

**BEFORE THE INDEPENDENT TRIBUNAL CONSTITUTED BY THE MEC OF
CULTURAL AFFAIRS AND SPORT, WESTERN CAPE IN TERMS OF SECTION 49(2)
OF THE NATIONAL HERITAGE RESOURCES ACT 1999 (ACT 25 OF 1999)**

**In re: APPEAL AGAINST THE PROVISIONAL PROTECTION IN TERMS OF
SECTION 29(1)(a) OF THE NHRA OF THE AREA KNOWN AS ERF 151832 THE
RIVER CLUB, OBSERVATORY, CAPE TOWN**

In the appeal of:

CASE NR 1511 2504 WD 1217E

Liesbeek Leisure Property Trust (LLPT)

First Appellant

Department of Environmental

Affairs and Development Planning

Second Appellant

(DEA&DP)

Department of Transport and Public Works (DT&PW)

Third Appellant

The City of Cape Town (CoCT)

Fourth Appellant

and

Heritage Western Cape (HWC)

Respondent

and

Various Interested and Affected Parties

I&AP's

INDEPENDENT APPEAL TRIBUNAL RULING

INDEPENDENT APPEAL TRIBUNAL:

- Mr. Ashraf Mahomed (Chairperson)
- Dr. Piet Claassen (Member)
- Ms. Eureka Barnard (Member)
- Mr. Michael Petersen (Secretariate)

INTRODUCTION

1. This appeal lies in respect of a decision by the Respondent to provisionally protect the area known as Erf 151832 at the River Club, Observatory, Cape Town, measuring almost 15 hectares in extent (the resource), in terms of section 29(1)(a) of the National Heritage Resources Act 25 of 1999 (the NHRA). Section 29 of the NHRA provides for the provisional protection of areas and resources.
2. Located at the foot of Devil's Peak with views of iconic Table Mountain, the land stretches between the banks of the Black and the Liesbeek Rivers and is regarded as a flood plain. The owner of the resource purchased it in 2015 and applied for rezoning from the present designated zoning of 'Open Space 3 (Special Open Space)' to a zoning that would allow intensive development.
3. The area and resource forms part of a multipurpose park, aptly named the Two Rivers Urban Park (TRUP), which extends from the confluence of the Black and Liesbeek Rivers in the north and the N2 /M5 interchange in the south, and contains all of the land between the banks of these two rivers,¹ The TRUP area will be

¹ See *Two Rivers Urban Park Contextual Framework and Phase 1 Environmental Management Plan*.

radically transformed by the proposed development. The almost 15 hectares site which contains the resource has been utilised as a golf driving range for more than 50 years.

4. The area and resource carry immense heritage value for the Indigenous First Nations' people of South Africa. Their narratives and the material to be conserved such as the burial places of their ancestors, which have cultural or historical significance and are sacrosanct, resonated throughout the appeal proceedings as they presented arguments from various perspectives. The area is regarded as sacred and visited regularly. Consequently, they refuse to be silenced and forced into submission, as they were for centuries. In many ways, the area and resource has become the contested site of a struggle, which started generations before in 1510 when the Portuguese arrived in the Cape and continues unabatedly.
5. At the time of hearing this appeal, the area and resource had still not been clearly designated and graded in terms of heritage status. This *lacuna* created fertile ground for an intense contestation between the Appellants wishing to see high density urban development of the area, on the one hand, and the Respondent and the majority of Interested & Affected Parties (I&AP's), which include the surrounding communities represented by their civic associations, wanting to preserve the heritage resource and conserve the surrounding environment in as rustic form as possible, on the other. These tensions were sharply reflected in the submissions' made by the parties in these appeal proceedings.
6. Drawing on the judgment in SA Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd 2007 (2) SA 461 (C), this Independent Appeal Tribunal (the Appeal Tribunal) held previously (on 29 January 2019) that the Respondent's decision-making process in respect of the provisional protection had not afforded the parties affected by the decision, who are protected by the constitutional right to fair administrative action, the right of appearance at the meeting where the decision was taken, particularly in light of the '*maximum period of two years*' in section 29(1)(a) of the NHRA. It made a finding on a very specific ground that the

Respondent had not complied with section 10(2)(c)² of the *NHRA*, and the decision-making process was therefore procedurally unfair.

7. In the unique circumstances of this case, mindful of the long duration of the provisional protection and a myriad of traditionally sensitive issues, the Appeal Tribunal exercised its discretion to issue a structural remedy directing the Respondent to respect and fulfil the right of appearance and to submit a report on its compliance with the requirements of section 10 of the *NHRA* and section 3 of the *Promotion of Administrative Justice Act 3 of 2000 (PAJA)*. In other words, the directive afforded the Respondent an opportunity to: -

- 7.1. Remedy the procedural defect of failing to implement section 10(2)(c) of the *NHRA*; and

- 7.2. Fulfil the statutory mandate of conducting the necessary negotiation and consultation in order to alleviate the threat to conservation and investigate the protection of the heritage resource required by section 29(1)(a)(ii) and (iii) of the *NHRA*.

