacts on us.
25. To give some sense of this, I quote below from what I told Rudewaan Arendse when he interviewed me for the purposes of preparing a report on the Two Rivers Urban Park for the Department of Transport and Public Works. (I refer to this report in more detail in paragraphs 51 and 52 below.)
- 25.1. *"The Khoi and the San have the most exquisite symbiotic relationship with the soil, with the river, with the stars, with [Kaggen], who's the mantis. And, when you look at the Liesbeeck River, the flow of that river and the land next to it. When I talk about a symbiotic relationship, I 'm saying that the river is flowing within; it's embodied within the consciousness of the Khoi, and so is the land. You can't separate the two. So, when you separate the Khoi from the land permanently, you separate a part of the body itself. It's disembodied the physical body; the physical manifestation that's imbibed in them. By dislocating the Khoi permanently from the land and from its proximity to the river, you're completely; you're ripping the soul out of them. It was physical, visceral dislocation, because of the understanding, the integral understanding of connectivity."*

- 25.2. *"Here you can actually identify for the first time where the act of land grab occurred, and then you can also identify for the first time where, without a leasing arrangement, without brokered arrangement, land was ostensibly stolen. You must also understand, this particular land is layered with a sedimentary pain of the first violation of the fence that was put up, which started the first Khoi war, which started the first forced removal*
- 25.3. *When that first war started.....it started that process of movement and elimination which over a period of approximately 180 years started from this war...the annihilation and extinction of the Cape San, we trace it back specifically to these people here."*
- 25.4. *"What about the holocaust of the first nations, about the genocide? So it's not just the recognition of this space, because coming with the recognition of this space, comes a responsibility..."*
- 25.5. *"On the broader spectrum it is, to us, a very significant period because of the amount of damage and decimation and destruction that it caused. For thousands of years integration with other groupings didn't result in this. You know that leopard toad, was not extinct, or close to extinction, before the Dutch came. So, when we talk in terms of environmental preservation, we had the black-mane lions here, hippos, and a whole range of elephants. These were shot out, and eventually with the fencing, the elephants just changed their route. The shooting of our animals that were also part of the symbiotic relationship of the Khoi. You can't just place the Khoi outside of*

its environment and say, that's the environment [You can't remove the Khoi from its environment]. The Khoi in itself has an environment.

25.6. *There was tremendous pain when there were no more live animals. There was tremendous pain when the hippo colonies were wiped out. There was tremendous pain. Not only were the Khoi dislocated, but the sentient beings around them, with whom they had these kinds of relationships, were also shot..."*

PART 3: SIGNIFICANCE OF THE SITE

26. The River Club Site and the Two Rivers Urban Park area that it forms part of, has great significance not only for those First Nations Peoples within whose historic footprint these areas fall, but also for all South Africans because of its historic significance. The San and Khoi cosmology is shared in some instances, although distinct. What is undoubtable shared is the acknowledgement of the deep connection between the environment, the cosmos and the expressions of the ritualised self.

Spiritual and ritual significance to Khoi people

27. This area has a unique *genius loci* (spirit of place) even to this day. It is known as Igamirodi !khaes, which means the place where the stars gather, and the mound from where the early indigenous people would analyse the stars, became the site on which the South African Astronomical Observatory, (previously known as the Royal Observatory) was built. It has an uninterrupted view of a particular aspect of

Table Mountain (Devil's Peak), and importantly, it is the only place where, from the confluence of the river, during the equinox (when days and nights are equal in length), you can see the sun sitting right on top of the lion's head.

28. It is also significant because it is where the Liesbeek and Black Rivers meet. Water is regarded as holding memory because it moves throughout the world, flowing down rivers, evaporating into clouds and falling as rain. Water is sacred and it may not be desecrated (for example by defecating in a river.) Water is also very important for the rituals of the Goringhaicona. We don't necessarily slaughter animals for rituals and many rituals are related to water and involve the use of water and plants that grow near rivers.
29. Rivers have a special significance, to Khoi people and are particularly important for the rites of passage and cleansing ceremonies performed by and for women. Confluences of rivers are regarded as particularly significant. The areas where rivers met were also used as meeting places for people. The confluence of the Liesbeek and Black Rivers was a place of confluence for the various Peninsula Khoi groups, including the Goroachoqua, Goringhaiqua, and Goringhaicona. The area also has significance to the Korana, and the Cokochoqua.
30. The process of land transformation and colonization that began here also resulted in the extirpation and ultimately the extinction of sacred animals: the blue buck, the Cape lion, and the quagga. The eradication of these sacred and spiritually significant animals created another kind of trauma for the San and the Khoi Khoi

people. The canned hunting of hippos and other wildlife distinctly changed the sense of place and meaning. These animals represented important links in the realm of ritual and spirituality. The degradation of the surrounding renoster veld and the pollution of the two rivers are directly linked to the occupation of this territory in the first instance by colonial authorities.

Historical significance

31. The TRUP precinct and River Club site also have great historical significance, for all South Africans. This was the site of the first resistance against colonial intrusion, where the Khoi successfully defended their settlements against the predations of the Portuguese admiral d'Almeida in 1510, but were later dispossessed of their land by the Dutch settlers who displaced the Khoi by settling Dutch farmers on land that the Khoi had previously used for their herds. It is the site slaves for brought here for the time for agricultural reasons. Where Afrikaans as language was born. The confluence of the sacred Liesbeeck and Black Rivers is considered to be the birth place of the Khoena Nation.

Resistance to colonialism


32. The River Club site is part of an area that is the epicenter of not just colonial conquest, dispossession and diaspora, but also of resistance. This is a place of deep spiritual meaning, and of revolution. This is a nexus of our heritage, our relationship with the stars, the river, and sacred animals. It is where colonial conquest began - and where it was defeated.

33. On 1 March 1510, on the banks of the Black and Liesbeek Rivers, Portugal suffered its greatest defeat at the hands of a resisting Khoi Khoi army. Francisco de Almeida, who was the viceroy to India, had conquered and sacked the Indian Peninsula and was also in control of both East and West Africa.
34. Traditional oral historical accounts speak of the raid at what is today Oude Moulén where De Almeida's men kidnapped some children and abused women. On their way back down the embankments, adjourning across the two rivers, they were encountered by a standing Khoi army that had a symbiotic relationship with their cattle. The cattle formed a phalanx that supported the main thrust of the Khoi. Using bows, arrows and stones, they drove the Portuguese to the shoreline and defeated them, killing De Almeida and 87 of his men, including approximately 14 captains of the mighty Portuguese fleet on what is today's Woodstock Saltriver beach. This deep relationship the Khoi had with their animals is exemplified in this piece of history
35. Over the next 150 years, over a thousand ships had docked on our soil and the shoreline was managed by a sophisticated, multilingual community called the Goringhaicona, who were a mix of various Peninsula Khoi groupings, influenced by two leaders, Xhore and Autshumao, under the great chief, Gogosoá. Xhore and Autshumao were educated in London and the Java. Autshumao was termed by Jan van Riebeeck as Harry the Strandloper. This group of Khoi were able to, through the use of very robust diplomacy, not only maintain a form of tacit peace with ships who were carrying slaves, ships who were part of vessels under the ordinance of



powers with clear colonial ambitions, managed to sustain an active trading point at a strategic vantage point of the continent and the world.

