

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

Case No: **11580/22**

In the matter between:

<b>OBSERVATORY CIVIC ASSOCIATION</b>	First Applicant
<b>GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL</b>	Second Applicant
and	
<b>JODY AUFRICHTIG N.O.</b>	First Respondent
<b>JAMES OTTO TANNENBERGER N.O.</b>	Second Respondent
<b>NICHOLAS SCOTT FERGUSON N.O.</b>	Third Respondent
<b>ALLAN JAMES FLYNN MUNDELL N.O.</b>	Fourth Respondent
<b>ADAM JOHN BLOW N.O.</b>	Fifth Respondent
<b>CITY OF CAPE TOWN</b>	Sixth Respondent
<b>THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS &amp; DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT</b>	Seventh Respondent
<b>WESTERN CAPE FIRST NATIONS COLLECTIVE</b>	Eighth Respondent

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**FILING NOTICE**

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**TAKE NOTICE THAT** the First to Fifth Respondents hereby files:

1        Supplementary Answering Affidavit deposed to by J Tannenberger; and

2 Confirmatory Affidavit of S Reuther

DATED at CAPE TOWN on this 18<sup>th</sup> day of JULY 2022.

  
**NORTON ROSE FULBRIGHT SOUTH AFRICA INC**  
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To: **The Registrar**  
 Western Cape  
 High Court  
**Cape Town**

And to: **CULLINAN & ASSOCIATES**  
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**And to: CITY OF CAPE TOWN**  
Sixth respondent  
**c/o Webber Wentzel Attorneys**  
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**And to: MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL  
AFFAIRS AND DEVELOPMENT PLANNING IN THE  
WESTERN CAPE PROVINCIAL GOVERNMENT**  
Seventh respondent  
c/o  
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**And to: THE FIRST NATIONS COLLECTIVE**  
Eighth Respondent  
c/o  
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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO. 11580/2022**

In the matter between:

**OBSERVATORY CIVIC ASSOCIATION** First Applicant

**GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL** Second Applicant

and

**JODY AUFRIGHTIG N.O.** First Respondent

**JAMES OTTO TANNEBERGER N.O.** Second Respondent

**NICHOLAS SCOTT FERGUSON N.O.** Third Respondent

**ALLAN JAMES FLYNN MUNDELL N.O.** Fourth Respondent

**ADAM JOHN BLOW N.O.** Fifth Respondent

**CITY OF CAPE TOWN** Sixth Respondent

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

**WESTERN CAPE FIRST NATIONS COLLECTIVE** Eighth Respondent

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**SUPPLEMENTARY ANSWERING AFFIDAVIT OF THE FIRST TO THE FIFTH  
RESPONDENTS**

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I, the undersigned,

**JAMES OTTO TANNENBERGER**

do hereby make oath and declare as follows:

*JOTW*  
*J* 1

1. I am a trustee of the Liesbeek Leisure Properties Trust (No. IT 248/2015(N)) (“LLPT”). I deposed to the LLPT’s initial answering affidavit in response to this application and am authorised to depose to this affidavit on behalf of the trustees of the LLPT (collectively “the LLPT respondents”). I refer to the resolution of trustees, which is attached to the initial answering affidavit as JT1.
2. Unless the context indicates otherwise, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my belief, true and accurate. Where I make legal submissions, I do so on the advice of LLPT’s legal representatives. Where I rely on information conveyed to me by others, I state the source, which information I likewise believe to be true and correct.
3. In this affidavit, I supplement the LLPT’s answer to respond to the final relief sought in prayers 2.1 to 2.9 of the Notice of Motion. The LLPT continues to rely on what is stated in its initial answering affidavit and I ask that it too be read in response to the final relief. I shall endeavour not to repeat what is stated there.
4. By way of background, I record that on 12 July 2022, the parties did not appear before his Lordship Mr Justice Dolamo but agreed to the draft order attached as “JT6”. The applicants abandoned the urgent interim interdict that they proposed to seek on that day. His Lordship Mr Justice Dolamo did not, however, grant the order as it required a special set down by the Judge President. By the time of deposing to this affidavit, the draft order is yet to be made an order of court. In fairness to the applicants, the LLPT respondents have nevertheless complied with the timetable as agreed between the parties in preparing this supplementary answer.

5. I structure this affidavit as follows:
  - 5.1. First, I address the structure and merits of the final relief the applicants seek in a prayers 2.1 to 2.6 of the Notice of Motion. In doing so, I supplement what is already stated in the initial answer in this regard.
  - 5.2. Second, I address the alternative prayers in prayers 2.7 and 2.8 of the Notice of Motion. This includes an application for an order in terms of section 18(3) of the Superior Courts Act for the immediate execution of Goliath DJP's order.
  - 5.3. Third, I address costs – i.e., the punitive costs order the applicants seek in prayer 2.9 of the Notice of Motion and the costs of the application for interim relief which was reserved.

## THE FINAL RELIEF

### Prayers 2.1 and 2.2

6. Prayers 2.1 and 2.2 are seemingly directed at enforcing the orders in paragraph 145.1 of Goliath DJP's judgment of 18 March 2022 – in the form of a declarator (prayer 2.1) and a further interdict (prayer 2.2). They are premised on the assumption that the operation and execution of the order is immediate, and not suspended pending the determination of applications for leave to appeal and appeals.
7. As explained in the initial answer, the LLPT denies that the order in paragraph 145.1 is purely interlocutory in nature. On the basis of legal advice, which the

LLPT believes to be correct, the LLPT understands the order to be both appealable under section 17 of the Superior Courts Act and suspended on appeal under section 18(1) of the Superior Courts Act. I refer to paragraphs 10 and 24 to 35 of the LLPT's initial answer in this regard. In addition to what is stated there, the following bears mention in respect of paragraph 145.1(b) of the order:

- 7.1. The interdict granted in paragraph (b) is inextricably tied up with the interdict in paragraph (a), as they are premised on the same definitive findings on the issue of consultation. The only basis in Goliath DJP's judgment for issuing the interdict in both paragraphs 145.1(a) and (b) was her finding that the consultation process that had been conducted with First Nations People was inadequate and compromised.
- 7.2. Goliath DJP's finding on the consultation point must be definitive because Goliath DJP proceeded to grant an order with immediate and final effect – she ordered consultation forthwith in paragraph 145.1(a).
- 7.3. Section 18(1) of the Superior Courts Act states that the operation and execution of “a decision” is suspended pending the appeal process. The LLPT is advised that the attributes of a “decision” as contemplated in this provision are:
  - (i) it must be final in effect and not susceptible to alteration by the court of first instance;

- (ii) it must be definitive of the right of the parties, i.e. it must grant definite and distinct relief; and
- (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

7.4. The LLPT is advised and considers that the composite interdictory order in paragraph 145.1 is indeed such a “decision”, premised as it is on a definitive finding that the consultation process required under the NHRA was inadequate. That finding is not susceptible to alteration in the Part B review and had the effect of disposing of a substantial portion of the relief claimed in the Part B review.

7.5. This is addressed further in the legal opinion the LLPT received from its counsel on or about 5 May 2022 (attached to the initial answering affidavit as annexure JT5), at paragraphs 35 to 45 especially.

8. If the LLPT is correct in its interpretation of the nature and effect of the order in paragraph 145.1, then there is no basis for the relief in prayers 2.1 and 2.2.
9. There are further problems with the relief sought in prayers 2.1 and 2.2. As was noted in the initial answer, the order sought in prayer 2.1 is incompetent insofar as it purports to extend the reach of the scope of the interdict in paragraph 145.1 of the judgment. The order of Goliath DJP reads:

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



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

10. The orders the applicants seek would declare that "*the First to Fifth Respondents are not permitted to undertake or progress any construction of any building or structure, or any earthworks or any other work on erf 151832 in respect of or in connection with the River Club...*", with a corresponding interdict. The orders the applicants seek would therefore extend beyond the bounds of the order they seek to enforce, and the scope of the particular authorisations at issue.
  
11. The order the applicants seek in prayer 2.1 also relies to an impermissible degree on Goliath DJP's judgment in the application for leave ("**the LTA judgment**") as a basis for the proper construction of the interdict. The LLPT respondents are advised that the judgment, including the order in paragraph 145.1, is to construed objectively and to speak for itself. Goliath DJP's judgment in the LTA judgment cannot amend, add to or change in any material way the meaning and effect of the judgment.
  
12. The LLPT respondents fail to appreciate the necessity for the order in prayer 2.2. If prayer 2.2 is intended solely to confirm Goliath DJP's order in paragraph 145.1(b), then it is an order that has already been granted and is *res judicata*. That this is the intended effect of prayer 2.2 is confirmed in the correspondence from the applicant's attorney, Mr Wessels attached as "**JT7**". For context, I also


include in this attachment the letter from the City's attorney, Ms De Freitas at Webber Wentzel, to which Mr Wessels' email is directed in reply.

### Prayer 2.3

13. The LLPT respondents strenuously deny that they are in wilful contempt of court. They have acted in good faith reliance on legal advice furnished to them by their counsel, including an experienced senior counsel. Mr Rosenberg has been in practice at the Bar for 35 years, and practised as senior counsel for 18 years. The LLPT respondents have reasonably relied on the advice of Mr Rosenberg and Ms Ferreira in endeavouring to understand the meaning and effect of Goliath DJP's order. The LLPT's conduct is neither wilful nor *mala fide* as alleged.
14. I refer to the written legal opinion in annexure JT5 to the initial answer, and also to what is stated in paragraphs 72 to 82 of the initial answer.

### Prayers 2.4 and 2.5

15. The LLPT respondents fail to appreciate the necessity for these orders. They are not required to vindicate the authority of the court or to compel compliance with paragraph 145.1 of the order, if the LLPT respondents are mistaken in their interpretation of that order.

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**Prayer 2.6**

16. I am advised that this relief is premised on a finding that the LLPT respondents have acted in wilful contempt of court. For the reasons I have stated, this is not so. There is, accordingly, no basis for this relief.

**THE ALTERNATIVE PRAYERS****First alternative prayer (prayer 2.7)**

17. The applicants state in paragraph 79 of the founding affidavit that the first alternative prayer is sought if the Court finds that they have failed to establish contempt of court on the part of Mr Aufrichtig and/or the LLPT. In that event, the applicants seek an order declaring that the order of Goliath DJP is an interlocutory order under s 18(2) of the Superior Courts Act and not suspended by the Respondents' applications for leave to appeal to the Supreme Court of Appeal.
18. Again, the LLPT respondents fail to appreciate the necessity for such an order. In deciding whether the declaratory order in paragraph 2.1 is appropriate, and in deciding the issue of contempt, the Court will already have traversed the ground that is apparently intended to be traversed by this alternative prayer. It is not apparent to the LLPT respondents why a further declaratory order is required.

