

**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
DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1), 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

**FOURTH AND FIFTH RESPONDENTS'
NOTICE OF APPLICATION TO STRIKE OUT**

KINDLY TAKE NOTICE THAT at the hearing of this application on 24 and 25 November 2021, the Fourth and Fifth respondents will apply for an order in the following terms:

1. Striking out the following portions of the Applicant's Replying Affidavit of Mr Leslie London dated 17 September 2021 on the grounds that they comprise:
 - 1.1. **New information**

paragraph 31 (Record: Vol 7: page 2608) and paragraph 50 (Record: Vol 7: page 2615).
2. Directing the Applicants to pay the cost of this application, including costs of two counsel.
3. Further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the fourth and fifth respondents will rely on the accompanying supporting affidavit of **MARK NEVILLE OWEN** in support of this application.

DATED AT CAPE TOWN on this 16th day of **NOVEMBER** 2021



OFFICE OF THE STATE ATTORNEY
Per: **M N OWEN**
Attorneys for Fourth and Fifth Respondents
Liberty Life Centre, 5th Floor

22 Long Street
CAPE TOWN
(REF:1873/21/P7)
Email: mowen@justice.gov.za

TO: THE REGISTRAR BY HAND
Western Cape High Court
CAPE TOWN

AND TO: CULLINAN AND ASSOCIATES BY EMAIL
Attorneys for the Applicants
18A Ascot Road
Kenilworth
CAPE TOWN
Email: Hercules@greencounsel.co.za

AND TO: NICHOLAS SMITH AND ASSOCIATES BY EMAIL
Attorneys for the First Respondent
2nd Floor, 114 Bree Street
CAPE TOWN
Email: nicks@nsmithlaw.co.za
REF: ND SMITH/L38-001

AND TO: WEBBER WENTZEL BY EMAIL
Attorneys for the 3rd, 6th and 7th Respondent
15th Floor, Convention Tower
Heernraght Street, Foreshore
CAPE TOWN
Email: Sabrina.defreitas@webberwentzel.co.za
REF: Sabrina De Freitas

AND TO: HERITAGE WESTERN CAPE **BY EMAIL**
Second Respondent
3rd Floor, Protea Assurance Building
Green Market Square
CAPE TOWN
Email: Penelope.Meyer@westerncape.gov.za

AND TO: BASSON AND PETERSEN ATTORNEYS **BY EMAIL**
Attorneys for the 8th Respondent
Suite No 6A, Bellpark Building
De Lange Street
BELVILLE
Email: Bpinc@gmail.com

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

CASE NO: 12994/21

ON THE ROLL: 24 and 25 NOVEMBER 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
DIRECTOR: DEVELOPMENT MANAGEMENT (REGION 1), 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

**FOURTH AND FIFTH RESPONDENTS'
AFFIDAVIT IN SUPPORT OF APPLICATION TO STRIKE OUT**

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I, the undersigned

MARK NEVILLE OWEN

do hereby make oath and say that:

1. I am a major male attorney duly admitted and practising in terms of the Legal Practice Act 28 of 2014 with the offices of the State Attorney at Liberty Life Centre, 5th Floor, 22 Long Street. I am the attorney of record of the Fourth and Fifth Respondents. I am authorised to depose to this affidavit on behalf of their behalf.
2. The facts deposed to herein are to the best of my knowledge true and correct, and they fall within my personal knowledge, unless stated to the contrary or otherwise apparent from the context.
3. This affidavit is filed in support of the Fourth and Fifth Respondents' application to strike certain material from the Applicants' replying papers on the grounds that they impermissibly introduce a new review ground in reply and/or introduce new material in reply.
4. In this application, the Fourth and Fifth respondents seek the striking out of from Mr Leslie London's replying affidavit, the following two paragraphs, namely:
 - 4.1. paragraph 31 (Record: Vol 7: page 2608), and
 - 4.2. paragraph 50 (Record: Vol 7: page 2615).

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5. In the Applicants' founding affidavit, two references are made to HWC's recommendation in its interim comment (Record: Vol 1: Annexure 'LL10': pages 142-152). The recommendation is to be found on the last page of HWC's interim comment in the following terms, namely:

"Notwithstanding the unquestionable qualifications and heritage standing of both heritage practitioners who compiled the report, HWC is of the opinion that the HIA would benefit from input from a specialist consultant, with the requisite expertise in dealing with the intangible aspects pertaining to the wider TRUP area. This input would assist in focusing on, in particular, the strong sense of place and meaning of the site pertinent to the First Nation Representatives. It is a strong recommendation that a supplementary report from an expert in this field is incorporated into the HIA".