36. 1657 was the beginning of the absolute colonial conquest of this country in Southern Africa as we know it. The Dutch East India Company decided to gift to its employees, called the free burghers, farms on the embankments of the sacred river, now known as the Liesbeeck, in what is today modern Observatory.
37. This is the place where land was stolen for the very first time for agricultural purposes and is also the place where the imposition of Roman Dutch law was used as a tool to usurp and justify the theft of land from the indigenous communities. As these occupied territories expanded, the local inhabitants were cut off from the river, and forcefully removed land. This is the site of the very first land theft, forced removals and brutal occupation in our country.
38. The free burgher farmers, once having attained land, needed to yield produce for the Dutch East India Company. The free burgher were at war with the resisting Khoi Khoi, and didn't have any labour to till the land so the Dutch East India Company began importing slaves from its colonies. This resulted in the arrival of enslaved people from Guinea, Angola, Mozambique, East Africa, Madagascar, India, Sri Lanka, Southeast Asia, Indonesia, Malaysia and the Java Archipelago, bringing a large Muslim diaspora. Those who decided to escape their enslavement were welcomed by the Khoi Khoi who shared a common enemy with them, namely the Dutch.



39. This also resulted in the first frontier war in 1659, because of the gradual and purposeful encroachment on indigenous land, the putting up of the fences, and Indigenous Peoples being cut-off from rivers. This precipitated 16 Khoi wars of resistance that fanned over South Africa for the next 180 years. The impact of this Khoi Mfecane (or forced mass-migration) can be felt all across Southern Africa, including Namibia, Botswana, Angola, Zimbabwe and beyond.

Emergence of Afrikaans

40. With the unique entanglement of people, we can trace this area as being the place where Afrikaans emerged, a confluence of languages; a unique creole, born from in "kombuis" area, where people from around the world forged together with local languages, creating for themselves a very unique dialect. The true origins of Afrikaans were erased from their African and creole roots by white supremacy.
41. When indigenous language speakers were forbidden to speak their own languages, colonial authorities went so far as to use very malicious, mutilating devices to stop them from speaking. For example, the removal of front teeth was done to prevent people from clicking. The four major clicks that inform Nguni languages come from San and Khoi influences such as Khoekhoegowab as an example.



PART 4: ATTEMPTS TO PROTECT THIS HERITAGE

42. The River Club precinct may be 'privately owned' but the history it holds belongs to humanity. It also belongs to the Khoi and San who once roamed the area for a millennia. It is a sacred space that holds the opportunity to heal our nation.

Heritage Impact Assessment Process

43. In order for the proposed development to proceed the developer required an environmental authorization under the National Environmental Management Act ("NEMA"). This required the undertaking of an environmental impact assessment ("EIA") process including the preparation of a heritage impact assessment ("HIA") report that complied with the requirements of section 38(3) of the National Heritage Resources Act ("NHRA") and satisfied the requirements of Heritage Western Cape ("HWC").
44. In the interests of brevity, I do not deal in any detail with the heritage-related aspects of the EIA process as they are addressed in the founding affidavit of Professor Leslie London but attach marked "TJ2" a copy of an article which I wrote explaining my experience of this process and which was published in issue 79 (2021) of New Agenda, the South African Journal of Social and Economic Policy.
45. The expert affidavits of Diedre Prins-Solani and Bridget O'Donoghue filed with the founding affidavit, explain the inadequacies of the developer's HIAs and why HWC was correct to conclude that the HIAs failed to comply with the requirements of section 38(3) of the National Heritage Resources Act, in particular because of the



wholly inadequate consideration of intangible heritage. I confirm and concur with these conclusions.

Genesis of support by First Nations groups for proposed development

46. However, I wish to draw attention to the following aspects of the HIA process in order to explain how some First Nations Peoples who were previously vehemently opposed to the proposed development, came to support it.
47. In April 2018 HWC issued a Provisional Protection Order that required the River Club site to be graded for heritage importance before any development could be considered. The Protection Order was very strongly supported by a range of First Nation groups and no First Nation groups expressed support for the proposed development.
48. The developer then appealed the Provisional Protection Order and the Ministerial Heritage Appeal Tribunal sat over the next 18 months.
49. At the beginning of the appeal process all the First Nation groups participating in the hearings of the Ministerial Heritage Appeals Tribunal were opposed to the proposed development because it would result in the destruction of a sacred site. During the appeals process the Chairperson of the Appeals Tribunal indicated that in his view the developer and the various organs of State involved, had not engaged sufficiently with First Nations regarding the proposed development, and urged them to do so.



50. At this stage it must have been apparent to the developer that there was a very significant risk that the united opposition of all the participating First Nations Groups to the proposed development might well prevent it obtaining the environmental authorization under NEMA that it required to undertake that development.
51. The Western Cape Provincial Government (Department of Public Works) and the City of Cape Town then appointed a Mr. Rudewaan Arendse of AFMAS Solutions to consult with First Nations groups and individuals and to prepare a report for the purposes of preparing a “Local Spatial Development Framework” for the Two Rivers Urban Park (“TRUP”) Area. His report dated 25 September 2019 was entitled “TRUP First Nations Report”.
52. Mr Arendse interview me in my capacity as the Supreme High Commissioner of the Goringhaicona Khoi Khoin Traditional Indigenous Council, for his report. I was concerned that his interview procedures did not comply with even minimum ethical requirement (for example he did not ask me to sign an ethical clearance form) and I specifically told him that the interview was not to be used in support of the proposed development.
53. After the publication of this report, a number of people whom Mr Arendse had interviewed, formed the “First Nations Collective”, led by Chief Zenzile Khoisan, who announced that the FNC intended to engage with the developer. From this point on, people such as me, who opposed the proposed development were

subjected to abuse and vilification. (I eventually had to obtain a protection order to against Chief Zenzile Khoisan after he threatened me.)

