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

CASE NO: **12994 /2021**

In the matter between:

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| **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 OF 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** | Eighth Respondent |
| **FOREST PEOPLES PROGRAMME** | *Amicus curiae* |

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## CITY'S APPLICATION FOR LEAVE TO APPEAL: PART A

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**PLEASE TAKE NOTICE** that, on a date to be arranged with the Registrar of this Court, the third and seventh respondents ('**the City**') intend applying for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of the High Court delivered on 18 March 2022 per the Honourable Goliath DJP ('**the Court**' and '**the Judgment**').

**KINDLY TAKE NOTICE FURTHER** that the City's grounds of appeal are as set out below.

**IMPERMISSIBILITY IN DECIDING THAT GROUPS WERE 'EXCLUDED OR NOT ADEQUATELY CONSULTED'**

1. The only basis upon which the Court found fault with the impugned decisions was that, in the Court's assessment, certain (unnamed) First Nations Groups were 'excluded or not adequately consulted' (para 131 of the Judgment). The Court was not permitted to make that finding for several reasons.

2. First, it was impermissible for the Court to conclude that there was inadequate consultation when that issue was not pleaded.

    2.1. The grounds of review pleaded by the applicants in their affidavits (both founding and replying affidavits) had nothing to do with the adequacy of consultation. This was in respect of both the environmental and

planning decisions (see FA pp 98-101 paras 198-199, 200-201 and RA p 2621 para 64; pp 2622-2623 para 68).

2.2. The Supreme Court of Appeal explained in *Fischer v Ramahlele* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13 that it is 'impermissible' to rely on a constitutional complaint that was not pleaded:

> 'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded."'

2.3. The Constitutional Court recently approved the *Fischer* dictum in *Damons v City of Cape Town* [2022] ZACC 13 (30 March 2022) para 116, and held that it is 'axiomatic' that pleadings fulfil an essential role in determining disputes in a court of law.

2.4. The Constitutional Court has also held that:

> 'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'
>
> *(South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC) para 114)

2.5. The Judgment – based as it was on a failure by the Court to hold the applicants to their pleadings – is thus an impermissible breach of the foundational constitutional value of the rule of law.

3. Second, deciding the application on an issue which the respondents were not called to court to meet was procedurally unfair and impermissible.

3.1. This is especially so when the Court, having decided to base its decision on the (unpleaded) issue of consultation, then failed to give the respondents an opportunity to file affidavits on the matter. The Court thereby breached the *audi alteram partem* rule which is founded on the principle of natural justice.

3.2. It was also improper, unfair and prejudicial for the applicants, during oral replying argument at the hearing of the matter, to be permitted to introduce an argument that unidentified First Nations groups had been 'excluded' from consultation.

3.3. As the Supreme Court of Appeal explained in *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* [2021] 2 All SA 57 (SCA) at paras 60 – 61:

> In motion proceedings, applicants are required to make out their case in their founding affidavit and may not make out their case in reply… This does not stem from an overly technical approach to pleading but concerns fundamental fairness… This is not to stump [the applicant] on technical points. It is to insist that a litigant should stick to the case it has set out in its challenge, and that it does not ambush its opponent in reply with a new case and new evidence entirely.

4. Third, in making this definitive finding that groups were 'excluded or not adequately consulted', the Court prejudged the review in Part B when the Court

was not asked or permitted to do so. As there has been a final determination of this issue, the review has already been decided without the respondents being heard.

5. Fourth, the finding in para 131 that First Nations Groups were 'excluded or not adequately consulted' is based entirely on the Court's conclusion that the AFMAS report by Mr Arendse was 'tainted' and 'unreliable' (paras 121-130). In so doing, the Court made the error of conflating (i) the non-statutory AFMAS report with (ii) the decision-makers' statutory consultative processes. The conflation is erroneous because the AFMAS report was concluded over and above the statutory processes administered by the Province and the City. In this regard:

5.1. The Court failed to consider the following common-cause evidence: 'To the extent that any indigenous person, group or representative structure felt marginalised by the First Nations Collective, they were free to submit comments and objections directly to the City and to appeal the decision of the MPT. This approach has been adopted by [the second applicant], which fully used these participation processes. Any such grouping or person was also free to participate in the public-participation proceedings that took place under the Heritage Act and the NEMA' (p 1518 para 250 – not disputed in reply (p 2666)).

