

**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

ANSWERING AFFIDAVIT

I, the undersigned,

HERCULES DU PREEZ WESSELS

do hereby make oath and state as follows:

1. I am an adult, male attorney practising as such at the firm Cullinan and Associates Incorporated. I have responsibility for the conduct of this matter on behalf of the applicants.
2. The facts set forth in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, both true and correct. Where what I say amounts to hearsay, I have a sound basis for my assertions, documentary and otherwise, and verily believe it to be true and correct.



3. In this affidavit I refer to the first respondent as "the LLPT", the third, sixth and seventh respondents as "the City", and the fourth and fifth respondents as "the Province".
4. This affidavit primarily concerns three strike-out applications filed respectively by the LLPT, the City and the Province (collectively, "the respondents") in relation to various allegations in the applicants' replying papers which are said, in the main, to amount to new matter in reply.
5. The allegations which the respondents seek to have struck are not in fact new matter, or otherwise objectionable, but are adduced in direct response to matters raised in the answering affidavits of the LLPT, the Province and the City. They fall within the confines of what may legitimately be raised in reply. These are matters for oral argument and reference to the relevant case law will be made when the matter is argued.
6. The merits of the various strike-out applications being matters for argument, I do not deal with them in this affidavit. My failure to do so should not in any way be construed as an acceptance of the correctness of the averments in the various affidavits filed in support of the strike-out applications. Nor should anything I say in this affidavit be read as such an acceptance or concession.
7. Unfortunately, it was not possible to answer the strike-out applications in 2021 because it was necessary for the applicants to secure a new senior counsel to accommodate the revised hearing dates. He was only in a position to settle this affidavit immediately preceding its service and filing on 10 January 2022.

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8. The purposes of this affidavit are -

- 8.1. to respond to the assertions by both the LLPT and the City that it was not possible for them to file further answering affidavits due to time constraints and unreasonable conduct on the part of the applicants or their legal representatives;
- 8.2. to correct unwarranted and inaccurate assertions made by the respondents about the applicant's conduct of the matter, particularly those in paragraph 71 of the City's heads of argument and paragraphs 45 and 46 of the LLPT's heads of argument. These assertions are aimed at unfairly casting the applicants and their legal representatives in a poor light and drumming up antipathy on the part of the Court towards them and, more importantly, the applicants' case; and
- 8.3. to place before the Court relevant facts concerning the LLPT's recent refusal to suspend construction pending the hearing of this matter.

Timetable and filing sequence

9. The times set for filing of documents and the dates of their actual filing, were as follows:

- 9.1. These proceedings were instituted on 2 August 2021. All parties received the founding papers electronically on this date. The founding papers were approximately 800 pages long.



- 9.2. The notice of motion called for the respondents to file answering affidavits on 10 August 2021.
- 9.3. The respondents sought an extension of this deadline to 23 August 2021. The applicants readily granted the extension.
- 9.4. In terms of the then contemplated timetable, the applicants were to file replying papers on 30 August 2021, 5 court days after the filing of the answering affidavits.
- 9.5. The Province filed its answering affidavit on 23 August 2021; the City filed its answering affidavit on 24 August 2021; and the LLPT filed its answering affidavit on 25 August 2021 (respectively 15, 16 and 17 court days after receipt of the founding papers). The total length of the answering papers was 1775 pages.
- 9.6. The effect of the filing of the LLPT's answering affidavit on 25 August 2021 was that the applicants were left with 3 court days to answer 1775 pages of answering affidavits, a task which was manifestly impossible.
- 9.7. The applicants filed their replying papers on 17 September 2021, 17 court days after receipt of the LLPT's answering affidavit and 7 court days outside the normal 10-day period for filing of a replying affidavit.
- 9.8. The applicants filed their heads of argument on 2 November 2021, 3 court days after the agreed deadline of 27 October 2021. The parties thereafter



agreed upon a revised deadline of 15 November 2021 for the filing of the respondents' heads of argument.

