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

Case No. 12994/21

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	Eighth Respondent

FIRST RESPONDENT'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE THAT the First Respondent ('the LLPT') hereby applies for leave to appeal to the Supreme Court of Appeal, against the whole of the judgment and Order handed down by the Honourable Ms. Deputy Judge President Goliath in Part A of this matter on 18 March 2022.

TAKE NOTICE FURTHER that the grounds for the application for leave to appeal are as follows:

1. The Court erred in finding that it could interdict the LLPT from undertaking any further construction, earthworks or other works (hereafter 'the construction') on erf 151832, Observatory ('the River Club Property') to implement the development, pending "conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of [the Second Respondent] HWC" in paragraph [145.1(a)], in that –

    1.1. The Order, albeit couched as interim relief, is final in effect and in substance where the decision –

        1.1.1. is not susceptible to alteration by the Court;

        1.1.2. is definitive of the rights of the parties in that it grants definitive and distinct relief, *viz*. an order directing the LLPT to "conclude meaningful engagement with all affected First Nations Peoples" as aforesaid; and

        1.1.3. has the effect of disposing of the review relief claimed in Part B of the application proceedings, inasmuch as the decision predetermines the question of the validity of the impugned decisions on the basis of a finding that the public participation processes which preceded the impugned decisions were defective;

    1.2. The Court erred in finding that the impugned authorisations were granted absent "proper and meaningful consultation with all affected First Nations Peoples", in that the Court considered -

1.2.1. New matter in reply, including new matter which impermissibly sought to raise new review grounds, which the respondents were not afforded an opportunity to deal with by way of further affidavits despite objecting to such new matter in strike-out applications;

1.2.2. Inferences as to the "exclusion" of certain groups or persons drawn by the applicants in oral argument from portions of various annexures to the founding-, answering- and replying affidavits, in violation of the principles established in Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa 1999 (2) SA 279 (T) at 324 and Minister of Land Affairs and Agriculture v D and F Wevell Trust 2008 (2) SA 184 (SCA), that a party cannot request a court to have regard to, or base arguments on, the contents of annexures which have been annexed to the papers when: (i) the relevant portion upon which the party seeks to place reliance has not been identified in the affidavit; and (ii) the case which is sought to be made on the strength thereof or the conclusions sought to be drawn therefrom have not been canvassed in the affidavit; and

1.2.3. Arguments made by the applicants for the first time at the hearing of the application that persons or groups were excluded from the respective public participation/ consultation processes on the basis of supporting affidavits by Mr. Tauriq Jenkins, delivered on behalf of the Second Applicant ('the GKKITC'), notwithstanding that –

1.2.3.1. No allegation of exclusion was made in Mr. Jenkins' affidavits or any relevant confirmatory affidavits, but rather that the persons or groups were merely opposed to the development; and

1.2.3.2. Those allegations of opposition in Mr. Jenkins' affidavits which were not confirmed on affidavit by the relevant persons or groups in any event constituted inadmissible hearsay evidence;

1.3. The Court erred in considering that the groups and organisations listed at paragraph [120] of the judgment (excluding for present purposes the GKKTIC *qua* Second Applicant) have an interest in this matter and were excluded from the respective public participation/ consultation processes, in circumstances where these groups and organisations -

1.3.1. Were not parties before the Court;

1.3.2. Did not file any affidavits in which they demonstrated or alleged: (i) that they constitute or represent directly affected communities; (ii) that their members are bearers of any intangible cultural heritage whose cultural identity or cultural life would allegedly be affected by the proposed development; (iii) that they did not receive proper notice of the respective authorisation applications; or (iv) that they were otherwise excluded from any public participation or consultation processes;

1.4. The Court erred in finding that "it was common cause and was not seriously disputed that certain groups did not participate in the consultation process, or subsequently withdrew from the consultation process" (at paragraph [123]), notwithstanding –

1.4.1. The lack of any adequately particularised founding allegations that any specific groups did not participate or subsequently withdrew from any consultation process, so as to reasonably alert the respondents that it was necessary to deal with any alleged interest of such group in the River Club development or facts relevant to the public participation and consultation processes as they pertained to such groups in the answering papers;

1.4.2. The lack of any opportunity for the respondents to deal with new matter in reply, which the applicants purported to rely upon for the new argument that the alleged exclusion of these groups constituted evidence of a *prima facie* right that was threatened by an impending or imminent irreparable harm;

1.5. The Court accordingly erred in considering and/or holding that–

1.5.1. "None of the parties could provide the Court with precise details [of unidentified First Nations groupings who do not support the development]" (at paragraph [123]); and

1.5.2. The "inability of the respondents, more particularly the Third Respondent ('the City') and the LLPT, to provide the Court with precise details of First Nations People who have an interest in the

matter, but was excluded from the consultation process was a significant and glaring omission" (at paragraph [130]).

