IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 12339/2022 &

Case Number: 12994/2021

In the matter between:

Goringhaicona Khoi Khoin	First Applicant
Regent Edmen Michael Hansen	Second Applicant
Chief Shiraatz Mohammed	Third Applicant
Peter Ludolph	Fourth Applicant
And	
Tauriq Jenkins	First Respondent
Delroque Dextry Arendse	Second Respondent
Observatory Civic Association	Third Respondent
The Trustees for the time being of the Liesbeek Leisure Properties Trust	Fourth Respondent
Heritage Western Cape	Fifth Respondent
City of Cape Town	Sixth Respondent

The Director: Development Management (Region 1), Local Government, Environmental Affairs & Development Planning, Western Cape Provincial Government	Seventh Respondent
The Minister for Local Government Planning, Western Cape Provincial Government	Eighth Respondent
Chairperson of the Municipal Planning Tribunal of the City of Cape Town	Ninth Respondent
Executive Mayor, City of Cape Town	Tenth Respondent
Western Cape First Nations Collective	Eleventh Respondent
In re: The matter between:	Case Number 12994/2021
Observatory Civic Association and Another	First Applicant
And	
The Trustees for the time being of the Liesbeek Leisure Properties Trust and Seven Others	First Respondent

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JUDGMENT ELECTRONICALLY DELIVERED

8 NOVEMBER 2020

Baartman, J (Slingers and Lekhuleni JJ concurring)

[1] This is an application for the rescission of the judgment of Goliath DJP, dated 5 May 2022, case number 12339/2022, and an appeal against the same judgment, case number 12994/2021. Although cited in both matters, Heritage Western Cape did not partake in the litigation. We heard both matters in the same hearing, as the following order (**the order**) is the object of both:

'145.1 First Respondent is interdicted from undertaking any further construction, earthworks, or other works on erf 151832, Observatory, Western Cape to implement the River Club development as authorised by the environmental authorisation issued in terms of the National Environmental Management Act, 107 of 1998 on 22 February 2021 and various development permissions issued in terms of the City of Cape Town's Municipal Planning By-Law, 2015 pending:

(a) Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC.

(b) The final determination of the review proceedings in Part B.

145.2 The three applications to strike are dismissed.

145.3 There shall be no order as to costs in the striking-out applications.

...'

[2] The first applicant, the Goringhaicona Khoi Khoin, and 3 others seek rescission of the order on the basis that it was induced by fraud in that the first applicant had not authorised the litigation nor was it opposed to the development that forms the subject of both matters. The applicants alleged that the first respondent (**Mr Jenkins**) had committed the fraud in concert with some of its members. Only Mr Jenkins opposed the rescission application, although he failed to file his opposing papers timeously. Belatedly, late afternoon on 10 October 2022, the day before the hearing, Mr Jenkins filed an answering affidavit, approximately 1 500 pages in length. The court refused an application from the bar for the late admission of the lengthy affidavit that was commissioned at 14h00 on 10 October 2022. An

unsigned version of the lengthy affidavit was electronically served on the parties early on 10 October 2022. Unsurprisingly, the applicant opposed the condonation application.

[3] We concluded that, in the circumstances of this matter, Mr Jenkins' explanation was unreasonable; it did not cover the full period of delay and it was not in the interest of justice to grant the condonation application.[1] We considered the following:

(a) On 27 July 2022, the rescission application was set down for hearing on an urgent basis. An opposing affidavit attested to by Mr Leslie London (**Mr London**) was filed that dealt only with urgency, not the fraud allegations. At that hearing, Mr Jenkins, who appeared in person, sought and obtained an opportunity to file an answering affidavit.

(b) However, Mr Jenkins only filed his Notice of Intention to Oppose on 19 September 2022, 8 weeks after the urgent application had been served on him. He proffered no explanation for that delay.

(c) On 11 August 2022, Hlophe JP directed that the rescission application should be heard together with the appeal referred to above. Mr Jenkins was present at that direction hearing. The Judge President further directed that the parties had to 'ensure that there were 3 sets of the record and that the file…in order, all …be done timeously as the Judges will need ample time to read … (as indicated before, parties are to self-regulate in this regard)'.

(d) On 22 August 2022, the applicants' attorney in correspondence enquired when Mr Jenkins intended to file his answering affidavit. He did not respond.

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[1] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curia)* 2008 (2) SA 472 (CC); *Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC).

(e) On 22 September 2022, the matters were allocated to us. Mr Jenkins was informed and he indicated that he would file his answering affidavit on Thursday, 6 October 2022.

(f) On the strength of that undertaking, the court set the matter down for a direction hearing on Monday 10 October 2022 at 08h30 in Court 18. It was anticipated and communicated to the parties that the parties should be able to indicate whether they needed time to respond to the answering affidavit Mr Jenkins had undertaken to file, or whether the matter could proceed as set down.

(g) We further considered that the Supreme Court of Appeal (**SCA**) had, in granting leave to appeal, directed that the appeal be dealt with on an urgent basis. Therefore, a postponement in the rescission application might have resulted in a separation of the two matters.

(h) Mr Jenkins did not file his affidavit as undertaken nor did he appear at the direction hearing. Instead, he left a voice note for my registrar, after the hearing, professing not to have known where the direction hearing was being held.

(i) At the hearing, on 11 October 2022, Mr Jenkins professed not to have known when his affidavit was due and indicated that he had been drafting it for the past 2 weeks. He did not explain why he had not done so earlier. In the absence of a full and frank explanation dealing with the whole period of delay, the dilatory behaviour was inexcusable.

(j) We also considered that the matters were inextricably linked and should be heard together. In the circumstances of this matter, the prejudice a postponement would have caused could not be remedied with an appropriate cost order.