54. On 13 September 2019 HWC's submitted an "interim comment" on the developers Second HIA. The HWC's overriding concern was that the Second HIA had not accounted for the intangible significance of the site flowing from the historical associations and that the assessment was consequently flawed. The interim comment concluded with the recommendation that a specialist consultant with experience in intangible heritage should be engaged to give input on the Second HIA. In response, the developer appointed Mr Rudewaan Arendse to prepare a report.
55. At or around that time that Mr Arendse presented his "TRUP First Nations Report" to a stakeholder group at Oude Moulen, as part of the HIA public participation process, it came to my notice that he had been engaged by the developer. In our view this meant that Mr Arendse had a conflict of interest. The impetus for the additional engagement process was because First Nations groups had been unhappy with the lack of meaningful engagement with them by the developer and its consultants and now the person facilitating that process was under contract to the developer. This, coupled with my earlier concerns about the absence of proper ethical safeguards, convinced me that Mr Arendse was not to be trusted. Consequently the Goringhaicona refused to engage further with Mr Arendse.



56. Our concerns were vindicated when we saw Mr Arendse's report entitled "River Club First Nations Report" which purports to be an investigation of the "aspirations" for the site on the part of the First Nations people. ("the AFMAS Report").
57. The AFMAS Report:
- 57.1. downplays and obfuscates the significance of the area and its associated intangible heritage to the Goringhaicona and other Indigenous People;
 - 57.2. seeks to de-legitimize the view of the Goringhaicona Khoi Khoi Indigenous Council;
 - 57.3. seeks to undermine the standing of the Chief of Goringhaicona and to portray the Goringhaicona as lacking credibility to speak about the significance of the area;
 - 57.4. elevates the First Nations Collective as the authoritative voice of First Nations peoples in relation to the proposed development; and
 - 57.5. seeks to portray the proposed development as a victory for First Nations Peoples.
58. The AFMAS report includes WhatsApp screenshots to portray the Chief of Goringhaicona as unreliable or unstable. To my knowledge no attempts were made by the author of the report to get the Chief's comments, to verify such screenshots or to place any such comments in context.



59. The AFMAS report also quoted parts of my previous interview by Mr Arendse, without acknowledging me as the source, and despite my having made it clear at the time of the interview that it was not to be used in support of the proposed development.
60. The report characterises the Goringhaicona as “drifters” and “outcasts” and presents extracts from the diaries of Jan van Riebeek that describe the Goringhaicona as “this ugly Hottentot race”, “a gang” who are “lazy” and who “never set hand to any work until you have promised to give them a good quantity of tobacco or food or drink”; they “live by begging ... stealing and robbing ...”.
61. In contrast, the Goringhaiqua, the group currently in support of the proposed development, are presented as “the traditional custodians of the historic landscape that encompasses the River Club site and the broader Two Rivers area.”
62. The use of these extracts from colonialist diaries, which are replete with racist assumptions and prejudice, is clearly to attack and undermine the Goringhaicona and our opposition to the proposed development.
63. The AFMAS Report also uses examples from other first Nations Groups around the world and posits them as precedent that can be applied to the River Club Site. This implicitly, but misleadingly, positions other First Nations Groups as being aligned with the proposed development.



Ministerial Heritage Appeals Tribunal

64. In April 2020 the Ministerial Heritage Appeals Tribunal dismissed the appeal and rebuked government departments for their divide-and-rule tactics and for failing to cooperate on a matter of great heritage importance, stating at paragraph 91 of the Heritage Appeal Tribunal Ruling that:

“The policy of maintaining control over one’s subordinates or opponents by encouraging dissent between them, thereby preventing them from uniting in opposition, is evident in this matter. Conservation efforts to preserve the heritage of the Indigenous First Nations people and communities and protect their cultural rights, have been hamstrung by the ‘politics of divide and rule’. In a divided and disparate society that can benefit from and become unified through knowledge of each other’s cultures and heritage, the current situation is not a good scenario to be in and this is unfortunate.”

65. The Department of Public Works subsequently launched legal proceedings to set aside aspects of the findings of the Heritage Appeal Tribunal Ruling but did not challenge its findings in relation to the exceptional heritage value of the River Club site.

Supplementary Report (to HIA report)

66. In response to HWC’s interim comments on the inadequacies of the second heritage impact assessment (“HIA”) report submitted on behalf of the developer, the developer filed a Supplementary Report which supplemented and was



incorporated into the second HIA report. The Supplementary Report was based on the two reports by Mr Rudewaan Arendse of AFMAS Solutions which I have referred to above..

67. The authors of the Supplementary Report conclude that:

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

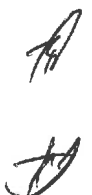
68. I have not included an analysis of the deficiencies of the HIA reports submitted by the developer because these issues are well canvassed in the founding affidavit of Leslie London. However, I wish to draw specific attention to the fact that the HIA consultants have attempted to rebut the claims of First Nation’s peoples that the intangible heritage values with which we are concerned relate to the whole TRUP area, and particularly the River Club site. They attempt to isolate particular places or aspects of the landscape as having heritage value while regarding everything in between as not being of heritage significance and consequently available for development. This reductionist perspective is completely at odds with the holistic

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and integrated perspective of the Khoi and with the very heritage that we are seeking to protect.

Attack on Goringhaicona

69. As is apparent from paragraphs 57 to 63 above, these HIA reports attack the Goringhaicona and promote divisions between First Nations groups. The HIA reports (including the AFMAS report) attempt to rewrite history in a manner that: questions our legitimacy as a group; denigrates us as “vagabonds” and perpetuates racist colonial prejudices against us; denies our relationship with this place (arguing that our historic “footprint” should be limited to the Castle and the Foreshore area in central Cape Town); and attempts to marginalize us by represents other groups as the genuine custodians of the TRUP area.
70. The distorted narrative reflected in the HIA threatens our ability to defend and to maintain our spiritual relationships with the TRUP area including the River Club site. The proposed development is a threat not only to the physical aspects of the site but also to our identity and legitimacy as a group, our history, and future.
71. These attacks have manifested in response to our resolute resistance to the proposed development.