- 9.9. In the event, the Province's heads of argument were filed on 12 November 2021, the City's heads of argument were filed on 16 November 2021 (a day after the agreed deadline), and the LLPT's heads of argument were filed on 18 November 2021 (three court days after the agreed deadline).
- 9.10. The hearing dates originally agreed upon were 24 and 25 November 2021. Because the presiding judge was unwell, the matter could not be heard on those days and had to be postponed.
- 9.11. New dates for the hearing of the matter have been allocated for 19, 20 and 21 January 2022.

The City's allegations of unreasonableness against the applicants

10. Arising from the above filing sequence, the City in paragraph 71 of its heads of argument alleges persistent unreasonableness on the part of the applicants, including "maintaining pressure on the respondents to file their answering affidavits under a truncated timeline" and "[preparing] their replying papers at a leisurely pace taking 18 court days" and "unilaterally [breaching] their undertaking" in relation to the filing of heads. Similar allegations are made in paragraphs 45 and 46 of the LLPT's heads of argument regarding the applicants' "lackadaisical approach".
11. In truth -



- 11.1. the City and the LLPT also missed deadlines;
- 11.2. the respondents had more time than the 15 court days provided for in rule 6(5)(d)(ii) in non-urgent proceedings to file their answering affidavits;
- 11.3. in part, due to the late filing of the answering affidavits by the LLPT and the City (about which we make no complaint), the applicants were left with an impossibly short time to reply to 1775 pages of answering affidavits;
- 11.4. taking into account the late filing of answering affidavits and the massive amount of material to be canvassed in reply (something clearly not contemplated by rule 6(5)(e), taking 17 (not 18) court days to file the replying affidavit was neither unreasonable, nor indicative of nonchalance on the part of the applicant;
- 11.5. the delay in filing of the replying affidavit was taken into account in setting dates for the filing of heads of argument;
- 11.6. the applicant's heads were not filed a week late, and the respondents were afforded corresponding additional time for their heads;
- 11.7. the Court has not been deprived of a week's reading time, particularly taking into account the new hearing dates.

Time for the respondents to file supplementary answering affidavits

12. At paragraph 7 of the affidavit filed in support of the LLPT's strike-out application, the LLPT's attorney of record states: *"Given the severe time constraints in this matter, I submit that it was not reasonably possible for the first respondent to file a*



supplementary answering affidavit in respect thereof. To do so would have undermined the first respondent's ability to file heads of argument timeously and to prepare for the hearing of Part A of this application."

13. Similarly, at paragraph 16.5 of the affidavit filed in support of the City's strike-out application, the City's attorney of record states: *"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."*
14. Apart from seeking to build unwarranted antipathy towards the applicants, these assertions are primarily directed at suggesting that there was insufficient time within the above filing sequence to file supplementary answering affidavits and, insofar as the City is concerned, also that there was conduct on the part of the applicants or their legal representatives that precluded them from filing further answering affidavits, including the alleged unreasonable refusal by the applicants of a request by the respondents to change the hearing dates when the applicant's heads of argument were filed late. This is not so.
15. In fact, the City expressly contemplated filing further answering affidavits as early as 10 September 2021 (more than two months prior to the original hearing date and the filing deadline for the respondents' heads of argument subsequently



agreed upon). This appears clearly from an email letter addressed by senior counsel for the City to all of the other counsel in the matter, dated 10 September 2021, in which the City's senior counsel declined to commit to a hearing date on the basis of the need to consider the filing of further answering affidavits once the replying affidavit had been received. The relevant portion of the email reads:

"The City's team is not available in the week of 18 October 2021. We are available the following week from Tuesday 26 October to Friday 29 October 2021.