(k) In addition, Mr Jenkins was legally represented in the interdict application before Goliath DJP and those attorneys indicated that

they might come on record for Mr Jenkins after the first applicant had terminated its mandate. However, Mr Jenkins is no ordinary litigant as his impressive CV indicates, from which the following appear:

> '[He is] an alumnus of the International Leadership Programme at International House, New York. ...recipient of the Merit Award in Oral History at the Graduate School of Arts and Science at Columbia University. ...founding chair of the AIXARRA Restorative Justice Forum, ...based at the Centre of African Studies at the University of Cape Town (**UCT**).
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> ... [Mr Jenkins is further] a research scholar, recipient of the Mafeje PhD scholar award in 2021. ...a member of the academic review process of the first KhoeKhoegowab language course introduced at UCT. ... [In addition, he has] represented the Goringhaicona on various regional and national forums dealing with issues of restitution and unity. [He is also] an accredited Section 11 monitor of the South African Human Rights Commission among other.'

[4] The first applicant is a group of individuals from a First Nations tribe who share the same heritage and desire its protection and preservation. In the appeal matter, Mr Jenkins professed to have instituted, on behalf of the first applicant, an application for an interdict to prevent the River Club development from proceeding pending the finalisation of review proceedings in which it challenged the environmental authorisation, among others, granted to the development.

[5] The interdict application was successful, and the appeal lies against that order. However, the first applicant now alleges that Mr Jenkins did not have the necessary authority to launch the interdict application on its behalf and that in any event, it does not oppose the development. The rescission application is directed at the same order that forms the subject of the appeal.

The River Club development

[6] The approved River Club development (**the development**) is at the heart of both matters. It is common cause that the development site has a rich heritage, having been occupied by indigenous people, used as a grazing place for livestock and serving various social, ecological, and sacred functions. The site is also important as the place where indigenous people first encountered and resisted colonialism. The site's heritage resources are mostly intangible, primarily the product of memory and historical association. However, the Black and Liesbeeck Rivers' confluence in the area is accepted as the point where indigenous people crossed and met the Portuguese.

[7] Sadly, the importance of the site and its valuable heritage significance have largely been ignored as the Liesbeeck River has been degraded and indefensibly polluted. In addition, a golf club, a parking lot, a conference centre and restaurants are modern features on the site that do not add to the site's heritage significance.

[8] The authorities received an application for the degraded site's development that envisaged rehabilitation of the Liesbeeck River, public open spaces adorned with indigenous vegetation to replace the golfing greens, the establishment of a heritage museum, an amphitheatre for use of both the First Nation Groups and other members of public and residential accommodation that would include affordable housing and commercial accommodation. Significantly, the development would include the construction of public transport infrastructure. The relevant authorities, after extensive public engagement spanning several years, granted the required authorisation and the development broke ground.

The rescission application

[9] The Observatory Civic Association, the third respondent, and Mr Jenkins on behalf of the first applicant, under case number

12994/2021, obtained an interdict to halt the development as indicated in paragraph 1 above. In the rescission application, the first applicant distanced itself from the allegations that had persuaded the court *a quo* to grant the interim interdict. The Observatory Civic Association, the third respondent, gave notice of its intention to oppose and filed Mr London's affidavit in which it dealt only with urgency; it did not, however, oppose the merits of the application.

[10] It was alleged on behalf of the first applicant that it had on 27 July 2021, in terms of its March 2021 Constitution, resolved to authorise Mr Jenkins to engage the services of Cullinan and Associates Incorporated to institute legal proceedings to interdict the development. In terms of the resolution, Mr Jenkins was also authorised to grant any power of attorney and to attest to affidavits on the first applicant's behalf. The signatories to the resolution were 'the Paramount Chief Aran, Supreme Senior Chief Desmond Dreyer, Supreme High Commissioner Tauriq Jenkins, Supreme Elder Peter Ludolph and Hamaqua Patricia Aran'.

[11] Mr Jenkins, in the interdict application, alleged as follows:

> 'Given the urgency with which these proceedings have been launched I have not been able to file confirmatory letter or affidavits from any of these groups with this affidavit but intend to file those with the supplementary founding affidavit that will be filed in the review application.'

[12] Mr Jenkins alleged, with reference to the persons he had consulted that:

> '78 Despite narrative disseminated by the FNC, the leaders of the vast majority of First Nation organizations have confirmed in conversations with me, that they remain strongly opposed to the proposed development. Of these traditional authorities and organisations views the ethics engaged in this process as a violation of the San Code of Ethics these include:
>
> 78.1 the vast majority the peninsula Khoi sovereign formations, including the Goringhaicona Khoi Khoin Traditional Indigenous Council, the Cochoqua

Traditional Authority, the Hessequa Traditional Authority under Chief Lanville, and the Gainougua Traditional Authority under Kenneth Hoffman;

....

78.3.1. the Komani-san led by Petrus Vaalbooi.'

Fraud allegation

[13] The first applicant has denied that the resolution was taken in terms of its 2018 Constitution, the only document in terms whereof it is bound, which provides as follows:

'[the Indigenous Tribe] shall only be legally bound in the exercise of its competencies set out in this constitution by a person or persons authorised in advance, in writing by the Paramount Chief, Regent, Chairperson and Senior Chief of CHIEFTAINCY of the Executive and NATIONAL COUNCIL or a person formation delegated by him or her in writing.'

[14] The 2018 Constitution further provides as follows:

'The Paramount Chief; Regent; Chairperson and Senior Chief of CHIEFTAINCY only these three (3) have the right to authorised someone by him or her in writing [to] represent[s] GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL in all legal proceedings by or against the TRIBE.'

[15] The first applicant alleged that the regent, Edmen Michael Hansen (the second applicant in the rescission application) had to be a signatory to resolution. He was not. Similarly, Senior Chief Shiraatz Mohammed (the third applicant in the rescission application) should have been a signatory to the resolution but was not. The absence of these signatories renders the resolution invalid. It follows that the first applicant did not authorise the litigation instituted under case number 12994/2021. The first applicant further denied that the 2021 document, on which the judgment was obtained, was its constitution.