First Nations Collective and the “social compact”

72. As I have explained above, the “First Nations Collective” (“FNC”) only emerged after Mr Arendse had conducted the consultations which culminated in the TRUP First Nations Report.
73. FNC is a group of vocal supporters of the proposed development and appears to have been established for that purpose. Although I do not have personal knowledge of how the group is constituted, it is apparent from their publications and public statements that:
- 73.1. every one of the members of the FNC are strongly supportive of the proposed development;
 - 73.2. neither the FNC nor any of its members have submitted any objections to the granting of an environmental authorization for the proposed development, nor opposed the reductionist approach to the intangible heritage associated with the sites that is reflected in the HIA reports;
 - 73.3. the FNC claim to be the “authoritative voice” of First Nations Peoples and to speak on behalf of most of the Khoi and San” and is recognized by the developer as the authentic representatives of the First Nations Peoples associated with the Site;
 - 73.4. Mr Zenzile Khoisan is a spokesperson and a leader of the FNC and
 - 73.5. the heritage consultant Rudewaan Arendse is a member of the FNC; and



- 73.6. the developer has entered into a “social compact” with the FNC in which the developer commits to ensuring that members of the First Nations Collective benefit from the procurement processes during the construction of the development.
74. The “social compact” with the FNC will also involve:
- 74.1. establishing an indigenous garden for medicinal plants used by the First Nations;
 - 74.2. establishing a cultural, heritage and media centre;
 - 74.3. establishing a heritage ecotrail that goes around the site and amphitheatre for use and cultural performances by both the First Nations and the general public;
 - 74.4. commemorating the history of the First Nations in the area, by establishing a gateway feature inspired by symbols central to the First Nations narrative at the road crossing the eco-corridor; and incorporating symbols central to the First Nations narrative in detailed design of buildings (e.g. pillars / supports, facades, building names, etc.); and
 - 74.5. naming internal roads inspired by people or symbols central to the First Nations narrative.
75. The FNC has acquiesced to the irreversible transformation of this sacred place of enormous cultural, spiritual and historical significance into commercial buildings -



purportedly on behalf of the majority of First Nations people who share a connection with this place. They are doing this in return for structures that commemorate the heritage that the proposed development is complicit in destroying, and the financial benefits from the “social compact”.

First Nations opposition to proposed development

76. The developer, supported by its heritage consultants Messrs. Clark, Townsend and Arendse, have sought to create the impression that the proposed development is now supported by the majority of First Nations organizations (through the FNC) because they believe that their concerns about the transformation of this unique site will now be adequately addressed
77. The Goringhaicona and most other First Nations groups on the other hand believe that we have a cultural, spiritual and ancestral duty to protect such places from threats of destruction and that the fact that this site has been damaged in the past (e.g. by using it as a landfill and as a golf course) in no way justifies further damage. On the contrary, every effort must be made to restore the landscape and rivers of the TRUP area, to use it as a living expression of Khoi and San culture, to commemorate its historical significance, both as the initial point of impact of the colonial project, and the resistance to land dispossession. The TRUP area is of such value that ultimately we would like to seek World Heritage Site status for it.
78. Despite the narrative disseminated by the FNC, the leaders of the vast majority of First Nations organizations have confirmed in conversations with me, that they remain strongly opposed to the proposed development. Of these traditional



authorities and organisations views the ethics engaged in this process as a violation of the San Code of Ethics These include:

- 78.1. 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;
- 78.2. the Khoi and San Kingdom Council of Southern Africa, the Nama, the !Aman Traditional Council under Parament Chief Martinus Fredericks, !khorallgaulaes Council, !Khowese 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
- 78.3. the National House of | Xam Bushmen Nation which encompass the following 11 |Xam Bushmen Tribes of the |Xam Nation:
 - 78.3.1. the Komani-san led by Petrus Vaalbooi;
 - 78.3.2. the Khwe Bushmen led by King Tier;
 - 78.3.3. the //Xegwi/ |Xam led by Queen Anette Loots Voster;
 - 78.3.4. the Guriqua led by Paramount Chief Anthony Andrew's
 - 78.3.5. the Hawequa led by Paramount Chief Shedrick Kleinschmidt;
 - 78.3.6. the !Xau-Sakwa led by Paramount Chief Clive Danster;

78.3.7. the Sonqua-|Xam led by Paramount Chief Pietrus Windvogel;

78.3.8. the Karoo-|Xam led by Paramount Chief Hermanus Baaitjies;

78.3.9. the Kalahari-|Xam led by Chief Piet Barends;

78.3.10. !Xun led by King Tier; and

78.3.11. the Ubiqua led by Prins Lieffie.

78.4. 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.

79. Given the urgency with which these proceedings have been launched I have not been able to file confirmatory letters or affidavits from any of these groups with this affidavit but intend to file those with the supplementary founding affidavit that will be filed in the review application.

80. The Goringhaicona Khoi Khoi Indigenous Council has consistently opposed the proposed development and have taken a number of steps in an attempt to ensure that the heritage associated with this site is protected for current and future generations. These steps include:

80.1. supported the application for the provisional protection of the site by Heritage Western Cape ("HWC");



- 80.2. participating in an Appeals Tribunal hearing concerning the validity of that provisional protection order;
- 80.3. applying to HWC for the Site to be graded as a provincial heritage site (Grade II) and making representations at the HWC hearings;
- 80.4. applying to the South African Heritage Resources Agency (SAHRA) for the Site to be graded as a national heritage site (Grade I);
- 80.5. submitting representations as an interested and affected party during the environmental impact assessment (EIA) process;
- 80.6. submitting an appeal against the granting of the environmental authorisation for the proposed development;
- 80.7. submitting objections in relation to the application for land use planning approvals for the proposed project;
- 80.8. submitting an appeal against the granting of the land use planning for the proposed project; and
- 80.9. making representations to the Planning Appeals Advisory Panel.

**PART 5: CONSEQUENCES OF ALLOWING DEVELOPMENT TO PROCEED IN
ABSENCE OF ADEQUATE CONSIDERATIONS OF HERITAGE IMPACTS**

81. Despite the fact that a comprehensive HIA that complies with the requirements of section 38(3) of the NHRA has not yet been done for the Site, HWC has recognized

that it is a site of national significance (Grade I) and has referred to SAHRA to grade it as such.

82. It is clear that the decision-makers that granted the environmental authorization and the land use planning approvals for the proposed development, and the Provincial Minister and the mayor who upheld those decisions on appeal, did so without considering an adequate HIA that complied with the mandatory requirements of the NHRA, and must be set aside. In the interim it is essential to prevent irreparable damage to the environment and heritage occurring.
83. Despite the damage that has been done to the site in the past it retains a powerful sense of place and the natural course of the Liesbeek River remains and can be restored to health (in particular by ensuring that the pipe that connects it with the rest of the river is kept clear). The TRUP initiative envisages the River Club site forming part of a biodiversity corridor connecting the mountain to the sea, and would allow this historic site to become central to a new narrative of healing and restitution, based on an acknowledgement of its multi-layered history. If the proposed development goes ahead, those opportunities will be lost forever.
84. The commencement of the development would cause irreparable damage to the Site and the associated cultural heritage.
 - 84.1. The infilling in the natural course of the Liesbeek River and of much of the floodplain would be, from our perspective, an unforgivable assault on the River and destroy a key element of this place forever.