1.6. The Court erred in finding that the public participation or consultation processes preceding the impugned decisions were defective or compromised on the basis that Mr. Arendse had a conflict of interest and was biased in favour of the First Nations Collective (at paragraph [130]), in that -

1.6.1. The Court incorrectly considered new matter in reply to the effect that he had "decided to include only certain Khoi groups in his study" (at paragraphs [126] and [127]) to draw an inference of exclusion, where no such case had been made out on the founding papers;

1.6.2. The Court should have rejected the new argument of defective public participation or consultation raised by the applicants for the first time in oral argument, in circumstances where the applicants' sole allegation of any alleged conflict of interest on Mr Arendse's part -

1.6.2.1. Was based on an alleged overlap between his respective appointments as consultant by the LLPT and the Western Cape Department of Transport and Public Works (at R: 731, para 55), which was in any event denied (R: 958, para 431 and R: 2582, para 7); a denial which should have been given due weight and accepted by the Court; and

1.6.2.2. Was stated in a way which did not reasonably alert the respondents to any contemplated reliance thereupon for purposes of founding a review ground or argument that the impugned decisions were invalid for defective public participation generally, or any failure or defect in the procedural aspects of consultation with First Nations groups more specifically, thus precluding a full ventilation of the issues;

1.6.3. The Court incorrectly considered the applicants' argument that Mr. Arendse's alleged conflict of interest was evidenced by the uncontested allegation that he is a member of the First Nations Collective (at paragraph [122]), notwithstanding that –

1.6.3.1. Mr. Jenkins' allegation was made in the context of a general description of the First Nations Collective (R: 737, para 73); not in the context of any allegation that Mr. Arendse's membership constituted evidence of a conflict of interest or gave rise to a reasonable perception of bias on his part;

1.6.3.2. The applicants' failure reasonably to alert the LLPT (or Mr. Arendse) to any contemplated reliance on Mr. Arendse's membership of the First Nations Collective in order to found a review ground or argument that it gave rise to a conflict of interest or reasonable apprehension of bias (thus rendering the impugned decisions invalid for

defective public participation), denied Mr. Arendse and the LLPT an opportunity to place facts before the Court in answering papers that Mr. Arendse' membership at any given point in time resulted from facts which would negate any such inferences;

1.7. The Court erred in finding that the public participation or consultation processes preceding the impugned decisions were defective or compromised on the basis that Mr. Arendse failed to comply with the SAN Code of Ethics or relevant international best practice standards (at paragraph [127]), in that -

1.7.1. The allegations contained in the founding papers were –

1.7.1.1. devoid of adequate particularity and in any event denied by Mr. Arendse, which denial should have been given due weight and accepted by the Court;

1.7.1.2. did not reasonably alert the respondents to any contemplated reliance thereupon for purposes of founding a review ground or argument that the impugned decisions were invalid for defective public participation, thus precluding a full ventilation of the issues; and

1.7.1.3. in any event denied by Mr. Arendse (R: 2582, para 7), which should have been given due weight and accepted by the Court;

1.7.2. Further allegations in the replying affidavit and Ms. Prins-Solani's replying affidavit – particularly the allegations considered by the Court that Mr. Arendse "appeared to have no documentation at all of informed consent as envisaged by the SAN Code of Ethics" (at paragraph [127]) - constituted new matter in reply, in respect of which the LLPT and Mr. Arendse were not provided an opportunity to deal with by way of a further affidavit;

1.8. The Court erred in finding that the public participation or consultation processes preceding the impugned decisions were defective on the basis of alleged defects in Mr. Arendse's report or alleged lack of independence on his part, in that the founding papers did not allege that the GKKITC (or any other First Nations groups) –

1.8.1. were not duly notified of the respective public participation processes which preceded the impugned decisions,

1.8.2. were denied the opportunity of making submissions or otherwise giving input to the heritage impact assessment process which preceded Mr. Arendse's report in the context of the environmental authorisation process; or