[16] Therefore, at an urgent meeting, the first applicant attempted to remedy the situation as follows:

'Introduction:

Following the meeting held on Sunday 29 May 2022 ...GKKITC National Executive Council, representing the Goringhaicona Tribe, have taken resolutions, as a tribe, in order to ensure that our best interests are protected and that we are not misrepresented ever again by any person, and in particular Paramount Chief Aran and Tauriq Jenkins, in any matter, in respect of the development at the Twin Rivers Urban Park in Observatory in Cape Town, or again in respect of other matters, in the future.

In light of this, the following has been noted by the leadership and tribe of the Goringhaicona:

1. There was never any consultation on the formation or ratification of the Goringhaicona Constitution in March 2021, and whatever PC Aran or Mr Jenkins may have done to give effect to this constitution was not done with the authority of the National Executive Council or the tribe as a whole;

2. The only valid Constitution is the 2018 Constitution;

3.There was never any approval of the appointment of Supreme High Commissioner Tauriq Jenkins as such and "Supreme High Commissioner" is also not a position that exists in Khoisan custom or tradition;

4.There was never any consultation with the Goringhaicona tribe with regards to the applications to the High Court;

5. There has never been any agreement amongst the Goringhaicona to the effect that we shall oppose the Twin Rivers Urban Park or the Liesbeeck development, and many members of the tribe support the development, particularly due to its economic benefits; ...'

[17] That meeting adopted the following resolutions:

'(a)The only valid Constitution of the GKKITC is the 2018 Constitution.

(b) Any and all authority to represent the GKKITC and the Goringhaicona tribe that may have vested in PC Aran and Tariq Jenkins, is hereby revoked.

(c) PC Aran and Mr Jenkins are forbidden [from] acting in any capacity, without the written, signed, authority of the GKKITC National Executive Council.

(d) PC Aran and Mr Jenkins are to resign from, failing which they are to be removed from, all Goringhaicona structures, including the GKKITC, the trust and all companies and cooperatives.

(e) The Resolution of 27 July 2021 is invalid and any actions taken in terms of this resolution are invalid.

(f) The applications made in the Cape Town High Court, with case numbers 12994/2021 and 11580/2022 shall be withdrawn and where orders have been granted, they shall be rescinded, and all actions, required to facilitate this, including any necessary court proceedings, must be taken.

(g) Any authority given to Cullinan and Associates to represent the GKKITC and the Goringhaicona tribe is hereby revoked.

(h) That Regent Elder Edmen Hansen or Elder Peter Ludolph, alternatively or failing them Chief Shiraatz Mohammed, be authorized to depose to any affidavits or statements for and on behalf of the GKKITC, in order to give effect to this resolution.

(i) TJC Dunn Attorneys are hereby appointed ...to give effect to this resolution and make any necessary application/s to court...'

[18] The applicants have alleged that Mr Jenkins obtained the interim interdict fraudulently. A judgment induced by fraud cannot stand; however, in order to succeed on this basis, an applicant has to prove that the respondent gave incorrect evidence at the initial proceedings; that the respondent did so fraudulently with the intention to mislead the court; and that such false evidence diverged from the true facts to such an extent that the court, had it been aware thereof, would have given a different judgment.[2] It is necessary to consider the evidence in support of the fraud allegations in some detail as rescission of a judgment is contrary to the principle of finality and should not be easily granted. The Constitutional Court has held as follows:[3]

'There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the processes of administering justice, the interests of

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[2] *Childerly Estate Stores v Standard Bank of S.A., Ltd* 1924 OPD 163.
[3] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (Council for the Advancement of the South African Constitution and another as amici curiae)* 2021 (11) BCLR 1263 (CC) para 98.

justice requires the grounds available for rescission to remain carefully defined. In *Colyn*, the Supreme Court of Appeal emphasised that "the guiding principle of the common law is certainty of judgments". Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion, as expounded above, should be exercised only in exceptional cases, having "regard to the principle that it is desirable for there to be finality in judgments".' (Internal footnotes omitted.)

[19] Therefore, this court went to some length to secure Mr Jenkin's version on record; he, however, seemed content to delay. Obviously, the court could not oblige considering the serious allegations which if true would militate in favour of the rescission application and would affect the outcome of the appeal. In the circumstances of these matters, a joint hearing was in the interest of justice. It is necessary to consider the evidence in some detail. Mr Vaalbooi alleged as follows:

'(a) [He is] the leader of the Komani-san. This averment lacks merit and demonstrates that [Mr Jenkins'] ignorance of the Bushman nation. I am the traditional leader of the Bushman.

(b) In paragraph [78] ... [Mr Jenkins] allege that I, in particular have relay to him that –

(i) I oppose the proposed development of the River Park development; and

(ii) I view the "ethics" ...as a violation of the San Code of Ethics.

12.2. I categorically deny that I have ever spoken to [Mr Jenkins]. I don't know who this person is and I have never met him. Any averment made that I have opposed the River Club development lacks merit and is a blatant lie. This Honourable Court must not take kindly to such untruthfulness that has been placed under oath.

12.3 I have never informed [Mr Jenkins] that the process engaged in by the First Nations Collective to develop the River Club is a violation of the San Code of Ethics. This is once again misleading and a blatant untruth.

...

13.1. I once again want to unequivocally reiterate my and my peoples unreserved and unconditional support to the first Nations Collective, which we are part of, in their desire to develop the River Club land for the social-economic and heritage rights and benefit of all the indigenous peoples.'

[20] Mr Vaalbooi's allegations stand uncontested. However, in oral address, Mr Jenkins alleged that some people have had a change of heart and that his allegations were misinterpreted. That does not answer Mr Vaalbooi's allegation that he had not met Mr Jenkins prior to the institution of the interdict application. In addition, Goliath DJP relied on Mr Jenkin's allegations as follows:

'[120] LLPT, supported by the heritage consultant and Mr Rudewaan Arendse, have sought to persuade the Court that the proposed development is supported by the majority of First Nations Groups through the FNC. Jenkins contested this assertion and alerted the Court to the existence of other First Nations Groups and Traditional Authorities who are opposed to the development and may have an interest in this matter. These include:

...