- 84.2. The construction of high buildings would obstruct the sight-lines between the area around the confluence of the Rivers and the Mountains and irretrievable alter the sense of place, and the open vistas.
85. The developer has already commenced the process of developing the Site and has refused to give an undertaking to desist until this review application has been decided. Consequently the second applicant asks the court both to grant the interim interdict (as set out in Part A of the Notice of Motion) and to review and set aside the impugned decisions as set out in Part B of the Notice of Motion)



TAURIQ JENKINS

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 *30th JULY 2021*.



BRENDAN STUDTI
Practising Advocate
4th Floor
56 Keerom Street
CAPE TOWN

COMMISSIONER OF OATHS

Designation and Area:

Full Names:

Street Address:

BRENDAN STUDTI
Practising Advocate
4th Floor
56 Keerom Street
CAPE TOWN



RESOLUTION

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OF THE

GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL

1. **WHEREAS** the Constitution of the Goringhaicona Khoi Khoin Indigenous Traditional Council (GKKITC) states that the GKKITC's mission are (*inter alia*):
 - to promote the right of self-determination for the Khoi Khoi people by having access to our natural resources;
 - to provide relevant information and cultural awareness to the Khoi Khoi and restore cultural and linguistic practices;
 - to engage National and Provincial government to secure rights to land, resources and the cultural protection for our indigenous products and practices;
 - to ensure the emancipation and restore the dignity of our women, men, youth and vulnerable groups;
 - to broadly promote socio economic development and address poverty eradication, job creation, skills development, gender equality, safety, peace and stability;
 - to form a legitimate national body of the Khoi and a global first nations body; and
 - to protect our rivers, flood planes, embankments, eco system and generally nature.

2. **WHEREAS** the Liesbeeck Leisure Property Trust ("the Developer") has been granted permission to develop an area adjacent to the confluence of the Liesbeeck and Black River in Cape Town which is of very great heritage significance to the Goringhaicona Khoi Khoin and other Indigenous Peoples ("the River Club Site") and the proposed River Club Development would dramatically change the River Club Site and cause irreparable damage to that heritage.

3. **WHEREAS** in order to prevent the River Club Development from proceeding it will be now necessary to apply to the institute a High Court to set aside the environmental and land use authorisations that allow it to proceed and to appeal to the Water Tribunal against the granting of a water use licence for that development.

4. **NOW THEREFORE** this duly constituted meeting of the National Executive Council held on 27th of ___ July 2021, resolves:
 - a. to instruct attorneys to represent the GKKITC in lodging an appeal to the Water Tribunal and in any High Court litigation that may necessary or desirable to prevent the

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

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

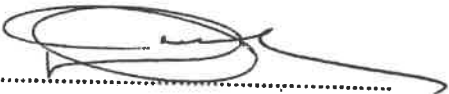
Signed at Oude Molen, Cape Town on this 27th day of July 2021

Paramount Chief Aran



.....

Supreme Senior Chief Desmond Dreyer



.....

Supreme High Commissioner Tauriq Jenkins




.....

~~High Commissioner Tauriq Jenkins~~


.....

Supreme Elder Peter Ludolph



.....

Hamqua Patricia Aran



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When it flows, it floods

By *Tauriq Jenkins*

Tauriq Jenkins is Supreme High Commissioner for the Goringhaicona Khoi Khoi Traditional Indigenous Council under Paramount Chief Aran

In 1996, the Khoi and San were not part of the Constitution. Then President Thabo Mbeki's "I am an African" speech, with the founding of South Africa's Constitution, would remain in its nascent stage until the fullness of the African body was completed.

For it is in the unmistakable lines of a shared history of resistance that we ultimately are one nation. Above all else we are African.

At the confluence of the waters of the Black River and the Liesbeek River, the Khoi collectively sustained the longest resistance against colonial oppression which fanned out across the subcontinent for 169 years. It spanned 16 Khoi wars, the last five of which were fought together with the AmaXhosa in the East. David Stuurman and prophet leader Makhanda fought side by side and were captured and taken to Robben Island.

Our matriarchal guide, Krotoa, brought with her an umbilical connection with the Dutch. We share a history too with Portuguese, English, Irish, Scottish, German, Flemish, French, Swiss, Russian, Greek and Turkish influences. The intermingling of these groups forged mixed groups, and the etchings of the Afrikaans language began to emerge on the banks of the Liesbeek River as first frontier.

Our claim is the human claim. The controversial development on the floodplains of the oldest urbanised river valley in South Africa is a tale of where

much of what we have become begins. At the foot of Devil's Peak, which forms part of the Hoerikwaggo, a mountain that rose from the sea and is older than the Himalayas, is the Liesbeek river. The memory of it speaks to the root of mankind itself. The Observatory itself was built on a hill where our ancestors navigated the stars and with the kindred and sentient fellowship of the Quagga, Cape Lion and Blue Buck. Their permanent departure from the valley and the face of the earth, together with the Cape San, flowed from the genocidal menace of colonial conquest and theft.

The embankments on what is today's Two Rivers Urban Park (TRUP) are a place of return. It is the place of the first victorious line of defence against a colonial aggressor, Francisco D'Almeida, the Portuguese viceroy who vanquished India in 1510. It is also the place of loss – the First Frontier War in 1659, theft of land, the first evictions of the indigenous Khoi Khoi, the deployment of agricultural slaves in 1657 with the establishment of the Free Burgher Farms. This is where we came undone.

Today, the most significant heritage battle ensues with a threat of a R4.5 billion development on its sacred terrain. It is led by a local developer backed by an enterprise with coffers amassed as the VOC (Dutch East India Company) itself did at its peak 360 years ago. The significant impact of the genocidal smallpox epidemics on the Khoi and San notwithstanding, part of the TRUP is Ndabeni, the first black

township which was built to quarantine migrant (mostly Xhosa-speaking) labourers when the city was hit by the bubonic plague.

Contrary to the historical inclusive nature of the site according to the Heritage Appeal Directive, which is being challenged in the High Court¹ by the Western Cape Department of Transport and Public Works (DTPW), "conservation efforts to preserve the heritage of the indigenous First Nations' people and communities and protect their cultural rights have been hamstrung by the 'politics of divide and rule'²:"

Notable and alarming at the same time, is the concern that government officials who are meant to serve the people of this country and should be loyal and respectful towards each other, are perceived to form alliances with other tiers of government and developers, instead of aligning the scarce resources, with experience skills and expertise to cooperatively solve complicated heritage issues, internally, and in good faith.

The Municipal Planning Tribunal's decision to rezone a Public Open Space to one for mixed use development is being appealed by Interested and Affected Parties. So is the Environmental Assessment by the



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The controversial development on the floodplains of the oldest urbanised river valley in South Africa is a tale of where much of what we have become begins.