6. In both instances at paragraphs 91 and 134 of the founding affidavit HWC's recommendation is mentioned in the context of describing the conclusion of HWC's interim comment.
7. After introducing HWC's recommendation, in paragraph 97 of the Applicant's heads of argument they contend that "[t]he Director was bound by the first proviso in section 38(8) to accept and ensure compliance with the HWC's 'strong recommendation' which, we submit, rose to the level of an information requirement contemplated in section 38(3)".
8. This contention was not put up in their founding papers as a ground of a failure of the Director, or the Minister on appeal, to comply with the first proviso of section 38(8) of the NHRA but was belatedly raised in two

paragraphs in their replying affidavit, namely paragraphs 31 and 50 which respectively provide that:

8.1. *“In any event, even if the Minister’s interpretation is preferred and this Court holds that HWC’s only function in terms of section 38(8) is to ‘specify its information requirements’, the NEMA authorities still failed demonstrably to ensure that HWC’s information requirements were met, because they condoned the LLPT’s failure to procure and submit a supplementary report from an expert in intangible heritage. This requirement went to the very heart of HWC’s objections - the heritage specialists’ failure to assess and articulate the true significance of the heritage resources on the River Club site in accordance with the NHRA”* (paragraph 31), and

8.2. *“The most obvious respect in which the LLPT has failed to comply with the HWC’s information requirements is in disregarding its request in its interim comment to submit a supplementary report prepared by a specialist on intangible heritage to remedy the shortcomings in the heritage specialists’ evaluation”* (paragraph 50).

9. The import of this belated emphasis on HWC’s recommendation was only apparent on receipt of the Applicants’ heads of argument as already indicated above. Accordingly, it was indicated in the Fourth and Fifth Respondents’ heads of argument that a striking out application would follow the filing of their heads of argument.

10. It is submitted that the Court should uphold the striking out application because had the Applicants wanted to rely on the failure to implement HWC's recommendation as a ground for alleging that the Director and the Minister did not comply with the first proviso of s 38(8) of the NHRA, this should have been put up in their founding papers.
11. There is no explanation why this new ground was not pleaded in the founding affidavit. HWC's interim comment is dated 13 September 2019 and was available to the Applicants in the preparation of their founding affidavit.
12. The Fourth and Fifth Respondents are prejudiced by the above-mentioned new material in the Applicants' replying affidavit.

CONCLUSION

13. In the premises, the Fourth and Fifth Respondents pray for an order in terms of its notice of application to strike out.




MARK NEVILLE OWEN

I certify that:

I the deponent acknowledged to me that:

- (a) he knows and understands the contents of this declaration;
- (b) he has no objection to taking the prescribed oath;

- (c) he 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 at the address set out hereunder on this the 16th day of NOVEMBER 2021.



COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

ADDRESS:

TERTIA LIZETTE KRIEL
KOMMISSARIS VAN EDE
COMMISSIONER OF OATHS
PRAKTISERENDE PROKUREUR (R.S.A.)
PRACTISING ATTORNEY (R.S.A.)
LANGSTRAAT 22 LONG STREET
KAAPSTAD / CAPE TOWN 8001

mna

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

Case No: 12994/21

In re: The Amicus Curiae application of

FOREST PEOPLES PROGRAMME

In the matter between:

OBSERVATORY CIVIC ASSOCIATION

First Applicant

**GORINGHAICONA KHOI KHOIN INDIGENOUS
TRADITIONAL COUNCIL**

Second Applicant

and

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

First Respondent

HERITAGE WESTERN CAPE

Second Respondent

CITY OF CAPE TOWN

Third Respondent

**DIRECTOR: DEVELOPMENT MANAGEMENT
(REGION 1), ENVIRONMENTAL AFFAIRS &
DEVELOPMENTAL 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

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AFFIDAVIT ON BEHALF OF THE FOURTH AND FIFTH RESPONDENTS

I, the undersigned,

MARK NEVILLE OWEN

do hereby make oath and say:

1. I am an adult male attorney of this Honourable Court, practising as such at the office of the State Attorney, 4th Floor, 22 Long Street, Cape Town.
2. The facts set out in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true.
3. I am duly authorised to depose to this affidavit on behalf of the Fourth and Fifth Respondents, and to deal herein with their attitude towards the amicus curiae application of the Forest Peoples Programme (the FPP”).
4. As appears from my letter dated 29 October 2021, annexure “GB4” to the founding affidavit of the FPP, the Fourth and Fifth Respondents informed the attorneys representing the FPP that they would not oppose their application to be

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admitted as an amicus curiae in this matter. This remains the attitude of the Fourth and Fifth Respondents.