**Second alternative prayer (prayer 2.8)**

19. The second alternative prayer is an application under section 18(3) of the Superior Courts Act for the immediate enforcement of Goliath DJP's order. It is sought in the event that the Court finds that the LLPT's interpretation of the order is correct, and that the order is a final one that would otherwise be suspended under section 18(1) of the Superior Courts Act pending appeals.
20. I am advised that section 18(1) is designed to protect the rights of litigants by ensuring that, in the ordinary course, the orders granted against them are suspended whilst they are in the process of attempting, by way of the appeal process, to have them overturned. Section 18(1) therefore requires the applicant to show "exceptional circumstances" justifying a departure from the general rule. In addition, section 18(3) provides that –

*"A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."*

21. I am advised and submit that the applicants have failed to make out a case for an order under section 18(3) in that they have failed to prove that –

- 21.1. exceptional circumstances require the immediate execution of the order;

- 21.2. they will suffer irreparable harm if the court does not order the immediate execution of the interim interdict; and
- 21.3. that the LLPT (and other affected parties) will not suffer irreparable harm if the court orders the immediate execution of the interim interdict.
22. In claiming that there are “exceptional circumstances” justifying an immediate execution order, the applicants contend that Goliath DJP erred in granting an appealable order with final relief and that the section 18(3) order is required to give effect to “*the clearly expressed intention of Goliath DJP*”. This is not so. There is no basis for concluding that Goliath DJP erred in granting her order: she made definitive and conclusive findings that there was inadequate consultation in her judgment, and those findings informed the order that she granted. None of the parties (including the applicants) have applied for rescission of Goliath DJP’s judgment on the basis of an error in her order.
23. On the second requirement, the applicants have failed to show that they will suffer any irreparable harm should the order not be suspended pending the SCA’s determination of the applications for leave to appeal (and any appeals that may follow). The applicants adduce no facts whatsoever in this regard, but rely solely on the principle of issue estoppel. I am advised and submit that the principle of issue estoppel does not assist them for at least the following reasons:
24. Goliath DJP made two findings on prejudice:

- 24.1. First, she found (at paragraph 131 of the judgment) that “*all affected First Nations Groups were not adequately consulted regarding the River Club Development*” and that “*those who were excluded or not adequately consulted may suffer irreparable harm should the the construction continue pending the review proceedings*”. For this reason, Goliath DJP ordered immediate consultation pending the review in paragraph 145.1(a). This appears also from paragraph 143 of the judgment.
- 24.2. I emphasise that there was no suggestion that the applicants were part of those excluded from the consultation process. Further, Goliath DJP did not find that the affected First Nations Groups would in fact suffer irreparable harm – only that they “*may*” do so.
- 24.3. Moreover, and in any event, the applicants have abandoned reliance on the order in paragraph 145.1(a) and cannot now seek to rely on this decision to justify a section 18(3) order.
- 24.4. Second, Goliath DJP found (in paragraph 136 of the judgment) that—  
  
“*The danger therefore exists that the Court adjudicating the application for review, when the construction is already in an advanced stage, may consider that the LLPT had built themselves into an “impregnable position” which could then have an influence on the review proceedings. Consequently, in the absence of an interim interdict, the advanced state of the building construction might render review proceedings a brutum fulmen.*”

*The Applicants will be prejudiced by the potentially adverse implications in such circumstances where a Court would be reluctant to exercise its discretion in their favour in an eventual successful review.”*

- 24.5. In this instance too, Goliath DJP did not go so far as to find that the applicants would suffer irreparable harm. She found only that “*the Applicants will be prejudiced*”.
- 24.6. Moreover, Goliath DJP was concerned with the prejudice that would eventuate if construction continued for so long as there was no final determination of the review in Part B. That is a considerably longer period than the period now at issue, being the period pending the SCA’s determination of the applications for leave to appeal and, possibly, its determination of the appeals.
- 24.7. The LLPT respondents have estimated that the period required for final determination of the review is anywhere between 12 and 24 months (even on an expedited timetable). This is to be contrasted with the determination of the applications for leave to appeal, which is anticipated in August 2022 (those applications having been filed at the beginning of June 2022). Should leave to appeal be granted, the parties will, in all likelihood, seek an expedited appeal in accordance with their agreement to expedite the review, so that it is reasonable to expect the appeals to be determined within six months.



25. On the third requirement, it is undeniable that the LLPT (as well as other parties to the proceedings) will suffer irreparable harm if an immediate execution order is granted. I refer to paragraphs 48 to 67 of the initial answer, where I detailed the harm that the LLPT respondents, the other respondents and the public at large stand to suffer should construction of the River Club be halted. While I was dealing in that context with the prejudice that would be suffered should an urgent interim interdict be granted pending the anticipated return day, what is stated there is equally applicable in the context of the section 18(3) order, and, if anything, applies with greater force seeing that the section 18(3) order would operate for a more extended period. I also explained in the initial answer why the applicants' attempt to cast doubt on its averments of harm were baseless and misdirected. Goliath DJP accepted that the development has substantial economic, infrastructural and public benefits – this was never placed in any doubt.
26. In further substantiation of the irreparable harm that the LLPT respondents would suffer should the section 18(3) order be granted (and indeed, other parties including the City, the Province and the Western Cape First Nations Collective and the public at large), the LLPT respondents rely on:
- 26.1. The particulars of the harm described in the LLPT's answer to Part A, which it was then anticipated would be occasioned by an interim interdict pending the final determination of the relief in Part B, marked "JT8" (while the anticipated period of work stoppage may be different under the section 18(3) order, the facts set out there continue to be of relevance);



- 26.2. The affidavit of the environmental consultant of SRK Consulting (South Africa) (Pty) Ltd, Ms Susanne Reuther, which was filed in the Part A proceedings and attached as “**JT2**” to the initial answer, and her confirmatory affidavit which will be filed herewith. Ms Reuther attests to her assessment of the socio-economic impact and benefits of the River Club development, which stand to be lost if the development is jeopardised by further delays;
- 26.3. The affidavit of the City’s Director of Enterprise and Investment, Mr Lance Greyling filed in the Part A proceedings and attached as “**JT3**” to the initial answer;
- 26.4. The affidavit of Mr Charles Jackson on behalf of the Western Cape First Nations Collective, filed in the Part A proceedings and attached as “**JT9**” (sans annexures). I respectfully refer this Honourable Court to paragraphs 9.9 to 9.10 thereof (inclusive of subparagraphs);
- 26.5. The affidavit of the quantity surveyor, Mr Haldane of MLC Quantity Surveyors SA (Pty) Ltd and the schedule of wasted and sunk costs the LLPT had already incurred, or would incur, should the River Club development be brought to a halt, as filed in the Part A proceedings and attached to the initial answer marked “**JT4**”, and Mr Haldane’s confirmatory affidavit which will be filed as soon as possible; and
- 26.6. The term sheets which show the material terms that are binding on the LLPT respondents in respect of progressing the development,

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under cover of a letter from RMB confirming its position in relation thereto, marked "JT10".

27. The applicants cannot gainsay the very real risk of irreparable harm that the LLPT respondents, in particular, face should the court order the immediate execution of the interim interdict and the development be terminated as result of further delays in its implementation.

### **COSTS**

28. The applicants seek a punitive attorney-client costs order against the LLPT trustees. As I have explained, the LLPT respondents have acted reasonably and in good faith reliance on legal advice in responding to Goliath DJP's order of 18 March 2022. There is therefore no basis for a punitive costs order against us.
29. In the circumstances, the LLPT respondents ask that the application be dismissed with costs, including the costs of two counsel.
30. The LLPT also seeks the costs it incurred in answering the application for urgent interdictory relief pending the return day and for the appearance of two counsel on 12 July 2022 to defend against the urgent interim interdict that was sought. The applicants abandoned that relief at the doors of court, yet required the LLPT to answer that relief and brief counsel to prepare to argue against it. The application for that interim relief on such extreme urgency, was clearly ill-conceived, unjustified and an abuse of the urgent court. The LLPT is accordingly entitled to the costs it incurred.

  
\_\_\_\_\_  
**JAMES OTTO TANNENBERGER**

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to at ..SANDTON.....on this ..18<sup>th</sup>.....day of ...JULY.....2022..... in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.

  
\_\_\_\_\_  
**COMMISSIONER OF OATHS**

**TAMMERON DE WIT**  
COMMISSIONER OF OATHS  
PRACTISING ATTORNEY  
5 SANDOWN VALLEY CRESCENT  
SANDOWN, SANDTON  
DATE:.....18.07.2022.....

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

**CASE NO: 11580 / 22**

**Before the Honourable Mr Justice Dolamo  
on 12 July 2022**

In the matter between:

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

WESTERN CAPE FIRST NATIONS COLLECTIVE Eighth Respondent

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**DRAFT ORDER**

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**BY AGREEMENT BETWEEN THE PARTIES, IT IS HEREBY ORDERED:**

- 1 The relief sought in paragraphs 2.1 to 2.9 of the Notice of Motion is postponed for determination on 27 July 2022.
- 2 The application will be heard on Wednesday 27 July 2022.
- 3 Any respondents wishing to oppose the application are required to deliver answering papers on or before Monday 18 July 2022.
- 4 Replying papers, if any, must be filed on or before Wednesday 20 July 2022.
- 5 Applicants' heads of argument must be filed on or before Thursday 21 July 2022.
- 6 Respondents' heads of argument must be filed on or before Monday 25 July 2022.
- 7 The costs of the application set down for 12 July 2022 are reserved.

**BY ORDER OF COURT**

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**COURT REGISTRAR**

**CULLINAN & ASSOCIATES**

Attorneys for the Applicants

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 TDW

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 TDV

# WEBBER WENTZEL

in alliance with > **Linklaters**

## Cullinan & Associates

**Attention:** Mr H Wessels

**Per email:** [hercules@greencounsel.co.za](mailto:hercules@greencounsel.co.za)

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Your reference

11582/22

Our reference

SDF/3049766

Date

11 July 2022

Dear Sirs

## OBSERVATORY CIVIC ASSOCIATION AND ANOTHER V JODY AUFRICHTIG N.O. AND OTHERS (CASE NUMBER: 11580/22)

1. We refer to the abovementioned application served on our offices electronically on the afternoon of Friday, 8 July 2022.
2. As you are aware, we act on behalf of the sixth respondent. We advise that our client does not intend to oppose the application.
3. We do, however seek clarity in respect of prayer 2.2 of the notice of motion.

3.1 Prayer 2.2 seeks an interdict against the first to fifth respondents from *inter alia* construction on the River Club site "*pending the final determination of the review proceedings in Part B of the main application*". Prayer 3 asks for prayer 2.2 to operate ending the return day of the rule *nisi*. Prayer 2.2 is seemingly framed as a self-standing interdict which would operate in addition to the interdict granted by Goliath DJP. However, it is *res judicata* because Goliath DJP granted substantially the same relief in paragraph 145.1(b) of her order.

3.2 We are unclear whether you seek an order in terms of prayer 2.2 because the applicants' founding affidavit explains that the applicants seek urgent interim relief in the form of a rule *nisi* interdicting the first to fifth respondents from undertaking any further construction on the River Club site "*pending a return date prescribed by the Court to determine the issues that arise for final determination – viz. whether the*

**Partners in office at Cape Town:** Office Managing Partner: G Fitzmaurice Partners: RB Africa C Alexander AK Allie AE Bennett AR Bowley SJ Chong KM Colman PA Crosland R Cruywagen ST Dias BEC Dickinson MA Diemont HJ du Preez LF Egypt AE Esterhuizen OH Geldenhuys PM Holloway SJ Hutton KT Inglis ME Jarvis S Jooste LA Kahn ACR Katzke A Keyser KE Kilner CS Meyer A Mhlongo LE Mostert C Nöthling A October CH Pienaar K Rew H Samsodien J Smit RS Smith PS Stein WV Tembedza PZ Vanda SE van der Meulen DM Visagie AWR Westwood

**Senior Partner:** JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa C Alexander AK Allie NG Alp RL Appelbaum DC Bayman KL Beilings AE Bennett AP Blair K Blom AR Bowley MS Burger M Bux V Campos RI Carrim T Cassim SJ Chong ME Claassens C Collett KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies KM Davis PM Daya ST Dias L de Bruyn PU Dela M Denenga DW de Villiers BEC Dickinson MA Diemont DA Dingley G Driver W Drue GP Duncan HJ du Preez CP du Toit SK Edmundson LF Egypt KH Eiser AE Esterhuizen K Fazel G Fitzmaurice JB Forman L Franca KL Gawith OH Geldenhuys MM Gibson C Gopal CI Gouws PD Grealay L Green S Haroun JM Harvey JS Henning KR Hillis Z Hlophe CM Holfeld PM Holloway J Howard KT Inglis ME Jarvis CA Jennings JC Jones CM Jonker S Jooste LA Kahn SJ Kalbskopf ACR Katzke M Kennedy KE Kilner A Keyser MD Kota JC Kraamwinkel J Lamb E Louw M Mahlangu M Mkhabela S Manley V Mannar L Marais MR Maredi G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer A Mhlongo AJ Mills D Milo NP Mngomezulu P Mohanlall M Moloi N Moodley L Moolman LE Mostert VM Movshovich C Murphy P Naidoo A Ngubo C Nöthling ZN Ntshona M Nxumalo AN Nyatumba A October L Odendaal GJP Olivier N Paige AS Parry S Patel N Pather GR Penfold SE Phajane M Philiippides BA Phillips MA Phillips CH Pienaar DJ Rafferty D Ramjettan GI Rapson K Rew SA Ritchie J Roberts Y Robbertse S Rule G Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh S Sithole J Smit RS Smith MP Spalding PS Stein MW Straeull LJ Swaine Z Swanepoel WV Tembedza A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tlhavani G Truter PZ Vanda SE van der Meulen JP van der Poel CS Vanmali JE Veeran HM Venter B Versfeld MG Versfeld TA Versfeld DM Visagie EME Warrington J Watson AWR Westwood RH Wilson KD Wolmarans

**Chief Operating Officer:** SA Boyd

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**WEBBER WENTZEL**in alliance with > **Linklaters**

Page 2

*interdict is in effect and, if so, whether the LLPT has willfully breached its terms"* (para 75 of the founding affidavit).