However, before agreeing to hearing dates, it is necessary to consider the replying affidavits. If there is any new material introduced in reply which requires further answering affidavits, then obviously the hearing date can be arranged only after those affidavits are filed." (emphasis added)

16. A copy of the email is attached marked "HW1". As appears from the description of the filing sequence above, the replying affidavit was filed on 17 September 2021.
17. The respondents effectively had the opportunity required by them in this email to consider filing further answering affidavits, because discussions aimed at agreeing on hearing dates continued for several weeks, from 17 August 2021 to 7 October 2021. I attach in this regard marked "HW2", the relevant exchange of email correspondence. Despite having had this opportunity to consider the replying affidavits, there was no request or application to file further answering affidavits from any of the respondents.
18. It was in fact the respondents that proposed the hearing dates of 24 and 25 November 2021 at a meeting of counsel held on 28 September 2021. It was

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simultaneously agreed that the applicants would file their heads of argument on 27 October 2021 and the respondents would file theirs on 10 November 2021. This much is made clear in the email dated 28 September 2021 from the City's senior counsel, which forms part of the exchange constituting annexure "HW2".

19. There was never any request or attempt by any of the respondents to file further answering affidavits -

19.1. at the meeting of counsel on 28 September 2021; or

19.2. at any time between the filing of the replying affidavits on 17 September 2021 and 7 October 2021, when the hearing dates of 24 and 25 November 2021 were agreed upon (see applicant's junior counsel's email dated 7 October 2021 in annexure "HW2"); or

19.3. thereafter.

20. Accordingly -

20.1. the senior counsel for the City's email of 10 September 2021 having been circulated to all of the various parties' counsel, they were alerted to the need to consider, upon filing of the replying affidavits, whether they should file further answering affidavits or seek leave to do so;

20.2. it was laid down by senior counsel for the City that if there was to be such a filing of further answering affidavits, the hearing dates would have to accommodate that;



- 20.3. neither the applicants nor any of the other respondents raised any objection to this;
- 20.4. when the respondents' counsel met with the applicants' counsel on 28 September 2021 to discuss dates for the hearing and the filing of heads of argument, there was no request to accommodate the filing of further answering affidavits by any party - instead the respondents' counsel proposed dates for the hearing and the filing of heads of argument;
- 20.5. the respondents having received the replying affidavits on 17 September 2021, they had a period of some three weeks to consider the need to file further affidavits before the hearing dates were finally agreed upon;
- 20.6. the failure to file further answering affidavits or to seek the opportunity to do so had nothing whatsoever to do with the late filing of the applicants' heads, as suggested in the above extracts from the affidavits supporting the strike out applications;
- 20.7. there was also no attempt to file or seek leave to file further affidavits during the further period of three weeks between 7 October and 27 October 2021, the due date for the applicants' heads;
- 20.8. instead, the parties elected to wait several weeks to file strike-out applications. The LLPT's application was served on 29 October 2021, the City's was served on 15 November 2021 and the Province's was served on 16 November 2021. The first application was thus filed when the applicants' heads were already overdue and the latter two applications were filed well



after the filing of the applicants' heads of argument. This had the consequence that the applicants were unable to deal with the strike-out applications in their heads of argument;

- 20.9. there has been no attempt by the respondents to file further answering affidavits in the extended period that has been afforded by the postponement of the hearing.
21. As regards, the alleged "refusal" by the applicants to accommodate a new hearing date in order to file further answering affidavits, the position is, in fact, the following:
- 21.1. On 29 October 2021, the LLPT's attorney addressed a letter to Cullinan & Associates demanding that an adjusted timetable and adjusted hearing dates be agreed due to the fact that the late filing of the applicants' heads of argument had "*disrupted the timetable put in place to accommodate a possible hearing on 24 and 25 November 2021*". This demand was premised on the assertion that the matter had not been allocated for hearing due to the absence of a draft order. A copy of this letter is attached marked "**HW3**". As appears from the letter, there is no reference to any desire on the part of the LLPT to file supplementary answering affidavits.
- 21.2. Later that day, the City's attorneys addressed a letter to Cullinan & Associates recording their support of the request for an adjusted timetable and new hearing dates. A copy of this correspondence is attached marked "**HW4**". As appears from the letter, there is no reference to any desire on the part of the City to file supplementary answering affidavits.