5. Because of the opposition by certain of the other Respondents to the FPP's request to be admitted as an amicus curiae, it launched its application for admission on or about 8 November 2021, slightly more than two weeks before the main application is to be heard. A perusal of the FPP's founding affidavit, and the copy of the written submissions which it proposes to make (annexures "GB1" thereto), shows the following:

- 5.1. The FPP adds nothing in respect of the relevant facts before this Court (paragraph 7 of annexure "GB1").
- 5.2. The FPP proceeds on the assumption that the relevant authorities did not properly consider the cultural significance of the site, or that developing the site would permanently undermine the cultural significance of the site. As an amicus, the FPP does not take a position in respect of this dispute (founding affidavit: paragraph 15).
- 5.3. The FPP makes extensive submissions regarding international treaties, judicial and quasi-judicial decisions and international law principles which,

it alleges, may assist the court in this matter (annexure "GB1", pages 6 - 26).

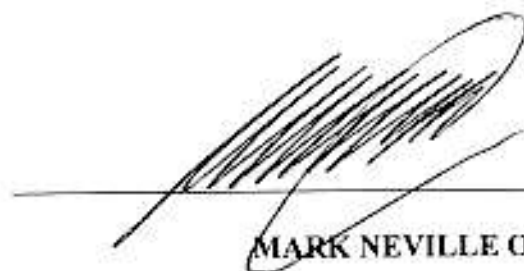
6. Having regard to what is set out above, it may well ultimately be found that the submissions on behalf of the FPP do not have a bearing on the decision which this Court is required to take in this matter, one way or the other. However, the Fourth and Fifth Respondents cannot simply assume, at this stage, that this will be the case. In the circumstances, if this Court grants an order admitting the FPP as an amicus curiae, the Fourth and Fifth Respondents will ask that the matter be postponed to give them a proper and fair opportunity to deal with the submissions which the FPP proposes to make. In this regard, I point to the following facts and circumstances:

- 6.1. The Applicants in the main application delivered their heads of argument on 2 November 2011, which was some four court days after the date upon which they had originally undertaken to do so.

- 6.2. The Fourth and Fifth Respondents' legal representatives thereafter, working under considerable time pressure, completed their heads of argument and delivered them on Friday, 12 November 2011.

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- 6.3. The Fourth and Fifth Respondents and their legal representatives have not had an adequate opportunity to deal with the written submissions which the FPP proposes to make, nor is it expected that their legal representatives will be able to do so before the date on which the matter is to be heard.
- 6.4. Whereas the Fourth and Fifth Respondents maintain the stance that they do not oppose the FPP's application to be admitted as an amicus curiae, it is no fault of the Fourth and Fifth Respondents that the FPP has waited until such a late stage before applying for admission.
- 6.5. The matter is of considerable importance for all of the parties concerned, including the Fourth and Fifth Respondents. Fairness therefore dictates that they should be allowed a sufficient and reasonable opportunity to deal with the FPP's submissions, should it be admitted.
7. In the circumstances, and in the event of the FPP being admitted as an amicus curiae, it is submitted that the matter should be postponed until a date to be determined by this Court.



MARK NEVILLE OWEN

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I certify that:-

The deponent signed this affidavit and swore and acknowledged that he: -

- a) knew and understood the contents thereof;
- b) had no objection to taking the oath; and,
- c) considered the oath to be binding on his conscience.

The deponent then uttered the words, "*I swear that the contents of this declaration are true, so help me God*".

SIGNED AT CAPE TOWN ON 16 NOVEMBER 2021



COMMISSIONER OF OATHS

Full names:

Designation and area:

Street address:

TERTIA LIZETTE KRIEL
KOMMISSARIS VAN EDE
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