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 CIITY OF CAPE TOWN	Sixth Respondent
EXECUTIVE MAYOR, CITY OF CAPE TOWN	Seventh Respondent
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eighth Respondent

EIGHTH RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE THAT the aforementioned Eighth Respondent hereby applies for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order of the Honourable Deputy Judge President Ms Justice Goliath (herein 'the Court') handed down in this matter on 18 March 2022.

The grounds of the application are as follows:

1. The Court erred and misdirected itself by overstating the importance of the recommendations of Heritage Western Cape's ('HWC's') *comments* on the Heritage Impact Assessment Reports ('the Reports') for the development of the River Club site ('the site'), whilst ignoring the fact that –

    1.1. in terms of section 4 of the National Heritage Resources Act 25 of 1999 ('the Act'), HWC's comments on the Reports are *recommendations,* and the Department of Environmental Affairs and Development Planning ('the Department'), as the competent authority, is the final decision-making body when dealing with the Reports, and although the Department must consider these *recommendations,* it is not bound by them. In this case, these *recommendations* were considered, during a thorough and extended process.

    1.2. in terms of section 24(1)(*a*) of the Act, HWC has an *advisory* function in relation to the Minister in terms of the implementation of the Act; and

1.3. by its own admission, at page 149 of the record, the HWC is only a *commenting* body in respect of the First Respondent's application for the development of the site, and the Department is the authorising body;

1.4. HWC, at page 150 of the record, acknowledged that the Reports complied with section 38(3)(e) of the Act and the formal notice and commenting requirements of PAJA; and

1.5. the Applicants concede at para 46.4 of their heads of argument, that the Department is the decision-maker and that it is the Department that determines the information, comments and recommendations in the HIA are to be weighed in the decision making process.

2. The Court erred and misdirected itself by stating, at paragraph [123] of the judgment, that it was not seriously disputed that certain groups *did not participate* in the consultation process, or subsequently withdrew from the consultation process, when the correct facts are that:

2.1. *all* the identified interested and affected groups participated in the approval process;

2.2. the Second Applicant, by its own admission, voluntarily *withdrew from the Eighth Respondent's grouping* of interested and affected persons but was part of the consultations during the composition of the TRUP First Nations Report which was compiled by Mr. Arendse;

2.3. the central requirement of section 38(3)(*e*) of the Act is that the results of the consultations with Interested and Affected Persons ('IAPs') must be incorporated in the Report. Whether these agree or disagree with the development is not the issue. What is required by section 38 (3)(*e*) is consultation as a process, and not agreement on development as an outcome of the consultation.

3. The Court overlooked the importance of the request by the Appeal Authority in a letter dated 25 November 2020, at page 300 of the record, that HWC supply it with the information and HIA requirements it considered necessary to comply with the requirements of the Act. This request was again made in a follow-up letter dated 26 January 2021, at page 302 of the record.

4. In that letter the Appeal Authority stated that, in the absence of a response, it would surmise that the Reports, as supplemented, do satisfy the HWC's and the Act's requirements, and that the issues raised by the HWC had been adequately addressed.

5. The Court misdirected itself by stating, at paragraph [124] of the judgment, that HWC expressed the view that the AFMAS Report appeared to be *"unreliable"*, whereas HWC had simply stated that there were *"issues"* with the Report. Such mischaracterisation of HWC's comments, at page 278 of the record, is a gross error. It is respectfully submitted that the issues raised by HWC –

5.1. do not indicate that some groups were *excluded,* or that the scope of the engagement was designed to *exclude* certain groups, but that the groups

elected not to participate *"fully"*. The fact that the groups participated is however unquestionable;

5.2. do not demonstrate that there was no meaningful consultation.

6. On a fair consideration, HWC had an issue with the methodology used, which does not amount to the exclusion of IAP's.

7. The Court misdirected itself in stating, at paragraph [130] of the judgment, that the *"Arendse Report created tensions and deep divisions in at least two First Nations Groups"*. This is a mischaracterisation, as the source of the division between the Second Applicant and the Eighth Respondent was because of an in-principle decision, either to support the proposed development, and provide input and engagement, or a blanket objection to, and rejection of, the proposed development. The latter is the stance taken by the Second Applicant. Nothing in the Arendse Report created or influenced the decision of the respective groups to adopt a particular stance for or against the proposed development.

8. The Court misdirected itself in finding, at paragraph [130] of the judgment, that *"the perception of Jenkins that Arendse was biased in favour of the FNC was reasonable in the circumstances"*, without providing tangible proof from the Report, as to the respects in which Arendse was biased, and to what extent this perceived bias influenced the functionary's decision to approve the proposed development. The latter is the only impact against which the alleged bias must be measured.