120.3 The National House of IXam Bushmen Nation which encompass the following 11 IXam Bushmen Tribes of the Nation;

(a) The Khomani San led by Petrus Vaalbooi;

...

(f) The IXau-Sakwa led by Paramount Chief Danster...'

[21] Chief Danster said the following in support of the rescission application:

'...3. I depose to this affidavit in order to clarify my involvement, or absence thereof, in the matter of Observatory Civic Association and Goringhaicona Khoi Khoin...under...case number 12994/2021, relating to the Two Rivers Urban Park, the River Club Development and related matters.

4. I was alerted to the existence of an affidavit deposed to by [Mr Jenkins] on 30 July 2021 in Cape Town, in which he alleged that I am in support of the application to the High Court, as indicated in paragraph 78 of the affidavit.

5. I must categorically state that I have never had any dealings or discussions with Mr Jenkins or Paramount Chief Aran in respect of this matter and am shocked that my name has been used to lend credibility to something that I have no knowledge of, without my consent.

6. I do not want to be associated with this matter, and should never have been associated with it, in the first place.

7. I wish to clarify that I do not support the application, the relief sought in the application, and do not wish for either Mr Jenkins or Paramount Chief Aran to misrepresent me or my views in this matter, or any other in the future.' (own emphasis)

[22] Mr Vaalbooi and Chief Danster are adamant that they had not discussed the development with Mr Jenkins prior to his launching the interdict application. In respect of the authorisation that Mr Jenkins purported to have had, the second applicant, Mr Hansen, who deposed to the founding affidavit in the rescission application, said the following:

'1. I am an adult male Senior Khoisan Elder and Regent of the Goringhaicona tribe...

31. We form part of the Khoisan nation, a conglomeration of multiple tribes and clans, spread out across Southern Africa, stretching from Cape Town in the South, to Southern Angola and Botswana in the North, and border of the Eastern Cape. ...

35. Over the last few years, particularly since the advent of the democratic dispensation in 1994, the Goringhaicona, and the rest of the Khoisan nation, has seen a resurgence in conscientization and assertion of our culture, and commensurate rights....

67. I was instrumental in putting together the Constitution document for the First Applicant in 2018, drafting it carefully, over time. It was adopted at all levels of tribal strucks in Mid-2018, with a bottom-up approach to approval being taken. ...

70. The 2018 Constitution was followed and abided by from 2018 until now, and we still subscribe to it, as far as possible, although we do have challenges with regards to the number of active members, as many organisations do. ...

72. In or about late 2017, [Mr Jenkins] came into the Kraal at Oude Molen, with the second respondent present, and began making his acquaintance.

...

100. The resolution put forward by [Mr Jenkins] to commence these proceedings on 27 July 2021, ... did not include the Supreme Council NEC,

and has the names of people on it who are not part of the Supreme Council or the NEC, such as:

100.1. The First Respondent (Mr Jenkins) ...

100.3. Desmond Dreyer, considering that there is no position that is occupied by [him], that would warrant him to be a signatory on the resolution.

101. I must note that there are 2 important people missing from the document, if the Supreme Council itself is considered:

101.1. As Regent, I should have been a signatory to the resolution;

101.2. Senior Chief Shiraatz Mohammed, the Third Applicant should also have been a signatory. ...'

[23] The third respondent, Senior Chief Shiraatz Mohammed, said the following:

'1. I am an adult male Senior Khoisan Chief of the Goringhaicona tribe...

28. The 2021 Constitution, as is attached to Elder Edmen Hansen's affidavit, was signed by people that I do not know of, and was never brought to the attention of the Nation Executive Council for approval, discussion, or ratification.

29. With regards to the 2021 Constitution, there was a weekend camp at the Kraal, where people came to do ...Ceremonies, but these people are not documented or Goringhaicona, and they appear to have also included people who just came to the Kraal for any purpose, because it is not normal for there to be so many people at a ...Ceremony.

30. The way the 2021 Constitution should have been adopted, if it was to be valid, is that it should have been put into the main stream of the Goringhaicona structures, which start with the National Executive Council, as well as the regional substructures, in each area.

31. Our Constitution of 2018 is the Highest regulation of tribal affairs, which Aran and [Mr Jenkins] are in violation of that Constitution. ...'

[24] The evidence from the second and third respondents is not controverted. Therefore, I accept that the 2018 Constitution is the first applicant's constitution and that actions contrary to it and not ratified

by the relevant structure permitted in terms of the 2018 Constitution are invalid and do not bind the first applicant.

[25] The fourth applicant, Peter Ludolph, did sign the resolution. He said the following about the circumstances in which he did so:

'1. I am an adult male Senior Elder of the Goringhaicona tribe...

4. I am 85 years of age have been involved in the Goringhaicona leadership for at least 25 years and have a deep understanding of the Goringhaicona governance structures and procedures...

6. At the beginning of May 2022, at a tribal council meeting ...I was alerted by Chief Ebrahim Abrahams to the difficulties around this matter, and the existence of an affidavit deposed to by [Mr Jenkins] ...

10. I cannot recall exactly the date that I signed the resolution, but I signed it under the following circumstances.

11. In the morning I was called by [Mr Jenkins] to come to the Kraal...as I was needed, to sign something. I was not told what it was for.

12. I got to Oude Moulen in the latter part of the evening and Shiraz Mohammed, Aran, his wife, Patricia, and I were present.

13. [Mr Jenkins] arrived a bit later, with 2 pieces of paper for me to sign for him.

14. I did not read it, and [Mr Jenkins] was vague about what it was for, just saying it was for the tribe.

15. He said "Elder, please sign this paper for us", and little else.

16 As I trusted [Mr Jenkins] at that point, I signed the resolution, not knowing what was intended by it.

17 Desmond Dreyer was running late, so we waited a while for him to arrive.

18. Desmond Dreyer eventually arrived and signed the document too, without being told what it was about. ...

23. I only understood what the magnitude and implication of the resolution was, when a Goringhaicona meeting was held on 29 May 2022 at the Marion Institute in Athlone, and the High Court application was shown to me for the first time, with my signature on the resolution document attached to it. ...