8. The merits of the appeal, in terms of the cultural significance of the heritage resource, heritage conservation principles, the factors relevant to the decision to provisionally protect the area and resource, the nature of the decision and its reasonableness, the nature of the competing interests involved, and the impact of the decision on the lives and well-being of those affected, were held over for later determination and is accordingly addressed herein.

9. Three government bodies appealed against the invoking of Section 29(1)(a) of the *NHRA*, namely the Department of Environmental Affairs and Development Planning (DEA&DP) (Second Appellant), the Department of Transport and Public Works (DT& PW) (Third Appellant) and the City of Cape Town (CoCT) (Fourth Appellant). The Respondent's Section 49(1) appeals committee rejected their

² Section 10(2)(c) of the *NHRA* states that, 'a person who may be affected by a decision has the right of appearance at such meeting'

appeals, and all three bodies chose to join the First Appellant (the owner of the resource) in the appeal to this Independent Appeal Tribunal, as provided for in Section 49(2) of the *NHRA*.

10. All the parties were eloquently represented in the appeal hearing. They provided the Appeal Tribunal with helpful submissions, both written and oral, and we are indebted to them.

BACKGROUND

11. This matter has a long and complicated history and a short summary is provided herein in order to place the issues before the Appeal Tribunal within context. In 2011, the City of Cape Town collaborated with the Two Rivers Urban Park Committee, a local Cape Town NGO, to develop the TRUP. The development of this urban park aimed at enhancing the social and economic potential of the area and encouraged intense urban development, which was intended to open up the area for recreational activities, cultural and heritage appreciation, and environmental prosperity.
12. The City of Cape Town issued a document titled *Revitalizing Urban Rivers: The Background* dated 15 December 2011, which referred to the TRUP and the potential negative influence of river canalisation and thoughtless urban development of urban river areas:

'The last two decades have seen a shift in attitude and policy with regard to urban rivers in developed and emerging countries around the world. Beginning in the industrial age and continuing for most of the twentieth century, urban river systems were canalized in an attempt to control water flow through cities. Rivers were engineered to adjust their paths, to control flooding and bank erosion, and to improve system drainage. Costly projects were undertaken to adjust nature for the benefit of man. Every benefit of river canalization, however, also came

with a detriment. The negative impacts of canalization on the ecosystem are vast. Concrete prevents plants from growing in the streams, which eliminates the food supply for first-order consumers and subsequently the entire food chain. This is devastating to the local ecosystem, eliminating fish and causing many birds to migrate elsewhere. Canalization can also have negative effects on floodplains. While people may want to adjust floodplains in order to allow development of nearby lands, this is not a sustainable practice. Floodplains actually provide a benefit to the surrounding lands by allowing the river to deposit nutrients into the soil. This enables riverside vegetation to grow and encourages wildlife to inhabit the area. As a result of the large negative impact that canalized rivers can have on their environment, the general trend in public policy over the last two decades has been to remove the canals and restore water flows to their natural conditions. Combining this process with an effort to reduce pollution in rivers results in large, costly projects. During the initial background research phase of this project, two rivers were identified that related closely to the Black River. These two rivers were the South Platte River in Denver, Colorado, USA, and the Bronx River in New York City, New York, USA. These two rivers both shared similar traits to the Black River, and the restoration efforts of these rivers gave critical insight into how to revitalize an urban river. The South Platte River before it underwent a restoration closely resembled the Black River in its present state. It was a seasonal river that became very shallow in the summer, but caused flooding issues in the winter. It also ran through a heavily industrialized area. The regeneration of this river started as a community-based effort with the formation of the Platter River Development Committee. This volunteer committee garnered support for the project by taking influential members of the public on tours of the river. Once the river was in the minds of the public, they were able to make heavy use of volunteer planting and clean-up efforts. Today the South Platte thrives both ecologically and economically, and contains over one hundred miles of trails.'

13. A brief report from Respondent to the Head of Department of Cultural Affairs and Sport dated 30 June 2017, stated the context and background on the process that it followed in regard to the TRUP Area. The following is noted from this report:

'The Two Rivers Urban Park is in the extent of 297 hectares within the Cape Town District. The Black and Liesbeek Rivers form part of the site and its environment. The property is owned by various stakeholders, such as the State, Provincial Government, Local Government as well as private ownership.

There are heritage resources which are protected in terms of the National Heritage Resources Act and include both tangible and intangible heritage resources which have historical, cultural, potential archaeological significance as well as commemorative association to the site.

A notification of Intent to Develop (NID) application was submitted to HWC on 18 July 2016. A baseline study was highlighted as a way forward to deal with the complexities of the site and to propose heritage design indicators that would inform other studies that would be site specific.

A Heritage Baseline Study, dated February 2017, compiled by Melanie Attwell and Associates in co-operation with Arcon Heritage and Design was tabled at an Impact Assessment Committee (IACom) meeting held on 12 April 2017. IACom made the following recommendations and interim comments:

Based on the significance of the overall site, the Committee recommended that the TRUP area be referred to the next meeting of the Inventories, Grading and Interpretation Committee (IGIC) for formal grading.

