

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

CASE NO: 12994/2021

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

NOTICE OF APPLICATION TO STRIKE OUT

KINDLY TAKE NOTICE THAT at the hearing of this application, the third, sixth and seventh respondents will apply for an order in the following terms:

Webber Wentzel Attorneys
Per: Sabrina de Freitas
(021) 431 7335
sabrina.defreitas@webberwentzel.com

1. Directing that paragraphs 85-90 (RA pp 2625-2631) of the replying affidavit of Leslie London, together with the annexures referred to in those paragraphs, be struck.
2. Directing that paragraphs 24-26 (pp 2997-2998) of the replying affidavit of Bridget Elizabeth O'Donoghue, together with the annexures referred to in those paragraphs, be struck.
3. Directing that the entire replying affidavit of Deidre Prins-Solani (pp 3014-3039), together with the annexures referred to in that affidavit, be struck.
4. Directing the applicants to pay the cost of this application, including costs of two counsel.
5. Further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the third, sixth and seventh respondents will rely on the accompanying supporting affidavit of Sabrina De Freitas in support of this application.

DATED at CAPE TOWN on this 15TH day of **OCTOBER 2021**.



WEBBER WENTZEL

Attorneys for the Third, Sixth and Seventh Respondents

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TO: **THE REGISTRAR**
Western Cape High Court
CAPE TOWN

BY HAND

- AND TO: **CULLINAN AND ASSOCIATES** **BY EMAIL**
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- AND TO **NICHOLAS SMITH ATTORNEYS** **BY EMAIL**
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- AND TO: **HERITAGE WESTERN CAPE** **BY EMAIL**
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- AND TO: **OFFICE OF THE STATE ATTORNEY** **BY EMAIL**
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- AND TO: **BASSON AND PETERSEN ATTORNEYS** **BY EMAIL**
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OBSERVATORY CIVIC ASSOCIATION	First Applicant
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EXECUTIVE MAYOR, CITY OF CAPE TOWN	Seventh Respondent
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eighth Respondent

AFFIDAVIT SUPPORTING CITY'S STRIKE-OUT APPLICATION

I, the undersigned,

SABRINA DE FREITAS

*EM
JDF*

do hereby make oath and say that:

1. I am the attorney of record of the third, sixth and seventh respondents ('the City'). I am authorised to depose to this affidavit on behalf of the City.
2. The facts in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are to the best of my belief both true and correct.
3. This affidavit is filed in support of the City's application to strike certain material from the applicants' replying papers on the grounds that they impermissibly introduce new review grounds in reply and/or introduce new material in reply.

REPLYING AFFIDAVIT OF LESLIE LONDON: pp 2625-2631 paras 85-90

4. In the applicants' founding papers, the applicants asserted three grounds of review in respect of the City's decisions:
 - 4.1. First, they argued that the City failed properly to account for the possibility that the second respondent ('HWC') might recommend that the River Club site should be listed in the provincial heritage resources register.¹
 - 4.2. Second, they argued that the City irrationally deviated from policy.²

¹ FA pp 91-93 paras 180-188.

² FA pp 94-98 paras 189-196.


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- 4.3. Third, they argued that the City's decision contravened a provisional protection notice issued by HWC.³
5. The applicants have now abandoned the first and third grounds of review.
6. In their founding affidavit, the second ground of review was directed only at the decision of the Municipal Planning Tribunal ('**the MPT**') i.e. the City's decision-maker of first instance.
- 6.1. The attack on the MPT's decision included an allegation that the '*extent and significance of the MPT's departure from relevant policy*' is evident from the fact that the City's Acting Director of the Environmental Management Department ('**the Acting Director**') had lodged an appeal against the environmental authorisation issued by the provincial authorities.⁴ That appeal was not lodged in respect of the MPT's decision.
- 6.2. The founding affidavit did not allege that the MPT should have engaged with the Acting Director's appeal, or failed to respond reasonably to the Acting Director's concerns. It did not identify any defect in the MPT's decision.
7. Importantly, the founding affidavit does not direct the second review ground at the appeal decision of the Mayor, ie the City's ultimate decision. The founding affidavit does not allege any policy that the Mayor failed to consider or irrationally deviated

³ FA pp 60-61 paras 108-113.