26. I am of the view that such an important document should have been clearly explained to me, and I am shocked that it was not. ...

74. Under the circumstances, the actions taken by Aran and [Mr Jenkins] had no proper authority, and could not have been authorised by the resolution signed by me, even if it had been explained to me, which it was not.'

[26] It seems that Mr Jenkins was determined to stop the development at all costs. He therefore fabricated a constitution to suit his objective and betrayed the trust others had in him. I do not come to this conclusion lightly; the evidence, Mr Jenkins' dilatory behaviour and professed ignorance in respect of when he had to file his answering affidavit and his contemptuous absence from the direction hearing the day before the main hearing support the correctness of the conclusion. Mr Jenkins must have appreciated that he had to apply at the direction hearing for a postponement as his answering affidavit was still in draft. That he did not attend that hearing is testimony to his disregard for the implications for his reputation and the court.

[27] The applicants sought the following relief:

'1. It is declared that the 2018 Constitution document, as opposed to the document dated 31 March 2021, of the First Applicant is the valid constitution of the First Applicant.

2. It is declared that the Goringhaicona did not authorize the litigation under case number 12994/2021.

3. It is declared that the First and Second Respondents are not the duly authorised representatives of the Goringhaicona.

4. The order and judgment by Goliath DJP under case number 12994/2021 on 18 March 2022 is rescinded.'

Conclusion

[28] I, for the reasons stated above, am persuaded that the judgment dated 18 March 2022 was induced by fraud. Mr Jenkins misrepresented the first applicant's Constitution and did not have authorisation to launch the proceedings that culminated in the judgment. He further

misrepresented the views of some indigenous leaders without consulting with them. Goliath DJP acted on those misrepresentations as is clear from the judgment as a whole and the paragraph referred to above. It is axiomatic that the court *a quo* would not have entertained the application had it been aware that the first applicant had not authorised the litigation. The judgment and orders stand to be rescinded.

[29] I further accept that the first applicant is governed by its 2018 Constitution and that it was so governed at times relevant to this judgment. It follows that the litigation under case number 12994/2021 that was not ratified by the first applicant was therefore not authorised by it. The application must succeed. Although a punitive costs order would have been appropriate, the applicants did not seek costs.

[30] The following order, with which Slingers and Lekhuleni JJ concurred, is granted:

(a) It is declared that the 2018 Constitution document, as opposed to the document dated 31 March 2021, of the first applicant is the valid constitution of the first applicant.

(b) It is declared that the Goringhaicona did not authorise the litigation under case number 12994/2021.

(c) It is declared that the first and second respondents are not the duly authorised representatives of the Goringhaicona.

(d) The order and judgment by Goliath DJP under case number 12994/2021 on 18 March 2022 are rescinded.

The appeal under case number 12994/2021

The Director: Development Management (Region 1), Environmental Affairs & Development Planning, Western Cape Provincial Government	First Appellant/Fourth Respondent *a quo*
The Minister for Local Government, Environmental Affairs & Development Planning, Western Cape Provincial Government	Second Appellant/Fifth Respondent *a quo*
Trustees for the time being of the Liesbeek Leisure Properties Trust	Third Appellant/*First* Respondent *a quo*
City of Cape Town	Fourth Appellant/Third Respondent *a quo*
Executive Mayor, City of Cape Town	Fifth Appellant/ Seventh Respondent *a quo*
Western Cape First Nations Collective	Sixth Appellant/Eighth Respondent *a quo*
And	
Observatory Civic Association	First Respondent/First Applicant *a quo*
Goringhaicona Khoi Khoin Indigenous Traditional Council	Second Respondent/ Second Applicant *a quo*
Heritage Western Cape	Third Respondent/ Second Respondent *a quo*

[31] The first, second, fourth, fifth and sixth appellants (**the appellants**) with leave of the SCA, appeal the order of Goliath DJP handed down on 18 March 2022, referred to in paragraph 1 above. In August 2022, the Observatory Civic Association (**the first respondent**) and the Goringhaicona Khoi Khoin Indigenous Council (**the second respondent**) sought urgent interdictory relief, Part A[4].

[32] The respondents further sought final relief under Part B, where they sought the review and setting aside of the 20 August 2020 grant of environmental authorisation under section 24 of the National Environmental Management Act, 107 of 1998 (**NEMA**) for the listed activities associated with the development. The respondents will further seek the review and setting aside of the 22 February 2021 decision, in terms of section 43 of NEMA, to dismiss the internal appeals against the August decision. The review is also directed against the decision of the Municipal Planning Tribunal granted in terms of section 98(b) of the City of Cape Town Municipal Planning By-law to approve, among others, an application to rezone the property to a subdivisional area.

[33] This appeal concerns the relief obtained in Part A. The appeal is not opposed and the respondents have abandoned[5] the relief obtained in paragraphs 145.1(a) (**the abandoned relief**); it is convenient to repeat the paragraph:

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[4] '1. That this application be heard as one of urgency...2. Interdicting the First Respondent from undertaking any construction, earthworks, or other works on erf 151832, Observatory...to implement the River Club development as authorised by an environmental authorisation issued in terms of the National Environmental Management Act, 107 of 1998 ("*NEMA*") on 22 February 2021...pending:
2.1 The final determination of the application brought in terms of Part B hereof; and
2.2 The grant of a permit by Heritage Western Cape in terms of section 29(1) of the National Heritage Resources Act, 25 of 1999 authorising the Defacement, alteration and excavation of the property (which paragraph shall be operative until 8 April 2022) ....'

[5] Rule 41(2) of the Uniform Rules of Court: 'Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment....'

'145.1 First Respondent is interdicted from undertaking any further construction, earthworks, or other works on erf 151832, Observatory, Western Cape to implement the River Club development as authorised by the environmental authorisation issued in terms of the National Environmental Management Act, 107 of 1998 on 22 February 2021 and various development permissions issued in terms of the City of Cape Town's Municipal Planning By-Law, 2015 pending:

Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC.'