Given the strategic importance and high significance of the site the Committee recommended that the Council of HWC give consideration to the provisional protection of the Two Rivers Urban Park area under Section 29 of the National Heritage Resources Act (Act 25 of 1999) , (NHRA) and in

so doing providing more effective legal controls than those provided for in Section 38(8) and specifically to investigate the desirability and extent of the area to potentially be declared as a Provincial Heritage Site.

The purpose of the motivation of IACom to recommend to the Inventories, Grading and Interpretation Committee (IGIC's) support for provisional protection was based on the significance of the heritage resources within the area. The information used to formulate this motivation (in part) to IGIC was extracted from the TRUP Heritage Baseline Report dated February 2017 by Melanie Attwell and Associates in corporation with Arcon Heritage and Design.

This report refers to the site having outstanding heritage significance and also lists these significances in the report.

The motivation for provisional protection presented to IGIC noted the most threatening issues or factors at hand is the fact that the development proposal for the TRUP-Park is unknown and therefore an open-ended project which puts the site at risk as the nature of the application is unclear. (Parts of the site was also put forward by SAHRA as a Grade 1 heritage resource but was never formally declared).

In brief, the IGIC noted the complex nature of consultation required associated with the site, but noted it was an essential part of the Section 38 of the NHRA process. (This process requires a heritage authority to ensure as per Section 38(3) of the NHRA, that requirements such as public consultations are met and articulated in reports.

The committee noted IACom's comment that the Baseline Study did not meet the requirements of the NID response dated 25 August 2016 and agreed with IACom's identification of gaps in the study.

It was noted that by 27 June 2017, HWC had followed due process in regard to its considerations of this project as with any other project under its review.'

14. At a meeting of the HWC Council held on 14 March 2018, it was agreed that provisional protection in terms of Section 29 of the *NHRA* for Erf 15183, Corner Liesbeek Parkway and Observatory Road, Observatory, Cape Town, is desirable.
15. Consequently on 28 March 2018, a notice of intention to provisionally protect Erf 151832, The River Club, Corner Liesbeek Parkway and Observatory Road, Observatory, Cape Town, bounded by Liesbeek Parkway, Observatory Road and the Liesbeek River, Observatory, was served on the owner of the property, the Liesbeek Leisure Properties Trust (First Appellant) in terms of Section 29(4) of the *NHRA*.
16. On 20 April 2018, the Respondent published a notice in the Provincial Gazette to provisionally protect the area known as Erf 151832, the River Club, Observatory, in terms of Section 29(1)(a) of the *NHRA*), for a maximum period of two years from the publication of the notice. This provisional protection referred to the following site: Erf 151832, the River Club, Corner Liesbeek Parkway and Observatory Road, Observatory, Cape Town, bounded by Liesbeek Parkway, Observatory Road and the Liesbeek River, Observatory. The heritage significance was noted as follows:

'The River Club forms part of the wider Two Rivers Urban Park (TRUP) and represents a microcosm of Cape history. It reflects the pattern of South Africa's social, architectural and political history spanning across the pre-colonial, colonial, apartheid and more recent history. The Two Rivers Urban Park landscape has high cultural values of historical, social, aesthetic, architectural, scientific and environmental significances. It contributes to an understanding of past attitudes, beliefs, uses, events, persons, periods, techniques and design. It has associated links with past events, persons, uses, community memory, identity and oral history. It possesses a strong sense of place. The Two Rivers Urban Park landscape is a complex composite of natural, cultivated and built landscape elements. It is a cultural landscape, transformed by thousands of years of settlement history. The landscape expresses both artistic and innovative qualities in terms of

its natural setting, architecture and planting patterns. It also has narrative qualities, possessing a rich layering of physical evidence brought alive by the oral histories of the people who lived and worked in institutions, amongst other things, the Valkenberg Hospital and the South African Astronomical Observatory. Different historical narratives create a story of pioneering and philanthropy, social reform and identity, self-sufficiency, farming and institutionalization. The Two Rivers Urban Park possesses many distinctive and interrelated precincts which clearly demonstrates or are strongly associated with its various historical roles and uses as a place for indigenous hunter-gatherers, grazing grounds for herders, colonial farms, scientific research, reformatory and hospitals.'

17. On 4 May 2018, the Respondent addressed a letter to Kantor Legal Services CC, who was acting for and on behalf of the City of Cape Town, stating the reasons for the provisional protection. In essence, the letter dealt with the rationale, quoted above, for why the proposed development could have a detrimental impact on the area and resources, with both tangible and intangible heritage value, and that it was justified for the area to be provisionally protected. In addition to the reasons quoted above, the letter provided:

'Any proposed development of the site must be taken with due sensitivity and must be informed by the above.

In terms of the NHRA, HWC is responsible for the identification and management of heritage resources. Provisional protection forms one of the methods of investigating the level of significance and thus the protection required.

In terms of the provision of the NHRA, heritage resources are finite and once destroyed cannot be renewed. HWC is accordingly mandated to take action to protect these resources in the interest of all South Africans.'