1.8.3. were denied the opportunity of making submissions or otherwise giving input on heritage considerations in the separate public participation process conducted in terms of the City's Planning By-law;

1.9. Accordingly, the Court erred in finding that the "exclusion of certain groups made it impossible for decision-makers to take into account all relevant considerations with respect to the impacts of the development (at paragraph [127], read with paragraphs [131] and [132]);

1.10. The Court erred in concluding that "any additional information arising from further engagement with First Nations Groups can be filed at a later stage" of the main application (at paragraph [142]), in that any information resulting from such a *post facto* engagement process would be irrelevant for purposes of the review application; and

1.11. The applicants did not seek the relief granted by the Court in paragraph [145.1(a)] of the Order.

2. The Court erred in granting the relief in paragraph [145.1(b)] of the Order, in that the relief granted in paragraph [145.1(a)] of the Order has disposed of the relief sought in the pending review application;

3. In finding that the applicants had established a *prima facie* right that was threatened by an impending or imminent irreparable harm the Court erred, in that-

3.1. The rights which the applicants asserted were rights which could be vindicated at the review stage in the main application;

3.2. There is no reason why the decision-makers could not reconsider any remitted internal appeals or applications in a manner which would vindicate any asserted rights;

3.3. For reasons detailed at paragraphs 1.2 – 1.9 above, the Court incorrectly decided the applicants' prospects of success in the main application based on – (i) a new ground of review raised for the first time in oral argument, *viz*. alleged defective public participation or consultation with First Nations Groups, where the issues had not been properly ventilated in the papers; and (ii) new matter in reply, including new matter which introduced new review grounds;

3.4. The Court further failed to apply the legal principles governing new matter, in that –

3.4.1. The new matter which sought to introduce new review grounds should have been disregarded.

3.4.2. To the extent it was open to the Court to allow any new matter in reply, the Court was obliged to afford the respondents an opportunity to deal with the new matter in further affidavits before deciding Part A;

3.5. There is in any event no reason why the rights implicated by the new review ground could not be vindicated in Part B of the application, as well as in any remitted internal appeal or application if construction activities were to continue in the interim.

3.6. The Court accordingly failed properly to apply the legal principles governing the granting of interim relief in circumstances where the applicants failed to put up facts upon which final relief in due course should be obtained, having regard to the inherent probabilities and the ultimate onus;

3.7. In rejecting the evidence put up by the LLPT, the Court failed properly to apply the applicable legal principles governing the resolution of disputes of fact in interim relief proceedings. Had the Court correctly applied these principles, it ought have concluded that the respondents' evidence cast serious doubt on the version of the applicants as to their prospects of success in the review and whether any alleged *prima facie* right was threatened by an impending or irreparable harm if the construction was not stopped;

3.8. The Court erred in finding or considering that the City conceded that "from a heritage perspective, any development of the River Club would transform the site and floodplain, affecting the wider TRUP environment" (at paragraph [132]), where the City's papers and legal submissions were to the effect that any "transformation" would have a positive heritage impact.

3.9. The Court erred in holding that "those [affected First Nations Groups] who were excluded or not adequately consulted may suffer irreparable harm should the construction continue pending review proceedings" (at paragraph [131]), notwithstanding that –

3.9.1. The applicants failed to demonstrate any intangible cultural heritage resource which had not been identified and assessed by the respective decision-makers;

3.9.2. The applicants failed to demonstrate that the wide-ranging protection mechanisms incorporated into the respective authorisations would not adequately safeguard the intangible

cultural heritage associated with the River Club site and its receiving environment.

3.10. There is no reason why the review court would be reluctant to exercise its discretion in favour of the applicants in an eventual successful review, or why the building construction might render review proceedings a *brutum fulmen*.

4. In finding that the balance of convenience favoured the applicants, the Court failed to consider properly or at all the evidence that by interdicting the LLPT from carrying out any construction work, the LLPT and the wider community would suffer irreparable harm, while the applicants would suffer none.