9. The Court misdirected itself by stating, at paragraph [130] of the judgment, that *"the AFMAS River Club Report is tainted and cannot serve the purpose it was intended for"*, a finding that even HWC never came to, as the commenting authority. This conclusion is simply incorrect, as a matter of both fact and law.

10. The Court misdirected itself in finding, at paragraph [130] of the judgment, that *"the inability of the Respondents, …., to provide the Court with precise details of First Nations Peoples who have an interest in this matter, but were excluded from the consultation process was a significant and glaring omission"*. This is a finding that the Court could not reasonably come to as –

10.1. the Applicants made unparticularised and unsubstantiated claims of exclusion, whilst the Second Applicant in particular could not provide the Court with information as to which groups had been intentionally or deliberately excluded.

10.2. even HWC never came to the conclusion that certain groups had been intentionally or deliberately excluded. HWC was, however, concerned as to the tensions between the Second Applicant and the Eighth Respondent; and

10.3. there is no Group or party before the Court that has made out a case that they, as an interested and affected Group, were excluded from the consultation processes.

11. The Court erred, at paragraph [131] of the judgment, by finding that *"all affected First Nations Groups were not adequately consulted…."*, and that *"those who*

were excluded or not adequately consulted may suffer irreparable harm should the construction continue pending review proceedings", which is a complete misstatement of the facts before the Court. Thus –

11.1. the Second Applicants affidavit, *inter alia* at page 729 and following of the record, indicates that First Nations Groups participated fully in the consultative process, albeit to oppose the development.

11.2. the Second Applicants affidavit, *inter alia,* at page 741-2 of the record, sets out the level and extent of their participation in the entire approval and consultation process; including but not limited to submitting representations as an IAP during the environmental impact assessment (EIA) process, and submitting an appeal against the granting of the environmental authorisation for the proposed development.

11.3. the Second Applicant further submitted an appeal against the planning authorisations granted and made extensive submissions both written and oral during the planning appeals process.

11.4. this is all evidence that, at minimum, the Second Applicant was never excluded from the approval process and the consultation process, and neither is there any proof or evidence before this Court that any other interested and affected Groups have been excluded.

12. The Court misdirected itself by concluding, at paragraph [137] of the judgment, that *"there is no reason why an urgent review cannot be heard in this matter, after proper consultation with the affected First Nations People*", in that –

12.1. the Court sets out a precondition for the review proceedings to be heard, viz, proper consultation, which is a gross error of law;

12.2. the Court imposed this requirement without it being sought in the Notice of Motion, and thus without its validity or appropriateness being addressed by the parties, including the Eighth Respondent;

12.3. the Court sets out a precondition that construction must be halted, in order to embark on a proper consultation process, which the Court does not attempt to set out the parameters of, or indicate what proper consultation involves, thus leaving this aspect of its order incurably vague and unable to be implemented;

12.4. the Court lost sight of the legal principle that the right to review the impugned decisions did not require any preservation *pendente lite*;

12.5. the Court further lost sight of the fact that, in ordering the precondition, it impermissibly prejudged the very issue to be determined in the review, viz, whether the consultation process had been fatally flawed, thereby rendering the latter proceedings effectively moot;

12.6. the Court failed properly to weigh up where the balance of convenience rests by not properly considering the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionaries concerned, and also the impact on those Groups and members of the affected communities that support the development;

12.7. the Court failed to consider whether, having regard to the inherent probabilities, the Applicants should, on the papers before the Court, obtain final relief at the review when the Court granted the interdict.

13. The Court misdirected itself, at paragraph [143] and [144] of the judgment, inasmuch as it appears to have lost sight of the fact that –

13.1. section 38(3) consists of no less than seven criteria that must be fulfilled when preparing an HIA; and

13.2. the Court incorrectly attached disproportionate weight to one of the seven criteria, viz, that referred to in section 38(3)(e); and

13.3. the test is not whether the Court disagrees with the approach of the decision-maker in accepting that there was compliance with section 38(3), but whether the decision-maker acted within its statutory powers, and whether, viewed objectively, it acted rationally and reasonably. These are facts to be decided in the review proceedings, and not during the interdict proceedings.

14. It is respectfully submitted that the Eighth Respondent has reasonable prospects of success in an appeal, but that, in any event, it is in the interests of justice that leave to appeal be granted.

Dated at **CAPE TOWN** on this the 07 day of **APRIL 2022**.

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