[34] The issues in the appeal are as follows:

(a) The effect of the abandonment.

(b) Mr Jenkins' authority to represent the second respondent.

(c) Whether the respondents made out a case for the interim relief they obtained.

(d) Whether the court *a quo* erred in dismissing the applications to strike out.

The abandoned relief

[35] The respondents abandoned the relief as it was not sought by anyone and, as indicated above, the second respondent, the first applicant in the rescission application, sought to rescind the whole judgment. However, the relief involves other unidentified parties in whose interest the order operates. The respondents' abandonment has no effect on the unidentified group's rights – its rights remain in place until set aside. The relief granted is problematic as no case was made out for it on the papers. The court *a quo* appreciated that the target group to be consulted was unidentified and that neither party to the litigation was able to assist in identifying the target group. Those appellants who were obliged to consult interested parties claimed that they had engaged in extensive public participation processes.

[36] The first and second appellants claimed that the authorisation granted had considered input from interested parties and the heritage interest had been adequately accommodated. The authorisation also provided for ongoing consultation with the affected First Nation Groups to ensure that the development meets expectations.

[37] In motion proceedings, an applicant must make out its case in the founding papers and the respondent must meet that case.[6] The respondents alleged irrationality and unreasonableness of the impugned decisions as a basis for the review application. That was the case the appellants had to meet. Ordinarily, a court minded to tailor the relief sought will afford the parties an opportunity to address the further issue. As the relief granted was not sought, none of the parties to the litigation could identify the group with whom there should be 'meaningful engagement and consultation'. There was no duty on the appellants to place that information before the court. In those circumstances, it was unfair to criticise the parties for failure to place information before the court that would not have advanced the issues in dispute as they appeared from the papers.

[38] The abandoned relief is final and unenforceable as, among others, it does not indicate who should undertake the consultation or with whom. It stands to be set aside on appeal.

Mr Jenkins' authority to represent the second appellant.

[39] Mr Katz SC, who appeared with Mr Prinsloo, instructed by the attorney Tim Dunn represented the second respondent in the rescission application where it alleged that Mr Jenkins had fraudulently represented that he had authority to institute proceedings on its behalf. As indicated above, that application found favour with this court. The

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[6] *National Commissioner of Police and Another v Gun Owners of South Africa* 2020 (6) SA 69 (SCA).

same legal team also acted on behalf of the second respondent in abandoning the relief referred to above and filed a notice to abide by the appeal. In those circumstances, it is difficult to comprehend Mr Jenkins' determination to address the court in the appeal on behalf of the second respondent.

[40] The second respondent is a voluntary group of like-minded First Nations persons who act together in furtherance of their shared cultural objectives. The group can only be represented by a legal practitioner of their choice. Mr Jenkins is not a legal practitioner and is therefore unable to represent any other natural person or group of persons. This court does not have a discretion in this regard; furthermore, even assuming it had the discretion, we would not have exercised it in Mr Jenkins' favour as the second respondent had resolved to dismiss him from their ranks. In Van der Merwe[7], the court held:

'[45] In terms of the common law, it is not permissible for a lay person to represent a natural person in a court of law. This common-law position now finds support in s 25 of the legal Practice Act 28 of 2014, which provides in relevant part that:

"(1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law."

[46] It follows that there is no discretion to allow a lay person to represent a natural person in a court of law. ...The pitfalls of a natural person being represented by a person who is not a legal practitioner are obvious. The

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[7] *Commissioner for the South African Revenue Service v Candice-Jean van der Merwe* (211/2021) [2022] ZASCA 106 (30 June 2022).

clearest example that comes to mind is that the rules of this Court would not oblige such a lay representative to file a power of attorney. This could cause a party to subsequently deny the authority of the representative, to the detriment of the administration of justice. ...'(Internal footnotes omitted.)

Were the jurisdictional requirements for interim relief met

[41] In the interdict application, the respondents asserted that the First Nation Groups have a right to have their culture respected and heritage sites protected. That was common cause among the parties. Therefore, the authorisations that form the subject of the review provide for its protection. It is important to bear in mind that the interdict was granted approximately 8 months after construction had already altered the original degraded site.

[42] The jurisdictional requirements for interim relief are well known.[8] Mr London deposed to the founding affidavit in the interdict application and described the *prima facie* right respondents sought to protect as follows:

'203. The facts set out above establish a strong prima *facie right* warranting protection by this court, namely a right to review of the unlawful decisions at issue, which themselves have compromised the rights of the applicants to lawful action that conserves South Africa's heritage for the benefit of present and future generations, and to the lawful implementation of the spatial planning instruments affecting the area of Observatory.

204. It is furthermore beyond question that the anticipated harm – i.e., the destruction and transformation of the River Club site – will eventuate if the relief in Part A of the notice of motion is not granted. Indeed, it has already begun'.

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[8] The requirements for interim relief are: (1) a *prima facie* right though open to some doubt, (2) a well-grounded apprehension that the right will be irreparably harmed if the interdict is not granted, (3) the balance of convenience must favour the award of the interdict; (4) there must no alternative remedy available to the applicant. *Setlogelo v Setlogelo* 1914 AD 221.

[43] The respondents sought to protect their right to review 'the unlawful decisions at issue'. That right cannot form the basis for interim relief. In OUTA[9], the court held as follows:

'[48] At the outset the high court had to decide whether the applicants had established a prima facie right, although open to some doubt. ...

[49] Second, there is a conceptual difficulty with the high court's holding that the applicants have shown "a prima facie...right to have the decision reviewed and set aside as ..." The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that "(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair" and in turn PAJA regulates the review of administrative action.

[50] Under the *Setlogelo* test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.'(Internal footnotes omitted.)