5.2. The statutory participation processes were concluded after the AFMAS report during which any First Nations Group could participate:

5.2.1. The AFMAS report was completed in November 2019.

5.2.2. After the second applicant ceased interacting with AFMAS, it continued participating in the statutory consultation processes.

5.2.3. During April 2020, after multiple phases of public comment (including engagements with the First Nations), the Environmental Basic Assessment Report ('**BAR**') was finalised. Anyone who did not participate in the AFMAS process in 2019 could participate in the BAR public-participation process in terms of the National Environmental Management Act 107 of 1998 ('**NEMA**').

5.2.4. On 18 September 2020 acting in terms of the Municipal Planning By-Law ('**the By-Law**'), the City held hearings in respect of the municipal-planning authorisations. Interested parties, including First Nations representatives, made submissions directly to the City.

5.2.5. During October 2020, interested parties – including First Nations representatives – lodged appeals in respect of the municipal-planning authorisations granted to the first respondent.

5.2.6. Those parties made oral representations to the City's Planning Appeals Advisory Panel on 23 February 2021. The second applicant was permitted to make further representations even after the panel's oral hearings.

5.2.7. There are no complaints about the ethics or inclusiveness or sufficiency of the statutory consultation processes which were conducted under NEMA and the By-Law.

5.3. The Court thus erred in concluding 'the consultation process' was viewed by some as unethical (para 121 of the Judgment) and that it is common cause that certain First Nations groups did not participate in 'the consultation process' or subsequently withdrew from 'the consultation process' (para 123 of the Judgment).

6. Fifth, there was no evidence that any First Nations group (or anybody else) claimed to have been, or had actually been, excluded from any consultation or engagement process administered by the City.

6.1. The Court erroneously conflated opposition to the development with a lack of consultation (para 123 of the Judgment). However:

6.1.1. the groups listed in paragraph 120 of the Judgment are not groups that claimed to be excluded from any consultation or engagement process. Instead, they are groups that, according

to the second applicant, '*confirmed in conversations with [Mr Jenkins], that they remain strongly opposed to the proposed development*'; and

6.1.2. those who opposed the development were sufficiently informed to have a view about the proposal and made their views known.

6.2. The Court erred in concluding that the City (along with the developer) was responsible for a '*significant and glaring omission*' because it did not provide the details of '*First Nations Peoples who have an interest in this matter, was [were] excluded from the consultation process*' (Judgment para 130). However:

6.2.1. the City was never required to provide such evidence because, in their founding and replying papers, the applicants never alleged that the City's consultation processes had been lacking; and

6.2.2. the City took the Court through all available evidence, which made it clear that there was no basis for the notion that any First Nations group had been excluded.

7. Sixth, the Court failed to decide the matter in accordance with law governing participation in the City's planning decisions.

7.1. The Court in para 107 correctly recorded (i) the City's submissions that provisions in Chapter 7 of the By-Law regulate adequate and effective participation in respect of municipal planning decisions, (ii) that there is no attack on the validity of the By-Law, and (iii) all participation processes should be measured by the provisions of the By-law.

7.2. Neither the applicants nor the *amicus curiae* has suggested that the By-Law failed to facilitate a constitutional level of participation, or that it is insufficient to meet the standards set by international law.

7.3. The Court erred in finding in para 118 of the Judgment that international law was 'triggered' and applying it as if it were directly part of South African domestic ('municipal') law, when it is not. Rather, international law is something that a court must consider when interpreting the Bill of Rights (section 39(1)(b) of the Constitution).

7.4. The Court failed to assess the City's compliance with the provisions of the By-Law. The Judgment does not refer to them again.

7.5. Neither the applicants nor the *amicus curiae* suggested that the City failed to discharge its statutory consultation obligations.