18. Notably, the initial development proposals of the owner did not make provision for heritage conservation. The focus thus far appears to have been on the mandates of the Second and Fourth Appellants. These two government bodies are required to take decisions to allow, curb or refuse the applications for urban development and rezoning. The Second Appellant (DEA&DP) must *inter alia* rule on the environmental impact, especially as the resource is located in a flood plain. The City of Cape Town (Fourth Appellant) must rule on the rezoning application and also the extent of the development that will be allowed, if the rezoning is approved. Both these decisions would first mandate extensive public participation processes.
19. Owing to various aspects relating to the development proposals of the owner, section 38 of the *NHRA* became applicable, giving the Respondent considerable opportunity, first to decide on the heritage value of the property and, if any, to submit proposals for the adaptation of conservation principles to the proposed development and to ensure that the heritage value of the area and resource is protected.
20. Section 38(8) of the *NHRA* provides that, “... *the consenting authority must ensure that ... any comments and recommendations of the relevant heritage resources authority ... must be taken into account prior to granting of the consent.*” Notably, the recommendations of the Respondent must be ‘*taken into account*’ i.e. not necessarily enforced.
21. The Respondent, however, chose not to depend only on the Section 38 procedures in the *NHRA* but to also invoke Section 29, in its own right. Consequently, a turf war appears to have unfolded in context of these appeal proceedings between the Appellants and the Respondent in the midst of the larger contestation between those in support of heritage conservation and protection on the one hand, and those who support intense urban development on the other.

ISSUES IN DISPUTE

22. The Appellants' raised various grounds of appeal, which can be broadly be summarised under the following themes:

22.1. The merits of provisional protection:

The absence of any 'triggers' for Section 29 of the *NHRA* i.e. the absence of either a belief that heritage resources are threatened or an intention to investigate a possible threat to heritage resources.

22.2. Further Substantive Grounds:

22.2.1. The directive issued by this Appeal Tribunal on 29 January 2019 was not properly carried out, and section 10 of the *NHRA* and section 3 of *PAJA* has not been complied with.

22.2.2. The Respondent's obligation to determine the duration of the provisional protection order and its omission in this regard.

22.3. Section 38 of the *NHRA*:

22.3.1. Section 38 of the *NHRA* bars the Respondent from deciding to provisionally protect the area and resource (in terms of Section 29 of the *NHRA*).

22.3.2. A 'parallel' process amounts to fruitless and wasteful expenditure i.e. the section 29 provisional protection and the section 38 process constitutes fruitless and wasteful expenditure by the Respondent allegedly due to the duplication of functions.

23. In considering the merits of the appeal, the Appeal Tribunal is enjoined by section 49(3) of the *NHRA* to have regard to: -

- '(a) the cultural significance of the heritage resources in question;*
- (b) heritage conservation principles; and*
- (c) any other relevant factor which is brought to its attention by the appellant or the heritage resources authority.'*

APPLICABLE LAW

Provisional Protection

24. Chapter II of the *NHRA* provides for the protection and management of heritage resources in South Africa. Section 29(1)(a) of the *NHRA* specifically provides for the provisional protection, for a maximum period of two years, of areas and heritage resources which the heritage resources authority considers to be threatened, and which threat it believes can be alleviated by negotiation and consultation. It provides:

'29(1) SAHRA, or a provincial heritage resources authority, may, subject to Subsection (4), by notice in the Gazette or the Provincial Gazette, as the case may be—

- (a) provisionally protect for a maximum period of two years any—*
 - (i) protected area;*
 - (ii) heritage resource, the conservation of which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation; or*
 - (iii) heritage resource, the protection of which SAHRA or the provincial heritage resources authority wishes to investigate in terms of this Act;*

and

(b) withdraw any notice published under paragraph (a).'

25. The *NHRA* places an obligation on the heritage resources authority to give written notice to the owner of the resource of the proposed provisional protection – see section 29(4) of *NHRA*. It also provides a deeming provision with a minimum period of 30 days provisional protection from the date of service of the notice under subsection (4) or until the notice is withdrawn or the resource is provisionally protected by notice in the *Government Gazette* or the *Provincial Gazette*, whichever is the shorter period – see section 29(5) of the *NHRA*. It provides:

'(4) A heritage resources authority or a local authority may not provisionally protect any heritage resource unless it has notified the owner of the resource in writing of the proposed provisional protection.

(5) A heritage resource shall be deemed to be provisionally protected for 30 days from the date of service of a notice under Subsection (4) or until the notice is withdrawn or the resource is provisionally protected by notice in the Gazette or the Provincial Gazette, whichever is the shorter period.'

26. Importantly, section 29(10) of the *NHRA* creates both a positive and negative obligation for the owner of the resource and it also applies more generally to everyone. It provides:

'No person may damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of a provisionally protected place or object without a permit issued by a heritage resources authority or local authority responsible for the provisional protection'.