- 3.3 Furthermore, para 2 of the applicants' heads of argument, in explaining what relief the applicants will seek on the return day, does not appear to mention the relief sought in prayer 2.2:

Prayer in notice of motion	Corresponding para in applicants' heads
2.1	2.1 and 2.2
2.2	Not dealt with
2.3	2.3
2.5	Not dealt with
2.6	2.4
2.7-2.9	Not dealt with

4. However, para 21 of the applicants' heads of argument asks for an order in terms of prayer 3 – which does refer to prayer 2.2.
5. We therefore request that you urgently clarify whether you still intend to ask for prayer 2.2.
6. Our client's rights remain in all respects strictly reserved.

Yours faithfully

**WEBBER WENTZEL**

Sabrina De Freitas

Senior Associate

Direct tel: +27 21 431 7335

Direct fax: +27 21 431 8335

Email: [sabrina.defreitas@webberwentzel.com](mailto:sabrina.defreitas@webberwentzel.com)

Letter sent electronically. A signed copy will be provided on request.





**Stacy Smit**

**From:** Hercules Wessels <Hercules@greencounsel.co.za>  
**Sent:** 12 July 2022 09:19  
**To:** Sabrina De Freitas  
**Cc:** Jeffrey Kron; Stacy Smit; Masego Mogotsi; Nick Smith; Owen Mark; BP Attorneys; Peter Rogers; Cormac Cullinan; Nick de Villiers  
**Subject:** RE: [LIE68] OCA and another / Trustees LLPT and others [NRFSA-JHB.FID5276403] [WW-WS\_JHB.FID2393898]

Dear Ms De Freitas

We confirm that we are seeking relief in terms of paragraph 2.2 of the notice of motion.

Paragraph 2.2 is not intended to operate independently of paragraph 1 of Goliath DJP's order. It is directed at confirming the operation of Goliath DJP's order in light of the stance adopted by the LLPT. It follows that any order corresponding to paragraph 2.2 of the notice of motion would be subject to the outcome of the respondents' envisaged appeals in the SCA, and our draft order will be formulated accordingly.

Yours faithfully,

**Hercules Wessels BA (Law) & LLB**  
 Senior Associate

18a Ascot Road  
 Kenilworth  
 Cape Town, 7708  
 t (general) +27 (0)21 671 7002  
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**From:** Sabrina De Freitas <Sabrina.DeFreitas@webberwentzel.com>  
**Sent:** Monday, 11 July 2022 20:52  
**To:** Hercules Wessels <Hercules@greencounsel.co.za>; Cormac Cullinan <Cormac@greencounsel.co.za>  
**Cc:** Jeffrey Kron <Jeffrey.Kron@nortonrosefulbright.com>; Stacy Smit <Stacy.Smit@nortonrosefulbright.com>; Masego Mogotsi <Masego.Mogotsi@nortonrosefulbright.com>; Nick Smith <nicks@nsmithlaw.co.za>; Owen Mark <MOwen@justice.gov.za>; BP Attorneys <bpinc.law@gmail.com>; Peter Rogers <Peter.Rogers@nortonrosefulbright.com>  
**Subject:** RE: [LIE68] OCA and another / Trustees LLPT and others [NRFSA-JHB.FID5276403] [WW-WS\_JHB.FID2393898]

Dear Mr Wessels

We confirm receipt.

Please find attached correspondence for your urgent attention. Please confirm receipt.

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relief is not granted is limited to the further alteration, pending the hearing and final determination of part B, of an already entirely transformed site. On the other hand, as will be shown, the harm that the LLPT will bear if an interdict is granted is severe, irreversible and out of all proportion to that which might be sustained by the applicants.

- 67. In dealing with the LLPT's irreparable harm, I do so with reference to first, the LLPT's obligations to Amazon Development Centre (South Africa) (Pty) Ltd (ADC); second, the implications for the development finance secured by the LLPT; third, construction penalties and cost escalation; and fourth, the LLPT's obligations in terms of services agreements concluded with the City for the external infrastructure work detailed in the services agreements. This includes road widening, new roads, a bridge over the Black River, internal roads, water and sewerage pipe reticulation, electrical supply to the site and landscaping.

*The LLPT's agreements with ADC*

- 68. The development is to occur in two precincts and a third portion, as described below:

- Precinct 1 which is located on the southern portion of the property provides approximately 60 000m<sup>2</sup> of mixed use floor space zoned as General Business (GB) in buildings with a maximum height of 25m in the GB3 subzone and 38 m in a GB6 subzone.
- Precinct 2 which is located on the northern part of the property provides some 90 000m<sup>2</sup> of mixed use floor space zoned as General Business (GB)

Handwritten notes: a circled '9', 'LJ', 'TOWN', and a signature.

in buildings with a maximum height of 38m in the GB6 subzone and 44.7 m in a GB7 subzone. Precinct 2 has been divided into precinct 2A and 2B.

- A third portion zoned special open space of not less than 49 835 m<sup>2</sup> (about the size of 13 soccer fields), with reasonable access in favour of the public as registered against the title deed of the property.

69. I annex a copy of a drawing showing these precincts, marked "JA7". Construction is to be on a phased basis, commencing with precinct 2A. I annex marked "JA8" a copy of a bar chart reflecting the overall planning programme.

70. The development of precinct 2A is to comprise buildings, structures, infrastructure and other improvements which the LLPT is to construct in terms of a development agreement it has concluded with ADC (the development agreement).

71. These improvements will provide for the accommodation of web services for Amazon Web Services (AWS) in two buildings and for the accommodation of a call centre (CS) in a third building. These three buildings comprise the first stage of the development of precinct 2A (the ADC premises). ADC has an option for the construction of an additional two buildings in this precinct in due course.

72. As required by the development agreement, the LLPT and ADC have concluded separate lease agreements for the web services and the call centre components (the lease agreements).

73. The current approved development is entirely dependent upon the involvement of ADC in terms of the development agreement and the lease agreements (as

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financing for the development of precinct 2A and the infrastructure has been procured by the LLPT, against the security of these signed leases). It is the norm that a development project cannot be funded without signed and binding lease agreements that evidence rental income sufficient to service the funding debt. Should ADC withdraw, as it is entitled to do in certain circumstances, that will almost certainly be the end of the development as planned and approved.

74. The development agreement provides for an anticipated practical completion of work by the LLPT on 30 November 2022 and a handover of the premises to ADC for it to attend to the tenant work, and a lease commencement date of 1 December 2023, being approximately 13 months after the practical completion date. Practical completion will be achieved as evidenced by the practical completion certificate issued by the principal agent. Such certificate will certify that the buildings have been completed for practical completion purposes in accordance with the relevant design documents and that the leased premises are ready for access by ADC for the purpose of carrying out further work by it.
75. ADC requires that a portion (approximately 12 000m<sup>2</sup>) of the retail component of precinct 1 be completed and operational (presumably for the convenience of its employees) within 6 months of its anticipated lease commencement date, and its contractual arrangements with the LLPT provide for this requirement. This is a further material element in the construction programme pressure bearing on the LLPT.
76. The 13-month period between the practical completion date and the lease commencement date is of particular importance to ADC. It is the time needed

Handwritten initials and signatures in the bottom right corner. On the left, there is a stylized signature that appears to be 'TDN'. To its right, there are two other signatures: one that looks like 'LJ' and another that is a more complex, scribbled signature.

to carry out what is defined in the development agreement as tenant works, being improvements and fitting out work according to ADC's design plans and specifications.

77. A portion of ADC's operations which are to be accommodated in terms of the development agreement are currently carried out in various leased premises in and about Cape Town. These leases are due to expire in the latter part of 2023. ADC is scheduled to start moving into its premises in the River Club development over the period December 2022 to November 2023.
78. There has unfortunately already been construction programme slippage, caused by the Covid-19 pandemic and consequent delays to the environmental and planning processes. A further delay was caused by the OCA lodging a purported appeal against the granting to the LLPT of a water use licence required in terms of the NWA. This has to date caused a construction programme delay of approximately six months.
79. The result of these delays has been to pressurise the construction programme, leaving little latitude for further delay (and any delays will trigger penalties). ADC recently agreed to reset the practical completion date and consequently the lease commencement date to those stated above, reducing its own tight tenant works programme. In the negotiations to adjust these dates, ADC has made it clear that it cannot and will not tolerate any further significant delay.
80. The development agreement contains various provisions entitling ADC to terminate that development agreement and the lease agreements in the event

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of it becoming likely that the anticipated practical completion and anticipated lease commencement dates will not be achieved.

81. Should interim relief be granted pending the final determination of the applicants' part B relief, the LLPT has been advised that further work on the development would be halted for anything between 12 to 24 months, if not longer. Obviously in this event it would be clear that the anticipated practical completion date and the anticipated lease commencement dates would not be achieved. Any such delay would almost certainly see ADC terminating the development agreement and the lease agreements, as it would be entitled to do. Indeed, even a reduced delay of 6 months will result in termination by ADC.
82. ADC received a number of bids for the provision of premises for its operations, culminating in it concluding the development agreement with the LLPT. There can be little doubt that alternative opportunities will be offered, be it by those who previously put up proposals to ADC or by other parties, to accommodate ADC (in South Africa or outside of South Africa all together). A further possibility in the event of ADC no longer tolerating further delays would be for it to negotiate fresh leases in its existing premises.
83. Accordingly, ADC's exit from the River Club development would almost certainly result in this development not going ahead. Over and above the financial consequences to the LLPT, all the current construction workers would immediately be out of work. The heritage and social compact commitments to the First Nations would also not materialise (over and above the socio-economic impacts stated below).

  
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84. In the accompanying affidavit of environmental consultant S Reuther of SRK Consulting South Africa (Pty) Ltd (SRK), she details the socio-economic impacts of the development. Costs and data are presented by Ms Reuther as at the date of her study, as indicated by her.
85. Estimated capital investment costs amount to R3.9billion, which is highly significant for a single development, as the total investment (over approximately 7 years) represents:
- approximately 1.4% of the City's GDP of R283.28 billion in 2015 (WCG, 2016); and
  - approximately 35.5% of the City's construction sector's contribution of R11.11 billion in 2015 (WCG, 2016).
86. As pointed out by Ms Reuther, the River Club development may increase total economic output by approximately R7.4billion over the approximate 3 to 5 year construction period.
87. Ms Reuther estimates that the development will directly employ an average of 5239 workers during the 30 month construction period, at times peaking at 8382 workers. Total direct construction employment amounts to approximately 157 170 person-months.
88. Ms Reuther estimates that the development may increase total employment by some 19 000 jobs, of which 13 700 would be indirect and induced for this project. The creation of some 5 239 direct and possibly some 13 700 indirect and induced jobs will contribute meaningfully towards employment at a regional level, and the construction sector in particular.