**ERROR IN ORDERING FURTHER ENGAGEMENT AND CONSULTATION (PARA 145.1(a))**

8. The Court ordered that there must be the '*Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC'* (para 145.1(a)). Read with para 137 of the Judgment, the '*meaningful engagement and consultation'* must occur before the judicial review application proceeds under Part B of the notice of motion. In granting the order, the Court erred in the following respects.

8.1. First, no party asked for the order in para 145.1(a). The Court ordered this new relief at its own instance. This is an 'inappropriate' contravention of 'the core principle of our adversarial system that the judge remain neutral and aloof from the fray' (*National Commissioner of Police and Another v Gun Owners South Africa* 2020 (6) SA 69 (SCA) paras 26-27).

8.2. Second, the order in para 145.1(a) was granted unfairly because none of the parties bound by the order were given a hearing about whether it should be granted. It was not sought in the notice of motion, not argued at the hearing, and not raised by the Court before the Judgment was handed down.

8.3. Third, there is no factual basis for the order in para 145.1(a) because, as explained in para 6 above, there is no evidence that any First Nations group (or anybody else) has been excluded.

8.4. Fourth, the order in para 145.1(a) is vague:

8.4.1. It is unclear who must conduct the consultation.

8.4.2. It is unclear who must be consulted.

8.4.3. It is unclear what is meant by '*meaningful engagement and consultation*'.

8.4.4. It is unclear whether the order requires a repeat of the prescribed statutory consultation processes or whether the Court considers the statutory processes, which are not challenged, to be insufficient – in which event it is unclear what more is required.

8.5. Fifth, the consultation ordered by the Court is unworkable. The Court ordered the consultation to be completed before the judicial review proceeds under Part B. That consultation, if it is to serve any purpose, must be capable of influencing the impugned decisions. However, those decisions have already been made and will stand until, at the very least, the conclusion of the judicial-review proceedings. They are not

susceptible to amendment before then since the decision-makers are *functus officio*. The consultation ordered by the Court is therefore futile and cannot have any lawful impact on the impugned decisions.

8.6. Sixth, the Court's order is final in effect. The parties are obliged to consult and engage forthwith. The obligation is not susceptible to alteration either by the Court (which is itself *functus officio*) or by the judicial officer who will become seized with Part B of the application in due course (who will have no power to overrule the Court). The obligation must be discharged, and the consultation process concluded, before the application for judicial review under Part B is heard, and so cannot be rectified or amended by the review court in due course.

8.7. Seventh, the order does not provide any objective basis for deciding when the envisaged engagement and consultation is 'meaningful' or whether it has included 'all affected First Nations Peoples'. Further disputes about compliance with the order are inevitable. Those disputes must be resolved before Part B can be heard, which might cause further litigation and delay the review.

**ERRORS IN ASSESSING BALANCE OF CONVENIENCE**

9. The Court failed to appreciate that there is no aspect of First Nations heritage that the interdict protects, and no aspect that the development will harm. The balance of convenience therefore favours the refusal of the interdict.

9.1. The Court failed to recognise that the interdict preserves a golf course, a parking lot and now a construction site. It is undisputed that those uses contradict the site's indigenous heritage and therefore that their continuation harms that heritage.

9.2. The Court erred in finding that '[t]he City conceded that from a heritage perspective, any development of the River Club would transform the site' (para 132). The City's consistent evidence and written and oral arguments were that the development will realise numerous heritage benefits and will not cause any harm to indigenous heritage. The City's evidence (which is undisputed) is that:

9.2.1. the development will establish a First Nations memory centre, an amphitheatre for cultural performances, an indigenous garden and a heritage eco-trail, in addition to utilising various First Nations names and symbols;

9.2.2. these features have been conceptualised and incorporated in partnership between the first respondent and First Nations representatives, and their detail will be developed and realised pursuant to that partnership, as an expression of indigenous agency; and

9.2.3. the development will therefore protect and celebrate indigenous heritage resources that have hitherto been ignored.