[44] Mr London said the following about the acknowledged heritage right:

'14. The heritage resource in question is the River Club site itself, a "virtual island" occurring at the confluence of the Black and Liesbeeck rivers. The property embodies exceptional heritage significance by virtue of its symbolic (and actual) association with early confrontations between the Peninsula Khoekhoe and the first Dutch settlers...as well as its location within the broader "urban park" that has an extraordinarily high concentration of heritage sites and a very unusual character. The River Club site is also an important "green lung" in the city (and identified as such in relevant spatial plans).'

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[9] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

[45] He then goes on to criticise the process followed in the 'heritage impact assessment', concluding as follows:

> '20. In the result, we contend that the environmental authorisation issued for the project is fatally defective and susceptible to review. The developmental approval granted for the project in terms of the MPB is, we contend, likewise defective.'

[46] Significantly, Mr London does not allege that the right to heritage is at risk from suffering any harm, let alone irreparable harm, as is the jurisdictional requirement for an interim interdict. It is common cause that the development site has symbolic and actual associations with early confrontations between indigenous peoples and early settlers. Although there is no tangible manifestation of the beliefs and interactions associated with the site, its heritage value is undisputed. However, the respondents did not allege or demonstrate that the development would cause irreparable harm to the heritage resource.

[47] On the contrary, the papers indicated that the development might enhance the resource having regard to the degraded state of the site when the authorisation was obtained. In addition, the First Nations Groups will be able to give input to ensure the development meets expectations. When the interdict was granted, the site had been transformed by construction. Therefore, the respondents' allegation that the interdict was sought to prevent the destruction and transformation of the site does not demonstrate future harm, as the site had already transformed. However, the heritage value is apparently still intact and not under threat.

[48] The court *a quo* held that the interdict was necessary to halt construction '*in order to embark on a proper consultation process*'. An inadequate consultation process refers to past action and cannot be rectified with an interim interdict, which is clear from OUTA, referred to above. The parties realised that and so abandoned the relief directed at further consultation.

The test on appeal in respect of interim relief

[49] The conclusion that the applicants have failed to identify a right under threat of irreparable harm leads to the test to be applied on appeal. In Knox D'Arcy[10], the court examined the relevant authorities and concluded that a court of appeal can interfere where it concludes that the court *a quo* granted the wrong order. The test is not whether the court *a quo* exercised its discretion properly, rather whether it arrived at the correct conclusion on a conspectus of the evidence before it. Brand JA[11] said the following with reference to the test in *Knox D'Arcy*:

> '[18] ...First amongst these concerns the intrinsic nature of the decision taken by the court a quo when it refused the business rescue application. The issue has its origin in the contention...because the decision by the court a quo derived from the exercise of a discretion, this court's authority to interfere with that decision is limited. The contention has its roots in the well-established principle that a court of appeal is not allowed to interfere with the exercise of a discretion merely because it would have come to a different conclusion. It may interfere only if the lower court had been influenced by wrong principles of law, or a misdirection of fact, or if it had failed to exercise a discretion at all. The reason for the limitation, it is said, is because, in an appeal against the exercise of a discretion, the question is not whether the lower court had arrived at the right conclusion, but whether it had exercised its discretion in a proper manner...Equally well settled, however, is the principle that this limitation on interference only applies to the exercise of a discretion in the strict sense. What gives rise to the emphasis on "strict sense" in this context, is that the term "discretion" is sometimes used in the loose sense to indicate no more than the application of a value judgment. Where the "discretion" exercised by the lower court was one in the loose sense of a value judgment, the limitation imposed on the authority of the court of appeal to interfere does not apply. In that event the court of appeal is both entitled, and in fact duty-bound, to interfere if it would have come to a different conclusion.

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[10] *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] 3 All SA 669 (A).
[11] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).

> [19] ...The guiding principles, I believe, are to be found in *Knox D'Arcy*...which principles have been approved and applied by the Constitutional Court on several occasions, eg in *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC)...a discretion in the strict sense is confined to those instances where the lower court could legitimately adopt any one of a range of options about which there may well be a justifiable difference of opinion as to which one would be the most appropriate. An award of general damages, for example, may vary from say R90 000 to R120 000. No award within that range could be described as "wrong". That is a discretion in the strict sense. ...
>
> [20] Reference to a "discretion" without these attributes does not convey the meaning of a "discretion in the strict sense". Even if a discretion without these qualifications is described as a "wide discretion", it conveys no more than the meaning that the court is entitled to have regard to a variety of diverse and contrasting considerations in reaching a conclusion. But in the end, that conclusion will be either right or wrong. ...the limitations on the powers of a court of appeal are confined to the exercise of a discretion in the strict sense.'

[50] Scott JA[12] held as follows:

> 'It follows...that the order made by the Court *a quo* in substitution of para (*d*) of the rule *nisi* is wholly at variance with the order which this Court would have made sitting as a Court of first instance. ...To the extent, therefore, that the Court *a quo* relied on that case to justify its order, in my view, it misdirected itself. In all the circumstance, this Court is entitled to interfere even if it is accepted that the discretion exercised by the Court *a quo* was a discretion in the strict sense...'

Application of the test to the facts

[51] Either the respondents met the requirements for interim relief or they did not. As indicated above, I am persuaded that the respondents did not establish a *prima facie* right, even if open to some doubt. There could thus be no consideration of irreparable harm in the absence of a *prima facie* right to be protected from future irreparable harm. Similarly, there could be no weighing of interests to determine where

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[12] *Administrators, Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA) at 561 B-D.

the balance of convenience lies which is properly why the court *a quo* did not undertake the enquiry. Had the court *a quo* undertaken the enquiry, it would have found the many opportunities for growth the development offers the First Nations Groups; the promotion of the site's heritage value and the employment opportunities for the unemployed in the province, to name just a few examples, far outweigh the unarticulated harm in the respondents' case. Without a *prima facie* right, the respondents never got out of 'the starting blocks'. An interdict is a remedy only for present and future invasions of a right, not for past invasions.[13]

[52] As indicated above, when the interdict was granted, the construction had already started in accordance with the authorisation that had been granted. The respondents have an alternate remedy – review of the impugned decisions. That process has already started and the review court will be able to make any order that is 'just and equitable' should it set aside any of the impugned decisions. It is not apparent from the papers that review proceedings are not an adequate alternative remedy. In the circumstances of this matter, this court would not have granted an interim interdict. It follows that this court is at liberty to interfere with the discretion exercised by the court *a quo*. The interim interdict stands to be set aside on appeal.