⁴ FA pp 96-97 para 193.

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from. The founding affidavit devotes only two throw-away lines to the Mayor's decision,⁵ and makes not a single reference to anything he said. The City's answer points out that the applicants appeared not to have even read the Mayor's decision.⁶

8. In response, the applicants try to make out a case in reply. In paragraph 85 of the replying affidavit, the applicants allege for the first time that reasoning in the Mayor's decision '*is inadequate and reveals a determination on the part of the Mayor to approve the development application despite reasoned positions adopted by experts within his own administration*'.⁷ In paragraphs 86-90 of the reply,⁸ the applicants '*by way of example*', to draw attention to an alleged inadequate consideration by the Mayor of the Acting Director's environmental appeal. This is impermissible:

- 8.1. None of the ostensible '*examples*' was pleaded in the founding affidavit, even though each one of them derives from information that was available to the applicants several months before they filed their founding papers.
- 8.2. Each of the '*examples*' constitutes a new attack on the Mayor's decision and a new ground of review.

⁵ FA p 98 para 196. The applicants fail even to correctly identify the decision-maker. They mistake the Mayor for 'the Minister'.

⁶ City AA p 1479 para 124.5.

⁷ RA pp 2625 para 85.

⁸ RA pp 2626-2631 paras 86-90.

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9. Paragraphs 86.2 and 86.5 of the reply allege that the Mayor dismissed concerns raised by the Acting Director. However, this is also new: the founding affidavit never alleged that the Mayor should have engaged with those concerns, or failed to do so.
10. Paragraphs 86-89 of the reply for the first time alleges that the Mayor failed to consider, or dismissed, ‘*all concerns*’ about flood risk and biodiversity.⁹ The founding affidavit contains no such allegations.
11. Paragraphs 87-90 of the reply refer to a Biodiversity Agreement, which is annexed to the reply, seemingly to criticise the Mayor for his treatment of that agreement.¹⁰ The allegations are, with respect, so nebulous that it is not possible to distil any relevance. The agreement and the allegations relating to it are also entirely new.
12. There is no explanation why any of this new material was not pleaded in the founding affidavit: it is all based on information that was available to the applicants as from 19 April 2021, long before their founding affidavit was prepared.

⁹ RA pp 2626-2630 paras 86-89.

¹⁰ RA pp 2629-2631 paras 87-90.



FURTHER AFFIDAVITS OF BRIDGET ELIZABETH O'DONOGHUE AND DEIDRE PRINS-SOLANI

13. The founding papers included two expert affidavits: one by Bridget Elizabeth O'Donoghue¹¹ and one by Deidre Prins-Solani.¹² Both affidavits dealt with the heritage of the River Club site.

14. As the Mayor explained in his answering affidavit:

14.1. Neither Ms O'Donoghue's affidavit nor Ms Prins-Solani's had been submitted to the City or placed before the MPT or the Mayor when the development proposal was being evaluated.¹³

14.2. Neither deponent had been briefed with the report that served before the MPT, the MPT's decision or the Mayor's appeal decision. Neither affidavit dealt with the City's extensive treatment of the development's heritage impact.¹⁴

14.3. Had either deponent been briefed with the City's decisions, she would have been aware of the City's deep appreciation of, and extensive engagement

¹¹ pp 755-772.

¹² pp 779-796.

¹³ City AA pp 1542 and 1544-1545 paras 348 and 360.

¹⁴ City AA pp 1542 and 1545 paras 351 and 363.

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with, the site's intangible heritage.¹⁵ Ms Prins-Solani would also have been aware that the Mayor had engaged extensively with HWC's concerns.¹⁶

- 14.4. The December 2019 supplement to the developer's heritage impact assessment – which addressed questions regarding intangible heritage – did not feature in Ms O'Donoghue's assessment at all.¹⁷
15. The replying papers include further affidavits by Ms O'Donoghue and Ms Prins-Solani which attempt to address the omissions highlighted by the Mayor.
- 15.1. Paragraphs 24-26 of Ms O'Donoghue replying affidavit explains that, following the Mayor's answering affidavit, she had been provided with all the documentation which had been omitted from her initial consideration.¹⁸ The applicants provide no explanation for why Ms O'Donoghue failed to consider the omitted documents for purposes of preparing her first affidavit.
- 15.2. Ms Prins-Solani's replying affidavit has two aims: (i) to consider documents which the applicants have always had but had not previously supplied to her, and (ii) to make new allegations about intangible cultural heritage.¹⁹ Ms

¹⁵ City AA pp 1543, 1544 and 1546; paras 353, 359, 365 and 370.