5. In this regard, the Court erred in that -

5.1. The applicants failed to establish any alleged *prima facie* right which could not be vindicated on review if construction activities were to continue in the interim;

5.2. The applicants failed to demonstrate - and the Court made no finding – that unless construction was stopped, any alleged *prima facie* rights could not be vindicated in remitted appeals or applications to the relevant decision-makers;

5.3. The Court incorrectly considered the LLPT's commencement of construction in the balance of convenience enquiry, where this consideration is only relevant for purposes of the review Court's exercise of its discretion as to just and equitable relief;

5.4. Given the applicants' failure to demonstrate (i) any intangible cultural heritage resource which had not been identified and assessed by the respective decision-makers; and (ii) the inadequacy of the wide-ranging protection mechanisms included in the respective conditions of approval, the Court failed to consider that the harm that the LLPT and the wider local community would bear if an interdict were granted was severe, irreversible and out of all proportion to that which might be sustained by the applicants.

6. The Court erred in finding that the applicants did not have any other alternative remedy.

7. The Court erred in finding that it could dismiss the LLPT's strike-out application in respect of new matter in reply on the basis that – (1) it "implicate[s] the review grounds and related issues"; (2) the City had "responded to the new arguments relied upon for the review of its decisions"; (3) none of the respondents will suffer prejudice if the matter is not struck out, as they "will be given further opportunities to respond to any new matter or additional review grounds" in the main application (emphasis added); and (4) "not much time was taken in argument dealing with the striking-out applications" (paragraph [141] of the judgment).

8. In particular, but without limiting the generality of paragraph 7 above -

8.1. The new matter identified in the LLPT's strike out application went beyond the review grounds which were relied upon in the founding papers;

8.2. Even assuming the new matter in reply could be said to "implicate the review grounds and related issues" (paragraph [141]) as articulated in the founding papers, the Court erred in considering the new matter in reply for purposes

of establishing the requirements for interdictory relief without affording the respondents an opportunity to file supplementary affidavits to deal therewith;

8.3. The LLPT has suffered material prejudice, as the Court considered the new matter in reply for purposes of finding that the applicants had satisfied the requirements for interim interdictory relief, as well as to provide a factual basis for the relief granted in paragraph [145.1(a)], which is final in effect and in substance.

9. The Court erred in finding that the application met the requirements for an urgent application and that the applicants had not unduly delayed in instituting the proceedings (paragraph [137]).

10. In particular, but without limiting the generality of paragraph 9 above, the Court erred in finding that:

10.1. It "is evident that the LLPT did not inform the applicants of its intention to invoke the provisions of the National Water Act 36 of 1998 to suspend the effect of the appeal relating to the water licence" as the basis for the Court's finding that the applicants did not delay inordinately in instituting the review proceedings (paragraph [24]), where this finding is in direct contradiction to the LLPT's allegation that its motivated request for the lifting of the suspension was simultaneously delivered to the First Applicant's ('the OCA's') attorneys and the Minister of Human Settlements, Water and Sanitation on 28 June 2021 (R: 874, paragraph 185 read together with paragraph 186).

10.2. The Court erred in finding that the OCA was only informed on 7 July 2021 that the LLPT had submitted a request to the Minister of Water and Sanitation to lift the suspension occasioned by the OCA's delivery of an administrative appeal against the grant of the water use licence. The OCA knew of that request to the Minister on the day it was made (28 June 2021).

10.3. The Court erred in finding that there was an "absence of any notification by the LLPT" to the OCA of the former's delivery of a request to the Minister of Water and Sanitation to lift the suspension automatically effected by the delivery of the appeal by the OCA against the approval of the water use licence, and the Court's consequential finding that the applicant "should not be penalised in such circumstances [of asserted absence of notification]." (Paragraph [24] of the judgment.)

10.4. The Court erred in finding that it was "… accordingly satisfied that explanation provided by the applicants are reasonable". (Paragraph [25].)

11. It is in the interests of justice that leave to appeal be granted, where the decision is final in effect and in substance and where the harm which flows from its immediate and substantial effect is serious, immediate, ongoing and irreparable.

12. If the relief granted in paragraph 145.1 of the Order remains operable, the crippling financial liabilities which the LLPT will suffer make it all but certain that the development as planned and approved will not go ahead. This, in turn, will mean that –

12.1. The members of the First Nations Collective and their future generations will be deprived of the only feasible prospect of manifesting their intangible cultural heritage at the River Club property, thereby endangering transmission of their cultural legacy; and

12.2. The broader community will lose the significant socio-economic and environmental benefits which would have flowed from this development.

DATED at CAPE TOWN on this the 28th day of MARCH 2022

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