  
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89. The cost of direct employment during the construction period is estimated at some R1.63 billion for the 5 years of construction, with the average wage being above the South African minimum wage of R3 500.00 in 2017, generating income for a large number of households.
90. Assuming that 5 239 direct employees support between 1.0 (skilled labour) and 2.65 (semi- and low-skilled labourers) dependants, an additional 12 500 people benefit from income earned by direct employment at the River Club development. Assuming further indirect and induced employment of approximately 13 700, this could increase the number of benefitting dependents by another approximately 30 000.
91. Further economic benefits and impacts as described by Ms Reuther go to increased State and local government revenue, and an increase in centrally located housing, including inclusionary housing. In this regard, of some 600 residential units, at least 120 units will be for inclusionary housing.
92. While the River Club development will see a loss of the private open space previously enjoyed by golfers, this will be replaced by significantly improved open space that is more accessible to the public. Open space facilities will include high quality landscape areas, pathways, lawns, river walks and rehabilitated watercourses. This high quality open space provided by the River Club development will be accessible to a wider public, compared to the current situation.
93. In the highly unlikely event of ADC not cancelling the development agreement should the development be suspended by an interim interdict, the development

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agreement provides for liability to ADC should the LLPT not deliver the premises to ADC by the anticipated practical completion date.

94. In this event, the LLPT will be liable to ADC for liquidated damages equal to two days of principal rent as defined in the lease agreements for every day of delay until the premises is delivered to ADC. These liquidated damages which may be invoked for at least 6 months prior to the right of ADC to cancel, amount to approximately R454 000.00 for every day of delay. Needless to say payment of damages of this magnitude will render the River Club development entirely unviable and the LLPT would have to terminate it and leave the site in its current transformed state, without implementation of environmental rehabilitation and the heritage memorialisation. Added to this will be the immediate loss of jobs for the currently employed construction workers.

*Development finance*

95. FirstRand Bank Limited, acting through its Rand Merchant Bank Division (RMB), has agreed to provide infrastructure and development finance to the LLPT for the development, in terms of a development facility agreement for the precinct 2A buildings and an infrastructure development facility agreement which relates to land and Infrastructural costs of the development as a whole, both internal and external (the loan agreements).
96. In terms of the development facility agreement RMB is to make available R1 106 684 000.00 as a development loan facility, repayable 30 months after the first advance date. The purpose of the development facility is to fund the development costs for precinct 2A, as defined. A non-refundable financing fee

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of R8 300 126.00 (plus VAT) is payable by the LLPT to RMB for the granting of this facility.

97. The land and infrastructure development facility agreement contains a similar provision for a non-refundable financing fee of R1 827 169.00 (plus VAT).
98. If the development is halted pursuant to an interdict granted in part A, both non-refundable financing fees are still due and payable by the LLPT to RMB (and would amount to a penalty for not implementing the facilities).
99. Both of the loan agreements provide for the consequences of events of default entitling RMB to cancel the loan agreements and the facilities, in which case in addition to the non-refundable financing fees becoming due and payable within 10 days of demand, RMB is entitled to immediate repayment of all advances made to the LLPT prior to cancellation (plus interest until paid), as well as recovery of all damages it may suffer as a result of cancellation. An event of default includes the occurrence of a material adverse change which is not capable of being remedied or mitigated against.
100. A material adverse change means the consequence/s of any event, circumstance or matter or a combination of events, circumstances or matters, which has or is reasonably likely to have a material adverse effect on the LLPT's ability to perform its obligations, or on the property, business, assets or financial condition of the LLPT resulting in its ability to perform any of its material obligations in terms of the development facility being materially or adversely affected.

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101. A suspension of the development pursuant to an interdict granted in part A in these proceedings would constitute an act of default under both of the loan agreements. Needless to say, should ADC terminate the development agreement and the lease agreements, this too would be a material adverse change and an act of default, entitling RMB to cancel the loan agreements.
102. In the event of RMB's cancellation of the loan agreements, the LLPT will be liable to RMB for substantial costs and damages, over and above the debt restructuring fees of R8 300 126.00 and R1 827 169.00. RMB's legal and bond registration fees amount to R1 350 000.00, to be paid by the LLPT. A further fee to Investec to settle the land purchase price finance agreement will be payable, in an amount of R1 250 000.00.
103. In addition, penalties payable to RMB on cancellation of the loan agreements, as and for damages, are estimated to amount to R22 120 000.00 in respect of the development loan facility and R1 620 000.00 in respect of the infrastructure development facility.
104. Were it to be possible for the development in some form or another to proceed after a suspension, fresh applications for development finance would have to be submitted – a complex, time consuming, expensive and uncertain process.

*Construction costs and penalties*

105. The main contractor for the development is WBHO Construction (Pty) Ltd (WBHO), appointed in terms of the principal building agreement of the JBCC Series 2000 (edition 4.1, code 2021, March 2005) (the JBCC contract).

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106. The LLPT's construction cost consultants MLC Quantity Surveyors SA (Pty) Ltd, in the person of Mr G Haldane, has calculated and quantified certain construction and related costs which are relevant for present purposes.
107. Assuming a suspension of building work on 25 September 2021, the value of completed construction work on the ADC premises, including apportioned land cost and professional fees, will total R349 860 780.00. Were the development not to proceed as a result of the granting of an interim interdict, this amount would in substantial measure represent a sunk and wasted cost. Further details of Mr Haldane's calculation (and all of his calculations to which I refer) are set out the accompanying affidavit of Mr Haldane.
108. The value of work completed as at 25 September 2021 in respect of infrastructure for the development as a whole will amount to R48 989 259.00, as calculated by Mr Haldane.
109. A delay in the building work of 12 to 24 months would result in the termination of the JBCC contract. Were WBHO to remain on standby to resume the works the LLPT would be liable to it for standing time (calculated over 18 months) of R115 067 517.00. The magnitude of this sum makes it inevitable that termination of the JBCC contract would be the only option.
110. Clause 39 of the JBCC contract deals with cancellation on cessation of works for a continuous period of 90 calendar days due to circumstances beyond the control of either party. The granting the interim relief sought by the applicants would bring clause 39 of the JBCC contract into operation.

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111. Clause 39 of the JBCC contract provides that either party may cancel the agreement on cessation of the works for a continuous period of 90 calendar days or an intermittent period totalling 120 calendar days due to circumstances beyond the control of either party. Where one party considers cancelling in these circumstances 10 days notification of such intention is to be given.
112. Mr Haldane has calculated the standing time costs which would be payable by the LLPT in this event, based upon the 10 day notification period and the 90 day delay period contemplated by clause 39. An amount of R13 028 531.00 would be payable by the LLPT to WBHO.
113. Mr Haldane has also calculated the delay penalties due by LLPT to ADC as a result of construction delays of 6 months, with ADC then terminating the development agreement and the lease agreements. In terms of clause 10.10 of the development agreement, if the developer does not deliver the premises to the tenant by the anticipated practical completion date, the developer will owe the tenant liquidated damages equal to two days of principal rent for every day of delay until the premises is delivered to the tenant. If practical completion is not achieved within 6 months of the anticipated practical completion date, the tenant has the right to terminate the agreement (and each of the lease agreements) within 30 days of such date, on written notice.
114. The liquidated damages for which the LLPT would be liable to ADC in the event of clause 10.10 cancellation would amount to R83 011 296.00, while the cost of the construction delay would amount to R35 232 029.00. Details of how the sum of R83 011 296.00 is arrived at appear in Mr Haldane's report summary.

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Details of the calculation of the cost of the construction delay are set out in annexure D to Mr Haldane's report summary.

115. In addition, in the event of termination by ADC in terms of clause 10.10 of the development agreement, the LLPT would be liable for interest on development costs amounting to R14 415 750.00, as set out under item 5 of Mr Haldane's report summary.
116. Mr Haldane has made certain further cost calculations, for illustrative purposes. In respect of precinct 1, he has calculated that an 18 month delay would result in an increase in the estimated construction cost of R141 634 652.00. An 18 month delay would result in an escalation of infrastructure costs of R21 306 314.00.

*Liability in terms of the services agreements*

117. Planning approval for the River Club development included a condition that the LLPT was to pay development contributions in respect of the construction of external infrastructure. In terms of services agreements concluded between the LLPT and the City, the LLPT undertook to construct certain of the external infrastructure, the cost of which was to be set off against development contributions payable by it. The services agreements provided that should the LLPT fail for any reason to construct the infrastructure in question, the City would do so and recover the costs from the LLPT. RMB has provided a payment guarantee to the City in respect of the LLPT's obligations in this connection, in the sum of R85 823 597.00. The LLPT will be liable to RMB for the full amount of R85 823 597.00 as and when the City calls for payment to cover the cost of the infrastructure construction which the City would have to undertake.

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118. The applicants assert that the balance of convenience favours the granting of an interdict, because of the '*magnitude of the destruction that will result if it is not granted*'. As pointed out, this contention is misconceived and entirely misses the point. Nor does the quantity of objections (seemingly also relied upon by the applicants) assist in assessing the balance of convenience. Finally, the applicants appear to suggest that unless interim relief is granted their review remedy will be undermined. This is certainly not the case. The applicants' review rights are protected and there is no reason why they should not obtain appropriate review relief, if they can demonstrate the unlawfulness of the impugned decisions.

e. **Alternative Remedy**

119. I have pointed above to the fact that the applicants have not demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. Assuming that the applicants were in a position to establish some or other harm requiring protection, the LLPT has been advised that the applicants could have instituted expedited review proceedings rather than belatedly claiming interim interdictory relief in circumstances of self-created urgency.

**Part 2: AD SERIATIM**

120. I will now deal with the specific allegations made in Mr London's founding affidavit. As I have already addressed many of the allegations contained in the founding affidavit, I will not respond to each and every allegation made. To the extent that I may fail to deal with any specific allegation, this is not to be taken as an admission. Any allegation made in Mr London's affidavit which is not in

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

Case No.: 12994/2021

In the matter between:

**OBSERVATORY CIVIC ASSOCIATION**

First Applicant

**GORINGHAICONA KHOI KHOIN INDIGENOUS  
TRADITIONAL COUNCIL**

Second Applicant

and

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

First Respondent

**HERITAGE WESTERN CAPE**

Second Respondent

**CITY OF CAPE TOWN**

Third Respondent

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

Fourth Respondent

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

Fifth Respondent

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

Sixth Respondent

**EXECUTIVE MAYOR, CITY OF CAPE TOWN**

Seventh Respondent

**WESTERN CAPE FIRST NATIONS COLLECTIVE**

Eight Respondent

  
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**FOUNDING AFFIDAVIT**

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I, the undersigned

**CHARLES JACKSON**  
(aka CHIEF !GARU ZENZILE KHOISAN)

do hereby make oath and say that,

1. The facts set out herein are within my personal knowledge, unless otherwise stated or appears from the context, and to the best of my belief true and correct.
2. Where I refer to information conveyed to me by others, I believe such information to be correct.
3. All submissions containing legal advice are made on the strength of information imparted to me by my legal representatives which I verily believe to be correct.
4. I am the Chairperson of the Western Cape First Nations Collective (herein after referred to as "**the FNC**") which consist of a broad based significant and prominent representative groups of the Khoi and San descendants and hold a mandate to depose of this affidavit on behalf of "the FNC". See Annexures, amongst others -
  - 4.1. "**ZK1**" – Letter from the Griqua Royal House;
  - 4.2. "**ZK2**" – Letter from the Congress of Traditional Leaders of South Africa;
  - 4.3. "**ZK3**" – Letter from the Cochoqua Tribal Council;
  - 4.4. "**ZK4**" – Letter from the Foundation Nation Restoration;

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4.5. "ZK5" – Letter from the combined National Khoi and San Council and the Katz Korana Royal House.

5. *In amplification*, I am also the Head of and Chief Representative of the Western Cape Gorin Haiqua Cultural Council.

6. The First Nation Collective is supportive of the application to oppose.

## 7. PARTIES

7.1. The Parties are cited in convention.

7.2. The First Nations Collective is a voluntary association of first nation structures and organisations including leaders under ancient Khoi and San cultural protocol.

7.3. The Eight Respondent has been joined to these proceedings as a Party having direct and substantial interest in the outcome of these proceedings. See Annexure "ZK6" – Court Order.

7.4. The First Nations Collective is a conglomerate of Khoi and San indigenous people represented by the following Councils, i.e.

- Gorin Haiqua
- Gorachouqua
- Cochoqua
- The Korana
- The Griqua Royal Houses
- San Royal House of N!l!n!e; and other San structures under leadership of Oom Petrus Vaalbooi and other leaders who have a long working history with us.

  
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- All other indigenous structures that support the Western Cape First Nation Collective, under full cultural protocol.