¹⁶ City AA p 1546 para 365.

¹⁷ City AA p 1543 para 354.

¹⁸ O'Donoghue SA p 2998 para 24.

¹⁹ Prins-Solani's SA pp 3015-3016 paras 5-6.

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Prins-Solani sets out a new critique of the City's decision-making process,²⁰ and attacks other reports on intangible heritage.²¹

- 15.3. The applicants provide no explanation for why Ms Prins-Solani failed to consider the omitted documents for purposes of preparing her first affidavit or why her earlier affidavit did not contain any of the new allegations even though each of those allegations relates to circumstances and information of which the applications were aware before they filed their founding papers.

PREJUDICE

16. The City is prejudiced by all the above-mentioned new material:

16.1. An applicant is required to make out its case in its founding papers, and may not set out new bases for relief in its replying papers. This is a fundamental requirement of fairness in pleadings. Departing from this rule and allowing the new material to remain in evidence would be unfair to the City.

16.2. The new material has only been raised in an attempt to make up for the applicants having put up such a weak case against the City in the founding affidavit, and because Mr London's allegations were so decisively repudiated in the Mayor's answering affidavit. To allow the applicants a second bite at the cherry would raise the spectre of a never-ending sequence of new material from the applicants once their claims are disposed of.

²⁰ pp 3037-3038 paras 51-54.

²¹ See, for example, p 3017 paras 9.3 and 10.

- 16.3. There is no reason for why the new material was pleaded in reply. Despite these being 'urgent' proceedings, the applicants gave themselves extensive time to formulate their challenges (three and a half months from the date on which they were provided with the Mayor's decision and reasons). Furthermore, their legal representatives were involved in the various impugned administrative processes and acquainted with the relevant facts.
- 16.4. While the applicants have allowed themselves lengthy periods of time to prepare their affidavits and submissions (over five months for their founding affidavit; three and a half weeks for their replying papers; more than six for their heads of argument), they prejudicially constrained the respondents (the applicants initially demanded answers to the 800-page application in a mere five court days and ultimately gave only three weeks).
- 16.5. The parties agreed that the respondents would have two weeks after receiving the applicants' heads of argument to file their heads of argument, and that this Court would then have two weeks to consider all the parties' written submissions (in addition to the voluminous record). Unfortunately, in breach of their undertaking, the applicants filed their heads one week late, but refused to adjust the hearing date. In these constrained circumstances, the City has been unable to prepare supplementary affidavits to deal with the new material.
- 16.6. The City has already been prejudiced in defending this application, and the new material in reply compounds that prejudice.

Handwritten signature and initials, possibly "UDF".

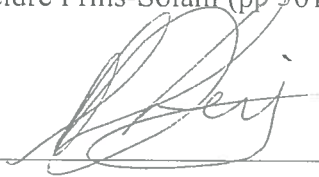
CONCLUSION

17. The City therefore ask this Court to strike out the following paragraphs and the annexures referred to therein:

17.1. paragraphs 85-90 of the replying affidavit of Leslie London (RA pp 2625-2631);

17.2. paragraphs 24-26 (pp 2997-2998) of the replying affidavit of Bridget Elizabeth O'Donoghue; and

17.3. the entire replying affidavit of Deidre Prins-Solani (pp 3014-3039).



SABRINA DE FREITAS

I certify that the deponent signed the affidavit in my presence and declared that the deponent knows and understands its contents, has no objection to taking the prescribed oath and considers the oath to be binding. Thus signed and sworn before me on **15 November 2021** at the address set out below.



COMMISSIONER OF OATHS

EMMANUEL MATIMBA MASHELE
 COMMISSIONER OF OATHS
 PRACTICING ATTORNEY R.S.A
 8th FLOOR, CONVENTION TOWER
 CNR. HEERENGRACHT & WALTER SISULU AVE
 CAPE TOWN CITY CENTRE, CAPE TOWN