The striking out applications

[53] In the striking out applications, the applicants contended that the respondents had in reply impermissibly introduced new grounds of review and sought to strike out the new matter. As it is common cause that new matter was introduced in reply, I do not deem it necessary to set the matter out in any detail. It is sufficient to restate that the applicant in motion proceedings must make out his/her case in the

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[13] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2022 JDR 2651 (CC) para 48.

founding papers. It is impermissible to make out a new case in reply, as the respondents do not have an opportunity to reply. The replying affidavit should be the shortest affidavit filed in motion proceedings.

[54] The court *a quo* dealt with the matter as follows:

'[138] Three strike out applications were filed by the LLPT, the City and the Province in relation to various allegations in the Applicants' replying papers on the basis, in the main, that they introduce new review grounds in reply and/or introduce new material in reply, or are irrelevant. LLPT applied for the striking out of certain paragraphs together with annexures in the replying affidavit of Professor Leslie London ...the ....expert replying affidavit of Ms Bridgit O'Donoghue, the expert replying affidavit of Ms Deidre Prins-Solani, and the entire affidavit of Mr Derick Ambrose Henstra...Third, Sixth and Seventh Respondent applied for the striking out of paragraphs 85-90 of the replying affidavit of London together with annexures, paragraphs 24-26 of the replying affidavit of O'Donoghue together with annexures, and the entire replying affidavit of Prince-Solani. Fourth and Fifth Respondents applied for the striking of paragraphs 31 and 50 of the Applicant's replying affidavit of London.

[139] The averments which the Respondents seek to have struck relate *inter alia* to allegations in response to matters raised in the answering papers, differences of opinions of heritage specialist, aspects relating to HWC's comments, and allegations surrounding legal arguments ...

[140] The papers filed in this matter are prolix ...At the hearing ...the Court was informed that the Rule 53 record still needed to be prepared and delivered to the Applicants. It is well established in review applications that an Applicant has the right to supplement its founding affidavit after the Rule 53(1) record is filed...'

[55] The court *a quo* accepted that the respondents could only supplement their review grounds after the Rule 53 record had been filed and that this had not been done. Nevertheless, the court *a quo* condoned the supplementing of the respondents' case in reply and added as follows:

'[141] This Court is mindful not to inappropriately traverse the purview of the review court. The issues to be determined in the review were considered for the restricted purpose of determining whether the Applicants make out a strong case for the interim interdict to be granted. In my view the majority of

the grounds relied upon in the striking applications implicate the review grounds and related issues. ...'

[56] I am unable to support the court *a quo's* finding that the applicants in the striking out applications would not be prejudiced because they would be able to respond in the review. The court *a quo* considered the impermissibly amplified grounds of review 'for the restricted purpose of determining whether the [respondents] make out a strong case for the interim interdict to be granted'. The prejudice is obvious. The order dismissing the striking out applications stands to be set aside on appeal.

Costs

[57] In respect of the striking out applications, the court *a quo* made no order as to costs and gave no reasons for that order. I can see no reason why costs should not follow the result. It is apparent from the judgment *a quo* that the applications were necessary. I intend to grant the striking out applications with costs to follow the result.

[58] There was general agreement that no costs would be sought against the second respondent if it succeeded in the rescission application. It succeeded; hence no costs award in the appeal will be made against the second respondent.

[59] Ms Blomkamp, the first respondent's counsel, submitted that it should not be mulct with the appeal costs, as it had abandoned the relief referred to above and did not oppose the appeal. However, the notice to abide by the appeal was filed after the SCA had granted leave; prior thereto, the first respondent had opposed the application for leave to appeal. Ms Blomkamp further submitted that the fourth appellant, the City of Cape Town, had no basis to partake in the litigation. It should have, so the submission went, abided by the court's decision.

[60] I am persuaded that the fourth appellant was within its rights to join the litigation as the development addressed some of its core constitutional

obligations, e.g., the proposed low-cost housing to be built, the many employment opportunities that would be created and the creation of transport infrastructure. I have further considered the submission that the Biowatch[14] principles are applicable. I disagree.

Conclusion

[61] I, for the reasons stated above, make the following order with which Slingers and Lekhuleni JJ concurred:

(a) The appeal is upheld in respect of all the appellants with costs, including the costs of two counsel. The orders granted on 5 May 2022 are set aside and replaced with the following order:

(i) The strike-out applications are upheld with costs, including the costs of two counsel.

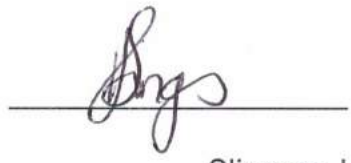
(ii) The application is dismissed with costs against the first respondent, the Observatory Civic Association, such costs to include the costs of two counsel.

(iii) The first respondent is to pay the costs, in respect of all the appellants, occasioned by the application for leave to appeal in the court *a quo* and in the SCA, such costs to include the costs of two counsel.

Baartman J

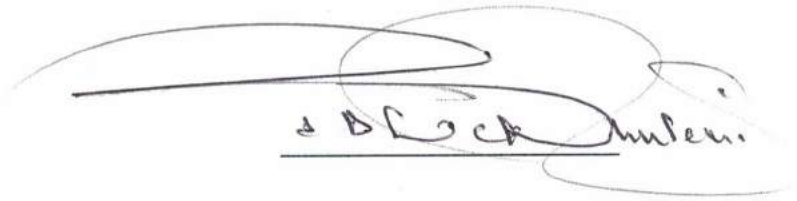
[14] Biowatch Trust v Registrar, Genetic Resources, and Others 2009(6) SA 232 (CC).

I concur.



Slingers J

I concur.



Lekhuleni J