7.5. Included in these structures are the following:

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

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

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


7.5.4. The Foundation Nation Restoration; and


7.5.5. The Cape Khoi San Labour Forum.

7.6. The Eight Respondents answering affidavit will in the first instance primarily deal with the Applicants' application in **Part A** - for an interdictory relief and such answering affidavit will be duly supplemented by dealing with issues raised in **Part B** - for the review of the granting of a development permit on the River Club site. Such supplementary affidavit to be served and filed in terms of the time-table as agreed between the Parties.

## 8. THE RIVER CLUB DEVELOPMENT

8.1. From the outset, the Eight Respondent place it on record that the Eight Respondent supports the First Respondent in the First Respondents opposition of the application. The Eight Respondent was part and parcel of the consultation process with all the relevant stakeholders and effected groups and

  
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have made meaningful contributions in the process to bring this River Club Development to reality.

- 8.2. Crucial to the support in opposition to the application, is the fact that this River Club Development present the First Nations Collective and all Khoi and San descendants the right of return to their ancestral land. Through this River Club Development, the history of the Khoi and the San will be told and celebrated and through this River Club Development, the heritage of the Khoi and the San will be preserved. Furthermore, this River Club Development presents an enormous opportunity for the protection and advancement of the socio-economic rights, benefits and interest of the Khoi and the San into perpetuity.
- 8.3. It is this process of the Right of Return to their ancestral land that the First Nation Collective has advanced through the consultation processes with all the stakeholders for and in the development of the ancestral land in the area known as the Two Rivers Urban Park. This particular area is of great significance to the First Nation Collective in that it marks the first area of dispossession of the Khoi and San in South Africa. It is of particular significance to the Gorinhaiqua and other significant Khoi and San clans in the Peninsula as it is historically recorded as the area associated with the battle of Gorinhaiqua in 1510 and also the first Khoi Dutch war during 1659 to 1660 in which the Gorinhaiqua played the most significant role.
- 8.4. What comes across clearly through this application is that the Applicants are hell-bent on sabotaging the First Nations Collective's Right of Return to the original Gorinhaiqua lands and to create a permanent heritage enclave on the site, which has been secured after an intense struggle over almost three decades.
- 8.5. Over a period of thirty years, the First Nations Collective, led by the Gorinhaiqua Council under the leadership of Chief !Garu Zenzili Khiosan engaged all the stakeholders including the developer about the advancement and protection of the socio-economic rights and interest of the First Nations Collective in the development. That dream, and struggle has now been recognized by the memorialization of the Khoi and the San nation in the River Club development.

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- 8.6. It is the First Nations Collective submission that there is full compliance in the design and layout of the River Club Development to address the concerns raised in the environmental impact assessment studies for the said development to incorporate the historical, cultural and heritage identity of the previous dispossessed groups.
- 8.7. It is the First Nations Collective's further submission that it is satisfied that the consultation with and input made by the First Nations Collective have been incorporated into the final approved plans for the development.
- 8.8. A very brief outline of the key developments or milestones in the River Park development is hereunder provided. A detailed historical background as to where and how this River Park development fits into the greater development of the Two Rivers Park Development is provided later on in this affidavit.
- 8.9. Following a Local Spatial Development Framework process in terms of Sections 12 to 14 read with Section 11 of the Cape Town Municipal Planning By-law (Part 3), 2015 as amended in 2016; which facilitates the identification of precincts that can later be investigated in separate Heritage Impact Assessment's depending on whether these precincts form the basis of applications for rezoning and/or other related land use applications.
- 8.10. Three areas (or precincts) have already been identified in the terms of reference as potential areas where Heritage Impact Assessments are to be conducted.

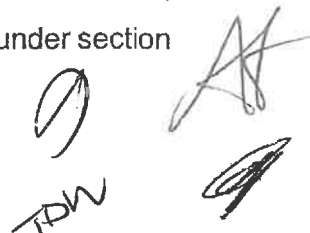
These include:

- The Ndabeni Triangle between Alexandra Road and Berkley Road (various erven).
- The Alexandra Institute, Alexandra Road RE 24290.
- The Oude Molen Precinct off Alexandra Road RE 2639.
- The Liesbeek and Black River Corridors (various erven) (i.e. The River Club) is the fourth green corridor Precinct identified in the terms.

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- 8.11. A Heritage Impact Assessment is required in terms of Section 38(1) and 38(8) of the National Heritage Resources Act and is intended to fulfil the requirements as laid out in section 38(3) National Heritage Resources Act and issues in the Heritage Western Cape RoD in response to the Notice of Intention to Develop.
- 8.12. Section 38(8) applies because a Basic Assessment Report (BAR) is triggered in terms of the National Environmental Management Act (NEMA). The commenting heritage body is Heritage Western Cape and the authorising agency in this instance is the Department of Environmental; Affairs and Development Planning.
- 8.13. In addition, as The Observatory Hill area and related structures has been graded a Grade 1 site (or a site of national heritage significance). As a result, South African Heritage Resources Authority is also regarded as a commenting authority in this project.
- 8.14. A Notification of Intent to Develop (NID) was submitted in terms of section 38(1) and section 38(8) of the National Heritage Resources Act 25 of 1999 on or around 2015.
- 8.15. In terms of section 38(8) of the National Heritage Resources Act, the responsible authority in the case of the Two Rivers Urban-Park is the Provincial Government of the Western Cape: The Department of Environmental Affairs and Development Planning.
- 8.16. On or around the 13<sup>th</sup> September 2019, Heritage Western Cape submitted its interim comments in terms of section 38(8) of the National Heritage Resources Act in response to the proposed development on Erf. 151832, corner Liesbeek Parkway and Observatory Road, i.e. The River Club, Observatory. (*This report is already part of the bundle and will not herein be included.*)
- 8.17. In essence, the Heritage Western Cape was not satisfied with the heritage impact assessment so compiled by the First Respondent.
- 8.18. The Heritage Western Cape recommended that the Two Rivers Urban-Park, which will include The River Club, must be provisionally protected under section



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29(1)(a) of the National Heritage Resources Act. This effectively meant that there would be an interim protection of the River Club development site for a period of two (2) years from this date of the 14<sup>th</sup> March 2018, which will in effect expire on the 13<sup>th</sup> March 2020, and which has indeed expired. A notice to that effect was published in the Provincial Government Gazette: Western Cape on or around the 20<sup>th</sup> April 1918.

- 8.19. On or around the 13<sup>th</sup> February 2020, the Heritage Western Cape submitted its final comments in terms of section 38(8) of the National Heritage Resources Act in response to the proposed development on Erf. 151832, corner Liesbeek Parkway and Observatory Road, i.e. The River Club, Observatory after a hearing and presentation of Impact Assessment Reports. *(This report is already part of the bundle and will not herein be included.)*
- 8.20. The Heritage Western Cape found that none of the concerns raised in their interim report was addressed and thus the requirements of section 38(3) of the National Heritage Resources Act has not been met.
- 8.21. In terms of the National Environmental Management Act 107 of 1998 and Environment Impact Assessment Regulations 2014 (as amended), on or around the 20<sup>th</sup> August 2020, environmental authorisation was granted for the development of the River Club by the Department of Environmental Affairs and Development Planning.
- 8.22. This was followed by an Appeal by the Heritage Western Cape and 20 Other interested Parties on or around the 10<sup>th</sup> September 2020 in terms of section 43(2) of the National Environmental Management Act 107 of 1998 and Regulation 7(3) of the 2014 National Appeal Regulations, against the environmental authorisation granted for the proposed development of the River Club for mixed use development and associated infrastructure on the remainder of Erf. No. 15326. *(This report is already part of the bundle and will not herein be included.)*

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- 8.23. This Appeal was dismissed by the Independent Appeals Tribunal on or around the 22<sup>nd</sup> February 2021 in terms of section 43(6) of the National Environmental Management Act.
- 8.24. It is now this decision, dismissal of the Appeal, that the Applicants intend to take on Review.
- 8.25. At this juncture, it is evident that the Applicants application does not provide new or different insights into the issue(s) for Review. The application is based on previous submissions but more importantly the application is based on the stance taken by the Heritage Western Cape in their interim and final report in opposing the granting of environmental authorisation as reasons for bringing this application.
- 8.26. Key amongst the reasons is the fact the Heritage Western Cape believed that it is the authoritative body to grant the approval for the development of the River Park development, amongst others.
- 8.27. This point is part of the subject of **PART B: The Review** application to be dealt with in the Eight Respondents supplementary affidavit, which from the outset the Eight Respondent submits was lawful, reasonable and procedurally fair.

## 9. PART A – APPLICATION FOR AN INTERIM INTERDICT

- 9.1. The primary objective of interdictory relief is to prevent or prohibit future unlawful conduct.
- 9.2. The requirements for an interim interdict are well established in South African law. They include the following:
- (a) a prima facie right;
  - (b) a well-grounded apprehension of irreparable harm should the interim relief not be granted and the ultimate relief eventually be granted;
  - (c) a balance of convenience in favour of the granting of the interim relief;  
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- (d) the absence of any other satisfactory remedy.
- 9.3. The Eight Respondent submits that the establishment of a prima facie right should be relatively straightforward in the context in which no authorisation has been obtained for the construction works in question. However, there is an added dimension of complexity in applications, like the current one, in which construction have been approved by the relevant authorities and the interdictory relief sought is inextricably intertwined with anticipated review proceedings.
- 9.4. It is the Eight Respondents further submission that in situations in which the interdict sought is directly linked with a pending review of administrative action, the assessment of the relative strengths and weaknesses of the applicant's case in the interdict application must entail a consideration of the merits and prospects of success of the contemplated review proceedings. The two proceedings are inextricably intertwined.
- 9.5. It is the Eight Respondents further submission that the decision to grant the First Respondent environmental authorisation approval, in terms of the such decisions, remain valid administrative acts until set aside on review. The implications of this are that the court in the interdict application must determine whether the consequence of that approval must be fully enforced until set aside, in which case, there could be no basis for granting the relief sought.
- 9.6. In this instance, the legality of the construction works must be weight up against the efficacy of an interdict. The Eight Respondent submits that in this instance, the legality aspect trumps the efficacy of an interdict and such an interdict should be refused.
- 9.7. Furthermore, as outlined earlier, the Applicants reasons and motivation for the Review application is entirely centred around the Heritage Western Cape's arguments at the internal appeals Tribunal. Core is the argument that the incorrect state organ / person have taken the administrative decision and / or a mandatory and material procedure or condition prescribed by an empowering provision was not complied with and lastly is the rationality of the decision

  
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making process. On all the above accounts, and especially and the empowering legislation, the heritage Western Cape is not the responsible to grant environmental approval of the project. On this basis alone, the Applicants application for Review is progressively weak. Heritage Western Cape authoritative framework is determined by the National Heritage Act and not by the National Environment Management Act..

9.8. This the Eight Respondent will further pursue in argument.

9.9. Apprehension of irreparable harm

(a) A critical issue facing the Applicants in connection with the allegedly unlawful environmental construction approval is that, regardless of the strength of the merits of a review application, there is a grave danger that by not allowing the First Respondent to continue to build, the First Respondent will suffer irreparable harm. This irreparable harm directly affects the First Respondent financially and is also extended to all investors in the development project that want certainty that the project can continue and be delivered within the time frames in order to realise their investment.

(b) This irreparable harm is also true for the Eight Respondent who has worked tirelessly to make this project a reality and have pinned the hopes and aspirations of the First Nations Collective in finally securing the historical and heritage recognition of the Khoi and the San people. It is a further delay in frustrating the aspirations of old, frail and tired Khoi and San descendants who would still want to be alive to experience the return to their ancestral land as this development project grants them the space and opportunity to celebrate their heritage and culture.

9.10. Balance of convenience

(a) The "balance of convenience" requirement for interim interdicts essentially relates to the exercise of judicial discretion in terms of which the court must consider the requirements for interdictory relief in conjunction with one another. The court must also weigh the relative

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prejudice to the applicant and the respondent, respectively, in the alternate situations in which the relief sought is granted or not granted, as the case may be.