The Case for the Protection of Cultural Heritage

27. In this Appeal, questions were raised as to whether the TRUP area, which includes the resource, enjoys 'cultural heritage significance'. If so, what is the nature and value of the heritage resources there and are they are worthy of protection. Ancillary to this is the question of the form of protection required (if any).
28. In the absence of evidence of tangible heritage resources in the context of these appeal proceedings, the focus shifted to the intangible heritage resources, and more specifically: -
 - 28.1. The multifaceted exercise of identifying cultural heritage resources; how these resources have been protected internationally; and
 - 28.2. Recent developments in the acknowledgement and conservation of South African heritage in terms of the indigenous cultural practices and structures.
29. The point of departure on the question of the protection of cultural heritage is section 31(1) of the *Constitution of the Republic of South Africa*:

'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, - (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'
30. It is the enabling provision for the *NHRA*, which provides the legislative framework for the legal protection, conservation and management of areas and resources that have heritage significance, as part of the 'national estate' of South Africa.
31. Section 3(1) of the *NHRA* defines the 'national estate' as including:

‘.....those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generationsand fall within the sphere of operations of heritage resources authorities.’

32. Section 3(2) of the *NHRA* provides a list of objects and places that are included in the national estate, such as: archaeological and paleontological sites, graves and burial grounds, places of significance relating to the history of slavery in South Africa, archaeological objects and material recovered from the soil or waters of South Africa.
33. Section 3(3) of the *NHRA* provides the criteria for determining whether a place or object *‘has cultural significance or other special value’*. These entail the following:

‘(a) its importance in the community, or pattern of South Africa’s history;
(b) its possession of uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage;
(c) its potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage;
(d) its importance in demonstrating the principal characteristics of a particular class of South Africa’s natural or cultural places or objects;
(e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
(f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;
(g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
(h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and
(i) sites of significance relating to the history of slavery in South Africa.’

34. Notably, for purposes of these appeal proceedings a heritage resource, in accordance with the *NHRA*, is a place or object of '*cultural significance or other special value*'; while cultural significance includes aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value. Therefore, the *NHRA* acknowledges cultural rights and cultural heritage of people to be worthy of protection.

35. This is articulated in the Preamble to the *NHRA*:

'Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character.'

Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathise with the experience of others. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into our rich oral traditions and customs. '

36. The Respondent is a heritage resources authority, established on 25 October 2002 by the Minister of Cultural Affairs and Sport with the necessary agency to protect resources, which have heritage significance as part of the national estate. It enjoys a wide statutory mandate, which is consistent with both the positive and negative obligations on the State to respect, protect, promote and fulfil the provisions and rights in the *Bill of Rights*.

37. Section 5(1) and (4) – (7) of the *NHRA*, which sets out various principles to assist the heritage resource authority to manage, coordinate and promote areas and resources which have actual or potential heritage value, provides:

'(1) All authorities, bodies and persons performing functions and exercising powers in terms of this Act for the management of heritage resources must recognise the 10 following principles:

- (a) Heritage resources have lasting value in their own right and provide evidence of the origins of South African society and as they are valuable, finite, non-renewable and irreplaceable they must be carefully managed to ensure their survival;*
- (b) every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans;*
- (c) heritage resources have the capacity to promote reconciliation, understanding and respect, and contribute to the development of a unifying South African 20 identity; and*
- (d) heritage resources management must guard against the use of heritage for sectarian purposes or political gain.*

.....

(4) Heritage resources form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management.

(5) Heritage resources contribute significantly to research, education and tourism and they must be developed and presented for these purposes in a way that ensures dignity and respect for cultural values.

(6) Policy, administrative practice and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development.

(7) The identification, assessment and management of the heritage resources of South Africa must—

- (a) take account of all relevant cultural values and indigenous knowledge systems;*
- (b) take account of material or cultural heritage value and involve the least possible alteration or loss of it;*
- (c) promote the use and enjoyment of and access to heritage resources, in a way consistent with their cultural significance and conservation needs;*
- (d) contribute to social and economic development;*
- (e) safeguard the options of present and future generations; and*
- (f) be fully researched, documented and recorded.'*

International Best Practise and Policy³

38. Section 39 of the *Constitution* (Interpretation of Bill of Rights) enjoins the following:

- '(1) When interpreting the Bill of Rights, a court, tribunal or forum—*
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
 - (b) must consider international law; and*
 - (c) may consider foreign law.*

³ Source of paragraphs 39 – 54: *Dreams not bricks. The Burra Charter and Australia's pioneering role in preservation*, November 2014 by Luise Rellensmann (Luise Rellensmann is an editor at Baunetz and assistant professor/research assistant at the department for architectural conservation at BTU Cottbus, Australia).