Province's Department of Environmental Affairs and Development Planning (DEADP) which found nothing environmentally problematic about 150,000 square metres of concrete on a flood plain. The heritage authority, Heritage Western Cape, outright rejected the Heritage Impact Assessment that was prepared for the developer as part of the River Club proposal. It also rejected the Heritage Impact Assessment (HIA) of the Two Rivers Local Spatial Development Framework, a macro draft framework that is critiqued as favouring the bulk development being proposed on the River Club while ignoring the precepts of the existing 2003 Two Rivers Urban Park Local Spatial Development Framework.

The HIA and its supplementary reports erred in the transmutation of its interviewed subjects into an all-encompassing authoritative commenting body claiming to speak on behalf of “most of the Khoi and San”. The First Nations Collective (FNC) needs to be challenged on its establishment, constitution, authority and functions. While many are well known leaders within the various Khoi formations, we challenge the extent to which the leaders in this collective carry the mandates of the organisations mentioned in the report.

Further objectors to these rulings include 20,000 people, institutions such the South African Astronomical Observatory (SAAO), the South African Institute for Architecture, and 60 civic and Khoi and San groups. The City of Cape Town itself has appealed the Environmental Assessment (EA).

How is it, amidst all of these appeals, that the developer is whipping up a narrative of a done deal?

MANUFACTURING CONSENT

The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) states:

Article 2: Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 8 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

Article 8.2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.

[e] **Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.**]

Liesbeek Leisure Properties Trust (LLPT) said it has “always approached this project with maximum transparency and has remained committed to all planning approval processes as required by law”³ and would “gladly” make its case in the appeal process.

The developer has in recent articles claimed that this development is supported by the overwhelming leadership of the Khoi and San. The truth is that the majority of the Khoi groups have vehemently objected to his development. The developer states:

The project will also serve as a first-of-its-kind landmark in the City for the First Nations people to reclaim, memorialise and share their heritage with the greater public. The planned Heritage Cultural and Media Centre will be operated by the First Nations people and will provide critical job opportunities to members of these communities. This initiative follows extensive and constructive engagements with the senior Indigenous Khoi and San leaders comprising the First Nations Collective.⁴

There has been no open discussion in the formulation of how this “reclaiming” and “memorialising” will be “operated” by the First Nations people. The notion of providing critical job opportunities has no figures, no description, and who exactly the beneficiaries are remains elusive. The developer maintains:

We have had many robust interactions with all of the First Nations representatives, who have an interest in the area, whose histories and inputs have been >>

respectfully incorporated throughout the planning and design of the reimagined River Club space.⁵ In fact, the majority of senior indigenous Khoi and San leaders in the Peninsula have expressed their full and unequivocal support for the redevelopment, and we are appreciative of the learnings they have inculcated.⁶

This is simply not true.

The name of the group mentioned is the First Nations Collective, an unregistered body comprising the interviewees of a report commissioned by the developer in support of the development.

The article in *New Agenda* 78, “Navigating a minefield to assert agency” (speaking for the FNC) stated:

Having been trivialised and bludgeoned into invisibility we elected to directly approach Jody Aufrichtig, representing the registered owners, about the redevelopment proposal. We have found the developer, Liesbeek Leisure Trust, open and empathetic to our concerns, which were placed on the table in a frank exchange of views. We believe that the developer has grasped the intense pain that has been associated with the bludgeoning of our narrative. As such, this developer, unlike any other government, corporate or social entities with which we have engaged, has made a firm commitment to ensure that the footprint of the Khoi and San’s history of resistance, and its modern-day resurgence,

is incorporated into the development plan.

Through this engagement, the First Nations Collective has secured an area in the centre of this development, which is of great cultural significance to us. This part of the redevelopment site has been set aside for building a fully-fledged heritage centre, a functional indigenous garden and cultural praxis site, a world-first international indigenous media and communication centre, as well as an amphitheatre where the best of Khoi and San art, culture and music can be showcased.⁷

The claim that Jody Aufrichtig has done more for the Khoi with his “empathetic” ear than anyone else, including the government, needs to be challenged. What is certain is that since 1652, every single governing administration, including post-1994, has been guilty of the marginalisation and gross disenfranchisement of the Khoi Khoi and San. The colonial splintering of identities in communities stripped away a connection to the soil, the environment and the notion of being African. This locates the Western Cape, in particular, as a perpetually primed terrain for conquest, manipulation and division.

The report produced by service provider AFMAS Solutions⁸, commissioned by the developer, goes out of its way to discredit the Goringhaicona, and is reminiscent of smear documents that surfaced last year targeting all leaders of organisations that are against the development. It aims to write the Goringhaicona out of history. The Goringhaicona in its various submissions has condemned epistemological violence as an act of attempted ethnocide.

However, the area was signed off by President Cyril Ramaphosa and the cabinet in August 2020 as part of the Khoi and San National Liberation and Resistance Route.⁹ The Department of Arts and Culture has also tried to have it added to an updated tentative Unesco list as a World Heritage Site. The promulgation of the Traditional and Khoi-San Leadership (TKSL) Act 3 of 2019,¹⁰ although deeply problematic and not close to an answer on key questions on land and restitution, indicated a symbolic shift towards further recognition of the Khoi and San. The Protection, Promotion, Development and Management of Indigenous Knowledge Act (IKA)¹¹ was signed by the President in 2019. So, in the legislative context, what makes the developer exceptional? His offerings are in two parts:

[The development will include a] ... fully-fledged heritage centre, a functional indigenous garden and cultural praxis site, a world-first international indigenous media and communication centre, as well as an amphitheatre where the best of Khoi and San art, culture and music can be showcased.¹² The developer has also committed to cleaning up and indigenising the ecology of the area and to ensure that the spiritual and cultural symbols of the Khoi and the San find resonance within the proposed development plan.¹³

The idea of the cultural media centre is a brokered package, impoverished of curatorial, archival or historical considerations. Nor are its custodianship and sustainability plans clear. A wound made for profit. As a ‘zwischenzug’¹⁴ it will usurp a complex and hard-earned



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Today, the most significant heritage battle ensues with a threat of a R4.5 billion development on its sacred terrain

integrated effort towards restorative justice taking place outside of the boardroom of the River Club.

The proposed development is inconsistent with national legislation and provincial and municipal spatial frameworks. The Liesbeek is one of the City's important fish-breeding rivers and should be conserved as such. Part of the City's Biodiversity Network, it is also a Protected Area in terms of the National Environmental Management Protected Areas Act and is also protected by the City's Municipal Spatial Development Framework (MSDF) as a biodiversity conservation area with wetlands and aquatic habitats. An agreement is in place with CapeNature for their ecological management in perpetuity. The proposed development intends to fill in the river and wetland habitats.