- (b) It is Eight Respondents submission that the potential prejudice for the First Respondent is self-evident. It relates principally to the potential to incur significant financial loss in so far as the respondent is prohibited from completing the construction work until the legal proceedings in question have been resolved, There is also the frustration and lack of certainty associated with proceeding with ongoing building works on the basis of an administrative decision that might subsequently be set aside on judicial review.
- (c) It is Eight Respondents further submission that this financial loss and lack certainty associated with the proceedings tips the balance in favour of not granting the interim interdict.

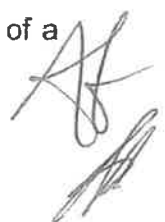
#### 9.11. Alternative remedies

- (a) An applicant for interdictory relief must also demonstrate that no suitable alternative remedy is available in order to remedy the conduct giving rise to the harm. The conduct to continue with the development is lawful conduct and should be continued until set aside on review.

#### 9.12. Other practical considerations: Urgency and delay

- (a) The failure to bring an application in terms of Part A is not clearly explained by the Applicants. One, might consider the fact that on Part B, the Review application, that the Applicants intended to brief suitable Counsel, but the Applicants knew already in February 2021 that the internal Tribunal Appeal was dismissed and that the construction work could and did proceed. There was nothing prohibiting the Applicants to bring an application on Part A timeously.
- (b) In assessing whether there had been an unreasonable delay in instituting the proceedings, the court must take notice of the lack of a

  
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detailed explanations of the applicants as to the enquiries and investigations that had preceded the institution of proceedings.

- (c) For this reason, the unreasonable and unexplained delay by the Applicants in moving the Part A application must fail.

## 10. HISTORICAL BACKGROUND

10.1. The Provincial Government of the Western Cape and the City of Cape Town are undertaking a joint planning and development proposal for the area known as the Two Rivers Urban Park. The proposal is to undertake the preparation of a Local Area Development Framework in terms of Sections 12 to 14 (read with Section 11) of the Cape Town Municipal Planning By-law (Part 3), 2015, as amended in 2016. The aim of the project is to unlock the development potential of the area for the future growth of Cape Town by linking and developing areas of Cape Town formerly divided by apartheid planning.

10.2. The Two Rivers Urban Park (TRU-Park) consists of 297 ha of land situated in the Municipal District of Cape Town. It is located approximately 5km from the Cape Town Central Business District, at the intersection of the N2, M5 and N1 freeways, and at the confluence of the Black and Liesbeek Rivers.

10.3. It includes but is not limited to, the following erven:

Oude Molen Erf 26439 RE, Alexandra Erf 24290 RE, Valkenburg Erf 26439 RE, erven 118877,160695, The Observatory erf 26423-0-1, River Club erf 151832, Ndabeni Erf 103659-0-2 RE.

10.4. The ownership of sites within the TRU-Park rests with State, Provincial Government and Local Government entities as well as privately owned and leased sites.

10.5. Around 2017, a study was conducted to place the heritage component within the planning framework and to fulfil the requirements of Heritage Western Cape in terms of section 38(1) and section 38(3) of the National Heritage Act.



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- 10.6. The statutory heritage related requirements were identified in a response to the Notification of Intent to Develop submitted to Heritage Western Cape on 18<sup>th</sup> July 2016, followed by a meeting between the consultants and Heritage Western Cape on 19<sup>th</sup> July at which a proposed approach was agreed upon.
- 10.7. A broad overarching Baseline Study would therefore be the first and most useful step to initiate the heritage process. It is intended to place the site in its social, heritage, physical and planning contexts; to identify, map and assess sites of cultural significance; and to provide heritage related design informants at a broad level. It also introduces the full consultation and stakeholder feedback process to date. Such a Baseline Study was done in 2016 and updated in 2017.
- 10.8. Several significant heritage related studies have been undertaken in the TRUP area. These include Heritage Impact Assessments, Heritage Studies, Heritage Screening Reports and Archaeological Investigations as well as heritage components and guidelines contained within urban design documents.
- 10.9. The Two Rivers Urban Park is significant from a heritage perspective, comprising a unique series of sites and structures associated with the agricultural, scientific, institutional, industrial and residential growth of the City of Cape Town. In addition, because of its strategic position in relation to the river systems and the historic pastoral routes to the north and south, it has a significant role in pre-colonial history in terms of the history of transhumance and the indigenous residents of the Cape and their struggles to retain their land. As a result, it plays an important role in the cultural identity of the First Nation.
- 10.10. The site is recognised by stakeholders for the wealth and value and information it contains about past histories and narratives extending back to precolonial times. The cultural heritage and natural landscapes of the TRU-Park are closely linked with the cultural landscape have evolved from the constraints and opportunities presented by the topography and the riverine systems. The use of the site has produced overlapping patterns of use and significance including the following:



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- The use of the site for summer grazing by transhumant pastoralists, largely the Gorinhauqua and Goriachoqua (under the custodial agreement of the Gorinhauqua) during the pre-colonial period.
- The placement of barriers and the development of frontiers by the Dutch East India Company (VOC) to limited access to fertile land and water systems.
- The sites of the granting of the first lands under individual tenure; and the introduction of private property ownership and use in the early Dutch Colonial Period.
- Early industrial use and the development of windmills to support agriculture in the area. These include the Oude Molen, and the Nieuwe Molen which remains.
- The presence of early homesteads and werfs which faced the Liesbeek River and used the riverine system for the purposes of irrigation using channels, weirs and dams.
- The use of the site for scientific institutional purposes i.e. at the Astronomical Observatory.
- The use of the site for medical purposes which required societal distance and separation i.e. the Valkenburg Mental Hospital and the Alexandra Institute.
- The use of the site for racially based segregation in terms of medical institutions i.e. the Valkenburg East Mental Hospital.
- The use of the site for segregated formal housing systems i.e. at Maitland Garden Village.
- The development of high density housing on the periphery of the TRU-Park in Observatory and Salt River.
- The growth of the railway transportation links, the development of rail lines across the mouth of the isthmus and the estuary
- The loss of the historic werfs to development i.e. at Malta Farm and Vaarschedrift.
- The use of the areas prone to flooding and unsuitable for housing for recreation purposes i.e. Hartleyvale and the sport fields along the Liesbeek Parkway.

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10.11. In addition to sites of intangible heritage, there are several sites formally protected in terms of section 27 of the National Heritage Resources Act. These include:

- The Valkenburg Hospital, forecourt, courtyards and related supplementary structures;
- The Valkenburg Manor House and related structures;
- The Alexandra Mill at the Alexandra Institute;
- The Oude Molen while a heritage resource of outstanding historical significance is not a PHS and has not been formally protected in terms of section 27 (NHRA).

10.12. There are PHS sites within the suburbs adjacent to the TRU-PARK including Observatory and Mowbray including:

- Wrensch House, Wrensch Road Observatory
- The Dovecote at Coornhoop Dixon Road Mowbray
- Molenvliet, Mowbray.

There are also PHS's within the suburb of Pinelands including houses and open space at The Meadway Road, Pinelands.

**10.13. TRU-Park Heritage parameters in terms of the National Heritage Resources Act (Act 25 of 1999).**

10.13.1. The National Heritage Resources Act (Act 25 of 1999) and Sections of the Act, apply in the case of the TRU-Park. The site contains a significant number of sites of significance, graded sites and formally declared sites (PHS's) as well as sites of memory and living culture.

10.13.2. A Heritage Impact Assessment is required in terms of Section 38(1) and 38(8) of the National Heritage Resources Act and is intended to fulfil the requirements as laid out in section 38(3) NHRA and issues in the HWC RoD in response to the NID.

**10.14. TRU-Park Heritage Requirements in terms of the National Environmental Management Act (NEMA) (Act 107 of 1998) as amended.**

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10.14.1. In terms of section 38(8) of the National Heritage Resources Act, the responsible authority in the case of the TRU-Park is the Provincial Government of the Western Cape: The Department of Environmental Affairs and Development Planning.

10.14.2. Several other environmental statutory requirements have relevance in relation to the TRU-Park. They include the following:

- The National Environmental Management (NEM) Waste Act (Act 59 of 2008);
- The NEM Biodiversity Act (Act 10 of 2004). This related to specifically critically endangered species and degraded ecological systems, both which are present in the TRU-PARK;
- The National Water Act (Act 36 of 1998).

**10.15. Consultation with registered heritage conservation bodies and interest and affected parties. (I&AP's).**

10.15.1. Planning for the TRUP site has had a strong consultation component since the initial processes as early as 1998.

10.15.2. Notably a significant part of this process was the setting up of a "social contract" of 1999 which comprised a set of principles to adjudicate future proposals for the area and the setting up of the TRUP Association. The TRUP Association was set up as a vehicle for ongoing public involvement of interested and affected parties. It had a constitution on which the Association conducted its mandate. At that stage, this organisation did not include the Khoi and San structures as primary parties.

10.15.3. The current process of consultation was established in 2015 by the setting up of a specialist team consisting of SUN (Sustainable Urban Neighbourhood Development) to undertake the necessary consultation arising out of the Provincial and City initiative for the TRU-Park.

- 10.15.4. A requirement of Heritage Western Cape is that stakeholders and registered heritage conservation bodies are consulted during the development of the Heritage Impact Assessment.
- 10.15.5. There has been a planning consultation process and a heritage consultation with registered heritage bodies and heritage commenting authorities. The First Peoples Museum (Mr R Martin) was consulted in terms of the heritage process. Both processes have intersected when the heritage study was presented to the stakeholder group on 14<sup>th</sup> November 2016 and comments sought. The First Peoples Museum is part of the now First Nations Collective.
- 10.15.6. The Planning participation process has included different levels of public engagement, namely government, directly affected, and interested parties. Firstly, the engagement at the government level includes the following stakeholders:
- (a) Sub-council's wards City of Cape Town, representatives and Provincial Government departmental representatives.
  - (b) A second level layer directly affected parties including Associations and Forums including TRUP Association, The Oude Molen Forum, Western Cape Diverse Traditional Leaders Forum, and the First Nation groups.
  - (c) Landowners, and Private businesses. The last stakeholder group is formed by the interested and affected stakeholders, including surrounding businesses, research institutions, environmental initiatives and individuals including the University of Cape Town, Friends of the Liesbeek, Friends of the Black, River.
  - (d) Registered heritage conservation bodies. These do not form a separate group but are included in the second level of stakeholders. They include the following: The Observatory Civic Association; The Pinelands Ratepayers Association; The Rosebank and Mowbray Association.

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## **EIGHT RESPONDANT NOW DEALS AD SERIATUM WITH ALL OF SECOND APPLICANT'S AVERMENTS**

### Introduction

From the outset, an important observation of the Second Applicants affidavit is that the affidavit is a neration of the deponents' "achievements" and listing of the numerous organisations that he belongs to and the articles that he has published. In a nutshell, a self- glorification exercise. Furthermore, the deponents' individuality dwarfs the importance of the Gorinhaicona Chief and the Garinhaicona tribe at minimum or at best the Khoi and San nation. The voice of the Gorinhaicona Chief is drowned out by this individuality. It really backs the question as to which and who's interest is served by the deponent deposing of such an affidavit. It surely does not reflect that the interest that is served is that of the Khoi and San nation.

### **11. AD PARAGRAPHS 1 AND 2 THEREOF:**

11.1. The contents thereof are noted.

11.2. To the extent that the Second Respondent refers to himself as the Supreme High Commissioner, which description is akin to that of an authoritarian leader. A trait not recognized in our free Democratic South Africa and a trait not recognized and not part of the Khoi or the San culture and their indigenous protocol.

11.3. The Khoi and San culture is that of an egalitarian system with a respect for human dignity and humility and does not elevate any one person to be the supreme above any other person.

11.4. The Khoi and San leadership construct is not a vertical leadership construct but a circular leadership construct where every voice is heard and every person's participation is valued in decision making.

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11.5. Such title as the Supreme High Commissioner has never existed in any of the Khoi and San leadership construct.