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

39. It is appropriate to have regard to 'cultural heritage' as a concept that was developed in a western Euro-American context and which does not always match the idea of heritage elsewhere in the world. This heritage discourse has recently gained attention and led to a shift in the way heritage is approached.
40. One of the ways in which this manifests is the realisation of the importance of including local communities and their knowledge in the management of their own heritage, and therefore making for a more equal and inclusive heritage practice.
41. In South Africa as in many parts of the world this is a very complicated matter, and begs the following questions: What is heritage? How does one go about preserving a place whose constructed elements are not bricks, concrete or steel, but a rich and intricate ancient fabric of dreams and stories?
42. Heritage comes in many shapes and sizes, of which 'sacred heritage' is one of the largest categories. It possesses special attributes, a notion which also applies to 'indigenous heritage'. The two are often interlinked, and the issues related to indigenous heritage and its position in the wider heritage field are most visibly contextualized in the discussions concerning the protection of sacred natural sites and indigenous rights.
43. The *Burra Charter*, drawn up in 1979, has made Australia a leading and influential voice in the field of cultural preservation. Luise Rellensmann re-evaluates this significant document, which has helped shift the idea of conservation from the

material to the wider cultural significance of place or object by recognising the very different nature of what is considered 'heritage' by Indigenous Australians as opposed to that of the West.

44. Crooked trees, rough rocks and waterholes are commonly places of worship in Aboriginal culture – in ways that are often incomprehensible to others, including their non-Indigenous fellow Australians. What might appear just a vast landscape to Western experts in archaeology, architecture or art history could be in fact a 'labyrinth of invisible pathways', as Bruce Chatwin describes in his book *Songlines from 1987*. The Sydney Opera House and Uluru (or Ayers Rock), two Australian icons, could be seen to symbolise concepts of heritage constructed in completely different ways by two different cultures: the Settler and the Indigenous.
45. With the *Burra Charter*, named after the historic mining town Burra in Southern Australia and adopted by Australia ICOMOS (International Council on Monuments and Sites) in 1979, preservationists in the country acknowledged these different approaches much earlier than elsewhere, and since then have differentiated the heritages of the country's people and cultures in conservation practice.
46. The *Burra Charter* was based initially on the *Venice Charter* adopted in 1964 – one of the most influential texts in twentieth century heritage preservation, and still widely used especially in Europe, which focussed on safeguarding cultural heritage mainly through the exact 'authentic' preservation of built form and substance.
47. However, in Australian indigenous culture places are considered important because of the creational stories they embody, rooted in the so-called 'dreaming', which is a set of beliefs that a group lives by. Against this context, the rigid principles of the *Venice Charter*, focused on the material authenticity of built heritage, could be seen to have limitations.
48. Australian preservation officials were confronted with questions of how to preserve the heritage of a culture that is still 'lived', but without manifesting itself through built form. The essence and difference contained in the *Burra Charter* when compared to the *Venice Charter* is its use of 'cultural significance' at the centre of

preservation practice. Thus, it brings a more open approach to a field that often talks about monuments, or Denkmäler in German terms that automatically evoke images of pedestals and palaces as well as of a genius creator and their work.

49. The *Burra Charter* challenges standard ideas that disregard the possibility that objects or places do not come into existence as monuments, but become monuments through human perception, by what people attribute to them.
50. According to the *Burra Charter*, preservation is aimed at retaining the cultural significance of a place not limited to its aesthetic and historic values alone but embracing social and spiritual values as well.
51. 'Place' in this case means a geographically defined area, which may include elements, objects, spaces and views having tangible and intangible dimensions.

'Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects'. (Article 1.2, The Burra Charter).

See also section 2 (xxxii) of the *NHRA*:

'Definitions

2. (xxxii) 'Place' includes –

- (a) a site, area or region;*
- (b) a building or other structure which may include equipment, furniture, fittings and articles associated with or connected with such building or other structure;*
- (c) a group of buildings or other structures which may include equipment, furniture, fittings and articles associated with or connected with such group of buildings or other structures;*
- (d) an open space, including a public square, street or park;*
and

(e) in relation to the management of a place, includes the immediate surroundings of a place.'

52. Culture is a social construct and in the case of Australia's indigenous people, extolled and sang about in 'dreaming' tracks. Thus, the *Burra Charter* puts the people and their perception at the centre, asking the question - for whom do we need to preserve what? Its emphasis is on understanding places first and then developing ways to manage them and their changes into the future. As is often misunderstood in the Western approach to conservation, it is not about keeping a place in a particular state, and preservation is seen as a process that needs to be negotiated afresh again and again.
53. In the same way, the *Burra Charter* has itself been revised many times since coming into being in 1979 - the last time this occurred was in 2013. The guidelines of the Charter have become increasingly influential over the years and have been applied outside Australia in parts of Africa, India, Vietnam and China, amongst others.
54. However, they've not been so much recognised or applied in the European context. Looking at Germany, one reason for this might be the guidelines' emphasis on involvement of the public: an approach that would challenge the authority of the Federal Preservation Office in the definition and interpretation of what heritage actually is.

ANALYSIS

The Merits of Provisional Protection

55. The key aspect of the heritage related argument relevant to his matter seems to be the question whether the section 29(1)(a) of the *NHRA* provisional protection was validly and lawfully triggered and decided.

56. To answer this question, one or more of three possible categories of factual findings must be present for a heritage resources authority to consider whether to provisionally protect an area or resource, namely:

56.1. A *'protected area'*;

56.2. A *'heritage resource, the conservation of which it considers to be threatened and which threat it believes can be alleviated by negotiation and consultation'*; or

56.3. A *'heritage resource, the protection of which SAHRA or the provincial heritage resources authority wishes to investigate in terms of this Act'*.