Significantly, in spite of the FNC assertions, there has been no downscaling of the concrete or 150,000 square metres of commercial bulk since their engagement. What is worse is that the sacred Liesbeek River is described “as a storm water ditch” by the developer and destined for infill without any objections from the FNC. Notably since their arrival on the scene, the commercial footprint has increased.

Furthermore, the collective has not submitted any comment against the devastating environmental concerns.

It has remained silent on the most salient – on the need to decolonise the framework of how heritage resources are being determined and the principles of true co-design and meaningful engagement.

This begs a deeper analysis of the notion of “agency”, referred to in the article in *New Agenda* 78. It would appear the FNC is currently only acting within the parameters of what the developer wants.

The City's Environmental Management Department (EMD) goes on to say in its appeal against the Environment Assessment for DEADP:

The social issues revolving around cultural appropriation and social impact have not been expounded on sufficiently, the First Nations narrative appears to not be totally inclusive of all relative groups (Para 2.3.7 page 2913).

This is further reinforced in the final comments of HWC (para 97) which noted:

... the scope of engagement resulted in a number of groups electing to not participate fully; the research process was contested by participants in the engagements; the impartiality of the research questions is not clear to the committee; the methodology for the engagement does not appear to follow accepted oral history interviewing protocols (for example, no ethical clearance forms were supplied); the confusion between this report and the DTPW-commissioned report brings the ethics around the engagement into question.

Augmenting this observation is the note in the EMD description of the development that:

The implementation of these mechanisms is to be assured through an institutional arrangement which establishes within the Property Owners Association (or similar) an autonomous legal entity led by the Gorinhaiqua Cultural Council that will be responsible for the governance, planning, management, operations, maintenance and sustainability of the indigenous place-making mechanisms” (para 2.2. p 2908).

This information is in the 2019 supplementary HIA report which was not circulated for public comment by the Municipal Planning Tribunal.

Paragraph 91 of the Heritage Appeal Tribunal Directive commented that:

The policy of maintaining control over one's subordinates or opponents by encouraging dissent between them, thereby preventing them from uniting in opposition, is evident in this matter. Conservation efforts to preserve the heritage of the Indigenous First Nations people and communities and protect their cultural rights, have been hamstrung by the ‘politics of divide and rule’. In a divided and disparate society that can benefit from and become unified through knowledge of each other's cultures and heritage, the current situation is not a good scenario to be in and this is unfortunate. >>



There is sadly no agency under such conditions. Rather it is turning out to be an injustice for everyone. This is a foil to divide and conquer a complex formation of Khoi and San groupings that continue to seek unity despite insurmountable challenges. The Khoi and San Kingdom Council of Southern Africa, the Nama, the Goringhaicona, !Aman Traditional Council, !khorallgauIIaes Council, IKhowsese Nama Traditional Council, the entire Korana across all provinces reject the River Club proposal, as do revivalist umbrella organisations 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. Of the peninsula Khoi sovereign formations, the vast majority rejects this development. Coupled with this are the Abathembu, and the Pandomisa kingdoms that are kin to the Korana, who in an unprecedented act of unity have merged in defiance of the divisive Verwoerdian tropes of the “Nguni threat” that have also entered into the contemporary political discourse on land.

The Congress of Traditional Leaders of South Africa (Contralesa) does not support the AFMAS Solutions report, despite the name of the body appearing in it. The Cochoqua are stated as supporters of the development. However four of the five Cochoqua houses in the Western Cape are confirmed to have rejected the development. The National Khoi and San Council is plagued with perception issues of transparency. In the Western Cape, on a variety of issues, this body has Brexited itself from its own, leaving a trail of bewilderment and dissatisfaction, Rooibos being a trigger word. The banks of Liesbeek became an occupied territory in 1657, and since the war fought against the Khoi in 1659, the DNA of the VOC, it appears, has remained. In reality what exists now is an unprecedented united front towards

a World Heritage Site, not the vision of a dystopian Amazon.com Disneyland for tourists and the wealthy to sojourn.

The developer paradoxically has attempted to narrow the 21,629 objectors of a petition¹⁵ heralded by the Observatory Civic Association as a “handful of residents” by publicly decrying how he is “sick of all the lies”.¹⁶ The NIMBY (Not In My Back Yard) accusation against the Two Rivers Urban Park Association and the Observatory Civic Association is a strawman built by the same inventors of the Biscuit Mill in nearby Woodstock. Framed as “regenerative” projects, the Biscuit Mill, as well as the Woodstock Exchange, are toe-to-toe with the City’s maximal thinking of utilising land close to the CBD “appropriately”. The Biscuit Mill has been critiqued as a gentrification catalyst. Its primary client base, tenants, as well as beneficiaries, do not reside in Woodstock. Locals increasingly struggle to afford rental hikes, while plans for social housing projects have been mired in controversy.

In Observatory, the developer faces a unified force of environmental, civic and Khoi and San agencies for recognition of a World Heritage Site, a common concern, that recognises this as a Ground Zero precinct that will begin a process of deep healing.

It is a cheap form of racial hypocrisy for him to paint a narrative of Observatory’s antagonism for his development as the view of only a handful of selfish white property owners. Observatory is long known as a diverse, bohemian, activist community. In 2020 the OCA objected to the attempted “constructive” eviction by the City of Cape Town (during the lockdown) of the Singabalapha (We Belong Here) informal settlement in Observatory.¹⁷ Many of these residents are members of the OCA, as are residents of the Willow Arts Collective, formerly known as the Circus, located next to the Hartleyvale Stadium. Mayoral Committee Member Cllr

Badroodien in a 786 Radio interview on Friday 29 January 2021, called residents “land invaders stalling necessary upgrades in the area”.

In a debate hosted by the Institute for African Alternatives on 15 October 2020, the closing of the venue, Tagore’s, which has since closed down, was singled out as proof of racial and class antagonism in the area. The same venue included a gallery for the first exhibition of Khoi and San art with some of the most talented fine arts work by Khoi activist artists.

On some arrangements the developer’s documents are more clear. The LLPT in its supplemental Heritage Impact Assessment Report (December 2019) made it clear:

... the implementation of these mechanisms is to be assured through an institutional arrangement which establishes within the Property Owners Association (or similar) an autonomous legal entity led by the Gorinhaiqua Cultural Council that will be responsible for the governance, planning, management, operations, maintenance and sustainability of the indigenous place-making mechanisms.