11.6. Inside the Khoi and San culture, one has to go through a !Nau ceremony. This ceremony is part of the recognized rituals and traditions handed down from generation through time immemorial. The principle of the !Nau ceremony, as practiced by most tribal or traditional Councils, require first recognition of indigenous heritage and indigenous descent. Following this, adherence of the principles of the !Nau tradition, through a process of recognition within a Council or structure, usually occurring after several years, will be accorded titles such as Headman/women; Chief, Paramount Chief, Commissioner and after one has proven oneself, High Commissioner. The accordance of title as is tradition of all these titles, only follows after recognized service is rendered. In the case of the Second Applicant, there is no evidence that the Second Applicant was inducted through the !Nau ceremony, at the time of receiving the title of Supreme High Commissioner. It is astounding that one can enter a group and be accorded a title higher than anyone else that has had long service.

**12. AD PARAGRAPH 3 THEREOF:**

12.1. The contents thereof are noted.

**13. AD PARAGRAPH 4 THEREOF:**

13.1. The contents thereof are denied.

13.2. To the extent that the averments so made by the Second Applicant, as will be pointed hereinunder, are not true and correct and are in fact disputed.

**14. AD PARAGRAPH 5, 6 AND 7 THEREOF:**

14.1. The contents thereof are denied.

  
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- 14.2. *To the extent* that the Second Applicants' qualification does not qualify him to be a specialist on the Khoi and San culture as the Second Applicant fails to indicate with particularity that his studies revolve around the Khoi and San history.
- 14.3. *To the further extent* that the Second Applicants' role and position within the AIXARRA Restorative Justice Forum does not qualify the Second Applicant to speak for and on behalf of the Khoi and San Community and groups.
- 14.4. *To the further extent* that the Second Applicant was never nominated and appointed as a Community Engagement Strategist by and for the Khoi and San people by the recognized Khoi and San leadership and groups. Such appointed was and is a creature of the University and does not represent the desires of the Khoi and San Community and groups for the Second Applicant to represent them.
- 14.5. *To the further extent* that the Eight Respondent does not fully deal with the averments so made in the Founding Affidavit of Professor Lesley London, such averments are disputed.
- 14.6. *To the further extent* that the Eight Respondent, as Representative of the First Nations and representing the majority of the Khoi and San Community and groups, take issue with the fact that individuals within the minority group of the Goringoicona put themselves out as the *de facto* representative of the Khoi and San. Such assertion is totally rejected with the contempt that it deserves.
- 14.7. *Furthermore*, the Goringoicona people, historically, never traversed or are any recorded as having a "kraal" at the Liesbeek River Park and are known to have been an outcast of the Gorinhaiqua people and have been "strandlopers".
- 14.8. The First Nations Collective and the Gorinhaiqua perspective, the Heritage Impact Assessment Report did adequately take account of the intangible heritage associated with the site.

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**15. AD PARAGRAPH 8 AND 9 THEREOF:**

15.1. The contents thereof are noted.

15.2. To the extent that the Second Applicant does not represent the views and aspirations of the First Nations Collective in respect of the development of the Liesbeek River Park site. Any assertion to the contrary is rejected and a total misrepresentation of the true state of affairs.

**16. AD PARAGRAPH 10 AND 11 THEREOF:**

16.1. The contents thereof are noted.

16.2. To the extent that the Second Applicant uses the word our, which he now infers himself into a Khoi and San group to which he does not belong. The Second Applicant is not a Khoi descendant.

**17. AD PARAGRAPH 12, 13, 14, 15 AND 16 THEREOF:**

17.1. The contents thereof are noted.

17.2. The battle of 1510 against Admiral Francisco DelMida was a battle fought by the Gorinhaiqua and not Gorinhaicona.

17.3. 1659 and 1660 battle was dispossession by Van Riebeek of the Gorinhaiqua and not Gorinhaicona.

17.4. The Second Applicant is attempting to rewrite if not falsify the history in order to make the Gorinhaicona, a marginal group, into a central role.

17.5. The most established urban house in the TRUP was the Gorinhaiqua and not the Gorinhaicona.

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**18. AD PARAGRAPH 17 AND 18 THEREOF:**

- 18.1. The Gorinhacona Chief, should be ashamed whilst their king proclaimed that Mandela died in prison and that the Nelson Mandela who was released from prison was an imposter.
- 18.2. This could have set another conflict between the Khoi and San and the Abatembu Royal house.
- 18.3. The Gorinhaiqua house made a public statement and urged that such statement be retracted.

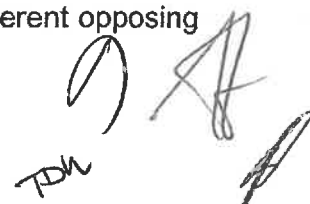
**19. AD PARAGRAPH 19 THEREOF:**

- 19.1. The contents thereof are noted.
- 19.2. The leader of IRASA is part of First Nations and does not support the stance so taken by the Second Applicant.
- 19.3. Camissa Museum founder, Patric Mellet in his book, The Lie of 1652, proclaimed that Gorinhacona is not a tribe.
- 19.4. First Nations Museum supports the Eight Respondents and have never endorsed the application of the Second Applicant.

**20. AD PARAGRAPH 20 THEREOF:**

- 20.1. The contents thereof are noted.
- 20.2. FINSA, DFIA supports the Second Applicant. Part of consultation process WCHC and Public Works consultation process.
- 20.3. The Second Applicant stance during consultation, was very confused and had a blanket opposition to development but could not present coherent opposing

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plan to the development. Evidenced by submission at Heritage Western Cape, could not give clear answer. The Second Applicant have and had no coherent plan for the memorialization of Khoi and San clans in the development.

- 20.4. WCKLC – disintegrated organization and not functional organization and exist in name only. Any reference to such an organization is a deliberate misrepresentation.
- 20.5. KKAAP and New Nations Movement are recently formed groups with marginal traction in the Khoi and San resurgence.
- 20.6. Very concerning, that a non-South African born person and non-Khoi and non-San descendant can position himself as the authoritative voice and representative of the Khoi and the San.

**21. AD PARAGRAPH 21 TO 24 THEREOF:**

- 21.1. The contents thereof is noted.
- 21.2. To the extent that the Second Applicants' representative refers to we as associating himself as a Khoi or San. He is not.

**22. AD PARAGRAPH 25 THEREOF:**

- 22.1. The contents thereof are noted.
- 22.2. Restitution of claims had an arbitrary date of 1913. Therefore, the Khoi and the San cannot reclaim their ancestral land. Therefore, can have representation, recognition and presence together with the socio-economic development of the Khoi and San on the River Club development.
- 22.3. Gorinhaicona had a proposal to develop same for the exclusive benefit of the Gorinhaicona.





**23. AD PARAGRAPH 26 AND 27 THEREOF:**

23.1. The contents thereof are noted.

**24. AD PARAGRAPH 28 TO 51 THEREOF:**

24.1. The contents thereof are noted.

**25. AD PARAGRAPH 52 TO 53 THEREOF:**

25.1. The contents thereof are noted.

25.2. To the extent that the First Nations is an organization which is a collective of all significant and representative groups that have a vested interest in the subject matter and the development at the River Club at minimum and of the entire Two River Urban Park Development at best.

25.3. To the further extent that the Second Applicants as an insignificant group cannot hold the entire First Nations collective hostage and cannot hold the entire project hostage for their own ends.


**26. AD PARAGRAPH 54 AND 55 THEREOF:**

26.1. The contents thereof are noted.

**27. AD PARAGRAPH 56 TO 63 THEREOF:**

27.1. The contents thereof are noted.

27.2. To the extent that onsultation with First Nations Collective has taken place and was adequate to meet the expectation of the Heritage Western Cape. This is born out of the AFMAS report which forms part of the application.

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- 27.3. Consultation was extensive, informative, comprehensive and present critical perspectives of the history of the two rivers park and represent the authentic views of the leadership which was engaged.
- 27.4. Views incorporated into report are historical facts and are in no way presented to delegitimize the Gorinhaicona.
- 27.5. AFMAS cannot assign legitimacy and importance to the Gorinhaicona. Patrick Mallet give accurate history of Gorinhaicona in his book the The Lie of 1652.
- 27.6. The recorded authentic historical fact is that the Gorinhaiqua is the only one to have a kraal in Two Rivers Urban Park.
- 27.7. To the further extent that the Protection Order is the subject of an Appeal.

**28. AD PARAGRAPH 64 AND 68 THEREOF:**

- 28.1. The contents thereof are noted.

**29. AD PARAGRAPH 69 AND 71 THEREOF:**

- 29.1. The contents thereof are noted.
- 29.2. *To the extent* that the historical fact of the position of the Gorinhaiqua is highlighted in an attempt to truly reflect the historical fact.
- 29.3. *To the further extent* and without detracting from the importance and existence of the Gorinhaicona tribe - that the Gorinhaicona elevates themselves as the warriors, which is blatant falsehood, occupiers of the land, which is a blatant falsehood as the Gorinhaicona had no kraal along the Two River Urban Park.
- 29.4. *To the further extent*, that entire affidavit in itself marginalize the other Khoi and San groups which represent a significant majority of the Khoi and San peoples as represented by the First Nations Collective.

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29.5. Resolute resistant to development does not make their stance correct, does not give authoritative voice, nor reflective of the views of the peoples as a hole. Only dissatisfaction is founded on self-interest.

**30. AD PARAGRAPH 72 TO 77 THEREOF:**

30.1. The contents thereof are noted.

**31. AD PARAGRAPH 78 THEREOF:**

31.1. The contents thereof are denied.

31.2. The Second Applicant is put to the proof thereof.

**32. AD PARAGRAPH 79 THEREOF:**

32.1. The contents thereof are denied.

32.2. The Second Respondent does not take Honourable Court into confidence.

32.3. The averment made therein is intended to deliberate and intentionally mislead the Honourable court.

32.4. This is atypical example of self-created urgency.

**33. AD PARAGRAPH 80 THEREOF:**

33.1. The contents thereof are noted.

33.2. Never opposed the provisional protection

33.3. Participated in the Tribunal process.

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33.4. Finding of Tribunal, concern as to consultation process all inclusive. Position was self-exile if not participate.

**34. AD PARAGRAPH 81 TO 85 THEREOF:**

34.1. The contents thereof are noted.

**THEREFORE**

35. The Eight Respondent moves for the dismissal of the application in terms of PART A – Interim Interdict

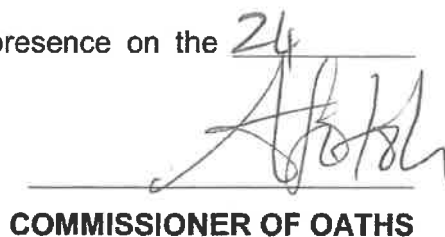
36. Costs of suite

37. Further and / or alternative relief.

  
DEPONENT

I certify that:

- I. The Deponent acknowledged to me that:
  - A. Deponent knows and understands the contents of this declaration;
  - B. Deponent has no objection to taking the prescribed oath; and
  - C. Deponent 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 on the 26 day August of 2021.

  
COMMISSIONER OF OATHS

ALEXANDER A FOTOH  
Ex-Officio Commissioner of Oaths - Practising Attorney  
A. FOTOH AND ASSOCIATES  
ATTORNEYS INC  
13B DERNA ROAD, KENWYN  
REPUBLIC OF SOUTH AFRICA



15 July 2022

Liesbeek Leisure Properties Trust  
4 Sandown Valley Crescent  
Sandton

ATTENTION: James Tannenberger  
BY EMAIL: james@zenprop.co.za

Dear James

### Funding of the River Club development

We hereby confirm that:

1. we have concluded development facilities with yourself,
2. the development facilities have become unconditional, and we have made advances in terms thereof;
3. the development facilities will be converted into term financing facilities on the basis as set out in the Term Sheet dated 1<sup>st</sup> June 2021;
4. the term sheet dated 1<sup>st</sup> June 2021 remains valid and binding, and the reference to an expiry date of 31 May 2022 was an obvious typographical error.