21.3. Cullinans responded to the LLPT's attorney in a letter dated 2 November 2021, with the City's attorney in copy. In this letter, we -

21.3.1. confirmed that the Judge President had issued a directive that this matter be heard on 24 and 25 November;

21.3.2. advised that we were willing to accommodate a 3-day extension of the deadline for the respondents' heads of argument in order to cure any perceived prejudice; and

21.3.3. indicated that we were disinclined to reopen the debate on either the timetable or the hearing dates due to the fact that construction of the River Club development was well underway. A copy of this letter is attached marked "HW5". A perusal of the letter reveals no unreasonableness on the part of the applicants or their legal representatives towards the respondents.

21.4. The LLPT's attorney of record responded to this letter on 3 November 2021 stating *inter alia* that the proposed extension would "*hopefully suffice for the delivery of the first respondent's heads*". A copy of this letter is attached marked "HW6". It is devoid of any suggestion that -

21.4.1. the applicants had been unreasonable in their stance that the hearing should proceed on the allocated dates; or

21.4.2. the LLPT or any other respondent wished to file supplementary answering affidavits.

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The LLPT's refusal to pause construction over the festive season

22. On 20 December 2022, I addressed a letter to the first respondent's attorney of record once again requesting that construction activities on the site be halted pending the hearing on 19, 20 and 21 January 2022. A copy of this letter is attached marked "HW7".
23. On 23 December 2021, I received a letter from the first respondent's attorney of record refusing to accede to the request, citing the applicants' "*generally dilatory approach*" to the prosecution of these proceedings. A copy of this letter is attached marked "HW8".
24. I am advised by members of the applicant that construction activities were observed on the site on 20 December 2021, 6 January 2022 and 7 January 2022 (these were the only days that the site was visited for the purposes of such observation). It is my understanding that these dates coincide with the 2021/2022 builders' holiday.

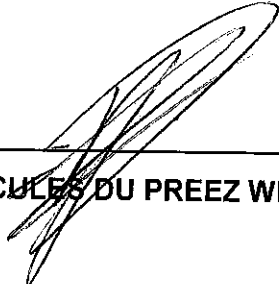
Conclusion

25. Accordingly -
- 25.1. There is no justification for the allegations by that the applicants have been unreasonable or dilatory in their conduct of the litigation;
- 25.2. All allegations on the part of the LLPT and the City of such unreasonableness and dilatoriness are denied;

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25.3. To the extent that there was lateness in the filing of any of their documents in the respects dealt with in this affidavit, the applicants were not alone and, to the extent necessary, they will apply at the hearing for condonation thereof on the basis set out in this affidavit;

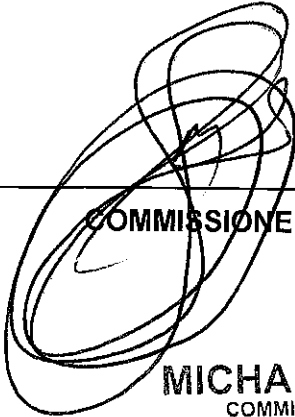
25.4. There is no basis for the LLPT's and the City's assertions that the litigation timetable, or any conduct on the part of the applicants, precluded them from filing further answering affidavits.


HERCULES DU PREEZ WESSELS

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 10 JANUARY 2022.





COMMISSIONER OF OATHS

Designation and Area:

Full Names:

Street Address:

MICHAEL JENNINGS

COMMISSIONER OF OATHS
PRACTISING ATTORNEY
1ST FLOOR, BLOCK C
132 ROSMEAD AVENUE
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