57. The Respondent submitted that since TRUP is not a 'protected area' as yet, both 29(1)(a)(ii) and (iii) of the *NHRA* are applicable to this matter, in so far as there is a heritage resource that must be protected, albeit provisionally, in order for: -

57.1. The threat to the conservation thereof to be alleviated by negotiation and consultation; or

57.2. The heritage resources authority (either national or provincial) to investigate the nature and scope of the protection in terms of the *NHRA*.

58. It is common cause that there are heritage resources with cultural significance in this area that are necessary to conserve. However, the Appellants have disputed whether section 29 of the *NHRA* was validly and lawfully triggered, and if the provisional protection is warranted under the circumstances.

59. To address these issues we are required to examine the heritage value of the area and resource, in terms of the *NHRA*. This is determined in terms of a balancing exercise with reference to a basket of heritage and other considerations that include: the sensitivities and significance of the wider heritage context and

surrounds; the impact of the proposed development on the immediate environment, and the conservation needs and protection measures.

The Sensitivities and Significance of the Wider Heritage Context and Surrounds

60. The I&AP's consist mainly of representatives of the Indigenous First Nations' community in South Africa. Collectively, the various African indigenous communities in South Africa are known as the Khoi-San / Khoisan, which comprise the San and the Khoi Khoi. The main San groups include the Khomani San who reside mainly in the Kalahari region, and the Khwe and Xun, who reside primarily in Platfontein, Kimberley. The Khoi Khoi consist of the Nama who reside mainly in the Province of the North Cape; the Koran mainly in the Kimberley area and Free State Province; the Griqua in the provinces of Western Cape, Eastern Cape, Northern Cape, Free State and KwaZulu-Natal; and Cape Khoi Khoi in the Western Cape and the Eastern Cape, with increasing pockets in the provinces of Gauteng and Free State.
61. The socio-political changes brought about by the current South African political system have created a space for the deconstruction of racially determined social categories of apartheid. Constitutional democracy facilitated the formal recognition of the Indigenous First Nations' peoples and advanced the promotion and protection of their rights.⁴
62. The protection, promotion, development and management of indigenous culture and practices is an important aspect, which is increasingly gaining recognition and importance in South African law post-1994. An example of this is the *Protection*,

⁴ The International Work Group for Indigenous Affairs (IWGIA) is a global human rights organisation dedicated to promoting, protecting and defending indigenous peoples' rights. IWGIA was founded in 1968 by anthropologists alarmed about the ongoing genocide on indigenous peoples taking place in the Amazon. IWGIA notes on its website that South Africa voted in favour of adopting the UN Declaration on the Rights of Indigenous Peoples.

Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019, which provides *inter alia* for the protection, promotion, development and management of indigenous knowledge, the facilitation and coordination of indigenous knowledge-based innovation, and for the establishment and operation of a National Office of Indigenous Knowledge Systems and the management of the rights of holders of indigenous knowledge.

63. A further example is the *Traditional Leadership and Khoisan Act 3 of 2019*, which for the first time in over 300 years provides for the formal recognition and open opportunities for access to justice for the historic communities of the Khoi and San. In addition, the Act allows Khoi and San to be included in the governmental administrative processes within the various ministries, and permits these ministries to make specific provisions for the social, economic and cultural priorities of the Khoi and San communities.
64. In summary, the San and Khoi Khoi indigenous First Nations' people are now formally recognised in terms of national legislation as a customary community with specific historical and cultural rights and interests, and they accordingly enjoy *locus standi* in these appeal proceedings and in various other *fora*.
65. It became clear during the appeal proceedings, largely from the impassioned pleas and submissions of the representatives of the Indigenous First Nations' community, that the area and resource has a high heritage value and cultural significance, at least of Provincial (Grade II) heritage value.⁵ The heritage value and cultural significance is increased due to historical activities that took place in this area when the Portuguese conflicted with the Khoi in 1510, 142 years before the arrival of Jan van Riebeeck.
66. There are also other claims by the representatives of the Indigenous First Nations' community, that the area and resource contains graves and burial grounds, including ancestral graves, royal graves, graves of traditional leaders, graves of victims of wars and conflict, and so forth.

⁵ See Postlethwayt Cindy (2019): "*Draft phase 1 heritage impact assessment for the site Two Rivers*": Section 8.1.6; p22.