Kind regards



LEIGH ROOME  
FirstRand Bank Limited, acting through its Rand Merchant Bank division  
(duly authorised)

#### CORPORATE AND INVESTMENT BANKING

1 Merchant Place  
Cnr Fredman Dr and Rivonia Rd  
Sandton 2196

PO Box 786273  
Sandton 2146  
South Africa

Switchboard +27 11 282 8000  
Website rmb.co.za

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**PROPOSED FINANCING ARRANGEMENT**



**Project Zola and River Club Precinct – Development Facilities**

**May 2021**

*[Handwritten signature]*

*[Handwritten initials]*  
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### IMPORTANT NOTICE

*This credit approved indicative Term Sheet does not constitute a commitment or an offer to commit to any transaction or financing. An unconditional commitment shall only exist on the finalisation and signing of the facility documentation and the fulfilment of all conditions precedent to the satisfaction of RMB.*

*This document is strictly confidential and is not for publication or circulation. The financial arrangements outlined herein are for the use and benefit of the Borrower and the Guarantors to whom this is submitted in good faith, and who is deemed to have accepted responsibility for ensuring the confidentiality of this document.*

PARTIES	
<b>Borrower</b>	Liesbek Leisure Properties Trust ("LLPT")
<b>Lender</b>	Rand Merchant Bank, a division of FirstRand Bank Limited ("RMB")
<b>Zenprop Guarantors</b>	
<b>Indigo Guarantors</b>	and I
<b>Guarantors</b>	Zenprop Guarantors and Indigo Guarantors
<b>Newco</b>	A new SPV to be incorporated and owned by the Shareholders on completion of the Amazon Development
<b>NewCo Guarantors</b>	GRE and RWZ who are further guaranteed by the Zenprop Guarantors
PROPERTY	
<b>Secured Property</b>	Erf 151832, Liesbek Parkway, Blackriver, Cape Town, known as The River Club Precinct, which property will be subdivided into [4] portions.
<b>Secured Property Subdivisions</b>	Should the Secured Property be subdivided further and to the extent that any of the portions are developed, and not funded by the Lender, the Lender will release the subdivision from the Mortgage Bond.
PROJECT ZONE	
<b>Project Zone</b>	The Amazon Development being undertaken by LLPT for the Amazon Lessee.
<b>River Club Precinct</b>	The mixed-use precinct to be developed on the Secured Property with an available bulk of [150,000] sqm.
<b>Amazon Lessee</b>	Amazon Development Centre (South Africa) Pty Ltd
<b>Amazon Guarantor</b>	
<b>Amazon Lease Agreements</b>	Entered into between LLPT and the Amazon Lessee and which will be assigned to Newco on transfer. These agreements encompass two leases described as AWS (CPT 14) and CS (CPT15).
<b>Amazon Development</b>	The development of [41,843] sqm of office space for the Amazon Lessee which includes [33,904] sqm relating to AWS (CPT 14), [7,939] sqm relating to CS (CPT 15) and [4,984] sqm relating to Basement Areas.
<b>Land and Infrastructure Development</b>	The development of all internal and external infrastructure for the River Club Precinct, for an amount of R501,824,626.
DEVELOPMENT FACILITY - AMAZON DEVELOPMENT	

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**Purpose** To finance the following:  
 1. the Amazon Development; and  
 2. the Non-Refundable Debt Structuring Fee.

**Facilities Amount** - Development Facility: R1,106,684,000  
 - VAT Facility: R 30,000,000

**Facility Term** - Development Facility: 30 months  
 - VAT Facility: 33 months

**Utilisation** The Facilities will be disbursed on a cost to complete basis as per RMB's standard building loan procedures.

**Non-refundable Debt Structuring Fee** R8,300,128 (excluding VAT)

**Interest Rate**

**Repayment**

**Hedging Agreement** /  
cc

**Hedging Strategy** ... risk (or ...)

**LAND FACILITY - LAND AND INFRASTRUCTURE COSTS**

**Land and Infrastructure Costs** The total costs summarised as follows:

	Cost	Accrued Interest	Total Cost
<b>Total Cost</b>	464,824,626	37,000,000	501,824,626

**Facility Purpose** To finance the following:  
 1. the Land and Infrastructure Development; and  
 2. the Non-Refundable Debt Structuring Fee.

**Facilities Amount** The Land Facility amount is calculated as follows:

<b>Total Cost</b>	R501,824,626
<b>Cost attributable to the Amazon Development</b>	(R143,555,510)
<b>Facility Required</b>	R358,269,116
<b>Facility Amount (80% of the Facility Required)</b>	R214,611,000

**Facility Term** The VAT Facility amount: R7,000,000  
 Land Facility: 30 months  
 VAT Facility: 33 months

**Utilisation** The Facilities will be disbursed on a cost to complete basis as per RMB's standard building loan procedures

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TOW





**Non-refundable Debt Structuring Fee** R1,827,169 (excluding VAT)

**Interest Rate**

**Repayment** Interest to be capitalized to the Land Facility Amount up to a maximum amount (as per the feasibility) whereafter interest is to be serviced by the Borrower monthly in arrears.

**Early Repayment Trigger** The Borrower will be required to reduce the Land Facility capital balance by the Early Prepayment Amount (as defined below) by no later than the second anniversary of the first advance under the Land Facility in the event that the Amazon Late Trigger occurs.

unless otherwise agreed to by the Lender.

**Amazon Late Trigger** Any breach that results in the cancellation of the Amazon agreements during the development period.

**Retail Development - Mandatory repayment**

**Land Sale Proceeds** All proceeds in relation to any sale of the land shall be applied to reduce the Land Facilities amount.

**First Right of Refusal**

**SECURITY**

**Security** The following security will be required:

favour of the Lender:

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ing:

and

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CONDITIONS PRECEDENT

Conditions Precedent:

Conditions precedent to financial close of the funding agreements will be those usual for facilities of this nature, including but not limited to:

- Execution of the facility agreements and all security documentation to the satisfaction of the Borrower and the Lender;
- Trustee and/or Guarantor resolutions providing the necessary constitutional consents for entering into the funding where required;
- Conclusion of the development agreement and building contract on terms and conditions acceptable to the Lender;
- Due Diligence of the Amazon Lease Agreement to the satisfaction of the Lender;
- Due diligence on the environmental, heritage and planning approvals by the Lender (or its appointed external independent service provider) to the satisfaction of the Lender;
- Approval of Hedging Strategy;
- A suitable security assessment report performed by an independent value appraiser appointed by the Lender in respect of the development indicating a value of not less than [redacted] or the Amazon Development on completion with any further conditions as may be required by the value appraiser;
- On completion of the Land and Infrastructure Development Facility, remaining bulk to be revalued such that the LTV will be [redacted] for the Land and Infrastructure Term Facility;
- Confirmation of insurance over the Secured Property to the satisfaction of the Lender;
- Municipal accounts in respect of the Secured Property confirming that all municipal service fees, consumption charges, property rates and other municipal taxes, levies and duties and any interest or surcharges on these amounts have been paid and that no legal action is pending for recovery of these amounts;
- RMB's standard building loan conditions for such transactions to apply, including but not limited to:
  - All relevant building and town planning approvals;
  - Approval by the Lender of the main contractor and professional team;
  - Professional indemnity insurance from all members of the professional team;
  - Duty of care undertakings from the members of the professional team;

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- Approval by the Lender of the development costing and building programme;
- Approval by the Lender of the building contract;
- Waiver of lien from the main contractor; and
- Performance guarantee acceptable to the Lender.
- All documentation required for Know Your Client ("KYC") and FICA;
- The absence of any material adverse change in the business, condition (financial or otherwise), operations, performance or prospects of the Borrower or Secured Property since date of acceptance of this term sheet; and
- Representations, warranties and undertakings customary for financings of this nature to be provided by the Borrower.

**EVENTS OF DEFAULT, INFORMATION UNDERTAKINGS, REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS AND CHANGE IN CONTROL**

**Events of Default**

Standard for a transaction of this nature

**Information Undertakings**

The Borrower undertakes to assist the Lender in the execution of the facilities. This assistance will include:

- providing such information as may be reasonably required by the Lender in connection with the implementation of the Term Facilities;
- ensure that the legal documents are each signed by the relevant persons duly appointed representative in line with the Borrower's delegations of authority;
- notification of the occurrence of any Event of Default;
- promptly notify the Lender, in writing, of any Material Adverse Effect; and
- provide the Lender with copies of the approved environmental impact assessment report and green building certification (and any renewals or updates thereon) upon receipt.

**Representations, Warranties and Undertakings**

Representations, warranties and undertakings customary for financing of this nature, which shall include, but not be limited to:

- Status;
- Binding obligations;
- Non-conflict with other obligations;
- Power and authority;
- Validity and admissibility in evidence;
- Insolvency;
- No winding up;
- No default;
- Taxation;
- Licences;
- No misleading information;
- No proceedings pending or threatened;
- No breach of laws;
- The Borrower shall be allowed to gear provided that such gearing is transferred to a new SPV no later than 18 months and/or an inter-creditor agreement is concluded to the satisfaction of the Lender;
- Environmental laws;
- Financial statements;
- Pari passu ranking;
- Good title to assets;

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**Change in Control** No change in respect of the beneficial interest in the Guarantors without Lender's prior consent, which shall not be unreasonably withheld.

**OTHER**

**Other Conditions applicable to all facilities** Terms and conditions standard for a transaction of this nature including general corporate action protections, warranties, representations and general and information undertakings. Terms and conditions are limited to standard terms agreed with Zenprop on other RMB facility agreements of this nature.

**Market Disruption and Flex** Standard conditions with regards to Market Disruption and Flex, such that the Lender has the ability to increase its pricing if there are any changes in bank funding costs for a transaction of this nature prior to and post draw down of the Facilities. Conditions are limited to standard terms agreed with Zenprop on other RMB facility agreements of this nature.

**Indemnity** The Borrower agrees to indemnify and hold harmless RMB (and their respective directors, officers, employees and agents) (each an "Indemnified Person") against any loss, liability, cost or expense incurred in respect of the Facilities (including the reasonable fees and expenses of counsel to such Indemnified Person) except to the extent resulting directly from the gross negligence or willful misconduct of such Indemnified Person.

**Costs** The Borrower agrees to reimburse RMB (as agent) promptly for , of all reasonable costs and expenses (plus VAT and other similar taxes thereon) including legal fees and costs of RMB's legal counsel incidental to the implementation of the Facilities. Costs associated with the registration of mortgage bond will be for the Borrower's account.

**Default Interest Rate** Upon the occurrence of an Event of Default, default interest will accrue on the Facilities including any unpaid amounts at the higher of the Prime Interest Rate plus or the applicable Facility Interest Rate . Such Default Interest Rate will be retrospectively adjusted from the date that such Event of Default occurred and whilst it is continuing.

**Drop Dead Date** This Term Sheet will be valid until 31 May 2021 after which it will expire.

**Submission to Jurisdiction** Without limiting any party's right of recourse to any court of competent jurisdiction, the Borrower and RMB irrevocably consent to the non-exclusive jurisdiction of the South Gauteng Division, Johannesburg of the High Court of South Africa in respect of any dispute arising out of or in connection with this letter.

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**| MANDATE**

By accepting and signing this Term Sheet, the Borrower and the Guarantors mandate RMB to provide the funding on the terms and conditions set out herein.

Issued on this Sandton day of 1 June 2021

  
Keenan Jacobs  
FirstRand Bank Limited  
(acting through its Rand Merchant Bank Division)

  
Leigh Egan  
FirstRand Bank Limited  
(acting through its Rand Merchant Bank Division)

**| ACCEPTANCE OF TERM SHEET**

I, J. Thamburulla, on behalf of the Borrower accept the terms of the proposed terms as set out in the attached Term Sheet.

Signed at SANDTON on this 1<sup>st</sup> day of June 2021

Signed: 

Name: J. Thamburulla

Capacity: Director  
Who warrants his/her authority hereto

**| ACCEPTANCE OF TERM SHEET**

I, \_\_\_\_\_ on behalf of the Guarantors accept the terms of the proposed terms as set out in the attached Term Sheet.

Signed at \_\_\_\_\_ on this \_\_\_\_\_ day of \_\_\_\_\_ 2021

Signed: \_\_\_\_\_

Name: \_\_\_\_\_

Capacity: \_\_\_\_\_  
Who warrants his/her authority hereto