9.3. The Court closed its mind to 'substantial economic, infrastructural and public benefits' by holding that they 'can never override the fundamental rights of First Nations Peoples' (para 143). Consequently, the Court failed in its duty to consider that the development will create 5,239 constructions jobs, 19,0000 employment opportunities, R4,5 billion in direct investment, increase local economic output by R8,5-billion, rehabilitate the degraded Liesbeek River, finance the construction of critical transport infrastructure, provide well-located affordable housing, introduce numerous other residential opportunities and boost investor confidence during a critical time for Cape Town as it attempts to recover economically from Covid 19.

9.4. The Court erred in failing to recognise that the overwhelmingly positive contributions of the development to the site's heritage and the wider public interest – which the interdict will likely permanently block – considerably outweigh the applicants' baseless assertion that the development will harm the site's intangible heritage.

**ERROR IN DISMISSING THE CITY'S STRIKE-OUT APPLICATION**

10. During oral argument the applicants conceded the City's strike-out application. The Court failed to appreciate this and erred in dismissing the City's application.

11. The Court placed extensive reliance on the second affidavit of Ms Prins-Solani (paras 125 – 128 of the Judgment). However, that affidavit should have been struck from the record and no reliance should have been placed on it, for the reasons put forward by the City and conceded by the applicants.

12. The Court concluded that the respondents would not be prejudiced if Ms Prins-Solani's affidavit were not struck '*since the Respondents will be given further opportunities to respond to any new matter or additional review grounds*' (para 141 of the Judgment). However, in granting the interdictory relief, the Court placed extensive reliance on Ms Prins-Solani's replying affidavit. None of the parties could address the contents of that affidavit in their preceding answering affidavits. It was therefore unfair to allow Ms Prins-Solani's replying affidavit (replete with new material) to remain in evidence, and substantially prejudicial to the respondents given the extent of reliance that the Court placed on that affidavit.

13. The Court should have upheld the City's strike-out application and declined to consider the replying affidavit of Ms Prins-Solani or any of the other matter that was sought to be struck.

**OTHER ERRORS**

14. The Court granted the interdict because it was satisfied that unidentified First Nations groups had not adequately been consulted (para 131 of the Judgment).

However, an interdict cannot be granted in respect of past conduct: it can only be granted to prevent the continuation of future harmful conduct (*National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 50).

15. The Court granted the interdict to prevent the first respondent from building itself into an impregnable position and thereby limiting the relief that the review court may order in due course. This was erroneous:

15.1. The review court will, if any reviewable irregularities are proven, have extremely wide jurisdiction to grant any order that is just and equitable.

15.2. The Court did not find (*prima facie* or otherwise) that the review grounds pleaded had any prospects of success. Because the Court did not find that the applicants may be entitled to any relief in Part B, it erred in granting an interdict to preserve the review court's discretion in the Part-B proceedings.

**CONCLUSION**

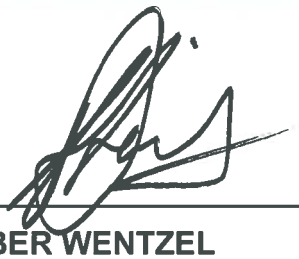
16. The Supreme Court of Appeal could reasonably arrive at a conclusion different to that of the Court and the appeal would have reasonable prospects of success on the grounds set out above.

17. In any event, the substantial importance of this matter for the public and municipal governance, and the public interest of the residents of Cape Town, including the impact of the judgment on future administrative decisions, amount to compelling reasons why the appeal should be heard and therefore why leave to appeal should be granted.

18. The issues to be determined on appeal will have a substantial practical effect and the decision of the Court is final in effect and disposes of the entirety of the relief sought by the applicants pursuant to part A of their notice of motion and, furthermore, a decision by the Supreme Court of Appeal would lead to the just and prompt resolution of the real issues between the parties.

19. Given the impact on the parties to this litigation and municipal decision-making processes more generally, the administration of justice requires that the appeal be determined by the Supreme Court of Appeal.

**DATED** at **CAPE TOWN** on this **8TH** day of **APRIL 2022**.



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