The FNC, in fact, only came into being AFTER the Heritage Appeal Tribunal heard the hard facts that First Nation groups had been overlooked by the developers. Though earlier informal contact with the developer by one or two entities did occur, the FNC did not exist when Khoi leaders opposed the development in 2018. In fact, in 2018, some of the FNC sat with us and cried at the Tribunal. The next time we met in the same venue, things had changed. So, while leaders in that cohort claim a long history of Khoi activism,



“

The truth is that the majority of the Khoi groups have vehemently objected to his development.

they were nowhere at the landmark Tribunal until the concept of a media centre, amphitheatre, herb garden, and heritage trails emerged on the table. So the question would be: what were the circumstances that fuelled the level of agency that gave credence to the FNC?

In 2017, the TKSL Act had not been signed, nor the bill on Indigenous Knowledge Systems, and the heritage matter of the Khoi was legally in limbo awaiting the signing of a white paper on intangible heritage. The Tribunal was the turning point. What was feared most by the developer and DEADP, DTPW and the City of Cape Town was what was to be said for the first time on record. A story of 360 years when Jan Van Riebeeck put up his palisade fence.

The AFMAS Solutions report commissioned by the benevolent developer stated:

Operationalizing the Social Compact: The First Nations Collective led by the Gorinhaiqua Cultural Council, in discharging its traditional duty of custody over not only the River Club site, but all of the precincts of the Two Rivers area; and in exercising its internationally recognized right of Indigenous cultural agency, is in the

process of establishing a legal entity that will be responsible for the post-establishment governance, planning, management, operations, maintenance and sustainability of the aforementioned Indigenous place making mechanisms. This entity will be a fully autonomous Indigenous entity, whose Indigenous access and negotiated rights, as articulated above – as the elements of the First Nations Imperative – will be enshrined in a formal agreement between the envisaged First Nations legal entity led by the Gorinhaiqua Cultural Council, and the Community Property Association of the development.¹⁸

If there was a real cultural agency, then the FNC could have said to the developer put that development aside, and talk to us about pain.

The Liesbeek Leisure Properties Trust has been allowed to dictate the negotiations where the result is a victory for a small group of local white men, including one of the wealthiest billionaires in the world who lives in Seattle, USA.

CONCLUSION

We owe our essence to the rivers, the stars, the land, and the sacred animals, many of which are no longer in existence. We have lost to oblivion the Blue Buck, Quagga and the Cape Lion, all of whom were hunted to extinction soon after access to the Liesbeek River was denied. We always remember and miss them, and meet them in awe and reverence in our dreams.

We say no to the concrete on the floodplain, to infill of the river, to the loss of memory to a mall with hotels.

We will not bid the kingfisher farewell. We say no to the violence against nature, to the violence of apartheid spatial planning, to the violence of the false claim that this is all done with the full consent of the Khoi and San. The Goringhaicona does not consent to this development. Not in a thousand years. Not in a million years. Never.

It's time we all pause to heal. We are of [Gamirodi !Khais, the “place where the stars gather”.

ENDNOTES

- 1 <https://www.groundup.org.za/article/legal-spat-between-provincial-departments-over-river-club-development/>
- 2 <https://www.groundup.org.za/media/uploads/documents/RiverClubRuling14April2020.pdf>
- 3 <https://www.dailymaverick.co.za/article/2020-09-17-city-appeals-against-provincial-authorisation-of-r4-billion-river-club-development/>
- 4 <https://theriverclubct.co.za/wp-content/uploads/2020/12/River-Club-Press-Statement-NEMA-and-Rezoning-Approvals-Final.pdf>
- 5 See the illustration at <https://www.groundup.org.za/article/r4-billion-river-club-development-clears-major-obstacle/>
- 6 <https://mg.co.za/opinion/2020-09-29-river-club-redevelopment-is-a-triumph-for-the-future-of-first-nations-heritage/>
- 7 <https://ifaaza.org/navigating-a-minefield-to-assert-agency/#more-1723>
- 8 <https://theriverclubct.co.za/wp-content/uploads/2020/01/AFMAS-Solutions-Final-River-Club-First-Nations-Report.pdf>
- 9 <http://www.dirco.gov.za/docs/2020/cabinet0610.htm>
- 10 https://www.gov.za/sites/default/files/gcis_document/201911/4286528-11act3of2019tradkhoaishnleadership.pdf
- 11 https://static.pmg.org.za/42647_19-8-Act6of2019ProtectPromoDevelopManagementIndigenousKnowledgeAct.pdf
- 12 <https://ifaaza.org/navigating-a-minefield-to-assert-agency/#more-1723>
- 13 Ibid.
- 14 <https://en.wikipedia.org/wiki/Zwischenzug>
- 15 <https://www.change.org/p/department-of-environment-affairs-and-development-planning-voice-your-opposition-to-the-river-club-bar-preserve-environment-and-heritage>
- 16 <https://www.2oceansvibe.com/2019/08/14/sick-of-all-the-lies-controversy-around-observatory-river-club-development/>
- 17 <https://www.groundup.org.za/article/obs-occupiers-win-interdict-against-city-cape-town/>
- 18 <https://theriverclubct.co.za/wp-content/uploads/2020/01/AFMAS-Solutions-Final-River-Club-First-Nations-Report.pdf> 

POWER OF ATTORNEY

I the undersigned,

Tauriq Jenkins

by virtue of my office as Supreme High Commissioner of the Goringhaicona Khoi Khoi Traditional Indigenous Council ("the GKKITC"), and duly authorised, hereby appoint the law firm of Cullinan & Associates Incorporated of 18A Ascot Road, Kenilworth, Cape Town (hereinafter referred to as "the agent"), with power of substitution, to be the lawful agent of the GKKITC to do any or all of the following acts or things:

1. To accept service of any summons or other legal process and to enter an appearance to defend or to oppose;
2. to defend any action or other legal proceedings against the GKKITC or in which GKKITC is concerned;
3. to make any counterclaim therein and to consent to judgment or suffer judgment to be given against me by default in such proceedings as the Agent or his advisers may think fit;
4. to commence any action or other legal proceedings for such relief as the Agent or his advisers may think necessary for the recovery or protection of the GKKITC's property or rights and to prosecute, discontinue, abandon or compromise any such action or proceedings, and to appeal against any judgment or decision of any court or tribunal in any such action or proceedings;
5. to sign all documents necessary in connection with any such proceedings;
6. to request information from public or private bodies in terms of applicable legislation, including but not limited to the Promotion of Access to Information Act, No. 2 of 2000, and to appeal any decision from a public or provide body to refuse information or part thereof as requested, and if necessary to make the necessary application to court to review such a decision;
7. when necessary, to employ and pay attorneys including correspondent

attorneys and counsel to conduct any such proceedings; and

8. generally to do and cause to be done whatever may be required to achieve the above purposes as fully and effectually as I could do personally.

SIGNED AT _____ ON THE _____ DAY OF _____ 2021.

Witnesses: 1. _____

2. _____

(Principal)