67. The fact that the area and resource has high heritage value and cultural significance is not disputed by any of the parties.
68. Notably, the cultural significance of the heritage resources in question from before Jan van Riebeeck's landing, was not well documented in the 2003 *"Two Rivers Urban Park Contextual Framework Phase 1: Environmental Management Plan"*, as, in that document, nothing is said of the conflict between the Khoi and the Portuguese. It only states that the area was used as grazing land for a short period every year⁶.
69. Under section 5.1 headed '*Places, buildings ... of cultural significance*' it vaguely states that, '*The Two Rivers Urban Park landscape has great cultural significance.*' But the historical role of the Khoi, including their pre- and post-colonial role, is not mentioned at all.
70. During the hearings, the representatives of the Indigenous First Nations' community made a dramatic presentation accentuating the early history of the area, thus highlighting the heritage value of the area.
71. Consequently, the Appeal Tribunal found that there are deep sensitivities and significance of the wider heritage context and surrounds for the Indigenous First Nations' community and that they want to be heard on issues of conservation and protection of the heritage resources in the area but were denied their rights in the past. It ruled on 29 January 2019 that the Respondent must engage in meaningful negotiation and consultation with all the parties, which include the Indigenous First Nations community.
72. The directive was intended for the negotiation and consultation between parties, together with the Postlethwayt⁷ heritage impact assessment, to lead to at least some of the groups involved working on a development proposal that will give space and recognition to the heritage value of the area.

⁶ Two Rivers Urban Park contextual Framework and Phase 1 Environmental Management Plan. Final Report. August 2003. City of Cape Town, Cape Town Administration Environmental Management Branch. The evolving landscape of the Two Rivers Park (4.2) Pre-colonial landscape.

⁷ At Figure 34: *Spatial development framework diagram* (p56), Postlethwayt indicates that some development on the site is acceptable.

73. A negotiated agreement between several of the parties involved would illustrate an important point, namely that urban development of some sort need not necessarily reduce the heritage value of the area and resource.
74. However, not all the parties agreed with this approach. Some of the Khoi groups, the TRUP Association and the Observatory Civic Association, still do not want any development and prefer to conserve the heritage of the area and resource.

Impact of the Proposed New Development on the Area and Resource

75. In these appeal proceedings, it was necessary to consider what heritage resources would be impacted on by the proposed development. Concomitantly, if further consultation will aid the conservation of the area and heritage resources, and if such a temporary stay in the development process will either aid the Respondent in investigating the impact on the area and resources and the protection required.
76. It is the complicated nature of this case that bars the full understanding of the intricate aspects of the particular heritage resources, that warrants a section 29 provisional protection order.
77. The legislature must have foreseen cases like this, and consequently granted heritage authorities the powers and functions to: -
 - 77.1. Decide whether to provisionally protect an area and resource in order to look into issues affecting conservation *per se*, which it considers to be under threat and which threat it believes can be alleviated by negotiation and consultation; or to
 - 77.2. Investigate and determine whether the nature and scope of heritage protection is warranted in an area or resource.

(See section 29(1)(a)(ii) & (iii) of the *NHRA*).

78. In regard to the contents of the various documents provided to this Appeal Tribunal as well as the submissions and 'evidence of heritage resources' gathered at the resource during the inspection *in loco* held on 1 November 2018, the heritage impact applicable to this matter can be summarised as follows:

78.1. The TRUP area, which includes the resource, encompasses a distinctive cultural landscape that forms part of what could most probably be one of the original Indigenous First Nations' areas and resources with cultural significance in terms of place.

78.2. In this case, 'place' means more than a geographically defined area, which may include elements, objects, spaces and views having tangible and intangible dimensions.

'Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects'.⁸

78.3. The inspection *in loco* revealed the extent to which the resource formed a 'natural edge', providing a clear unobstructed view of iconic Table Mountain. The resource in question forms part of the greater TRUP landscape and contributes to its cultural significance, specifically to its rivers and the floodplain. This unique landscape is the result of the dynamic relationship between topographical form, climate, geology, usage, history and settlement typology of the area.

78.4. The area is of great spiritual significance to the Indigenous First Nations' people and communities, and reflects all the patterns of South African history and early culture.

78.5. The heritage resources there pertain to the whole landscape of the area and interaction with its surrounds. It does not constitute a single heritage-

⁸ Australia ICOMOS Burra Charter, 2013 Practice Note – Understanding and assessing cultural significance

worthy item, but a basket of heritage aspects, of which not all have been documented hitherto, and cutting across research disciplines while encompassing a substantial sense of place. The area and resource therefore cannot be viewed in isolation from the greater area and the surrounds, and conceivably has many undocumented intangible heritage resources which warrants further investigation.

78.6. This case presents an opportunity for the narratives of the Indigenous First Nations' people and the cultural significance of the heritage resources in question to be properly documented and showcased as the first of its kind within the metropolitan area.

79. On the basis of these considerations, there is a clear indication that the suggested area and resource has substantial heritage value and cultural significance, which are contained in a complicated basket of heritage offerings associated with the greater TRUP area and its interaction with the surrounds.

80. The conservation and investigation of the protection of the area and the resource has yet to be concluded, and it must be said, is a matter of urgency. In this regard, the Respondent and the Heritage Resources Section (HRS) of the Fourth Appellant should reassess the potential damage and threats that any proposed development has or could have on the heritage value of the bigger TRUP area and of course the specific resource in question. In other words, HWC and HRS must ensure that: -

80.1. Any development of resource is sensitive to the cultural significance of the area;

80.2. The current development proposal responds sufficiently to the identified design informants appropriate for this area and resource. For example, it could assess what views from a particular location are seen as sacred views for the Indigenous First Nations' community and then assess what the impact of any new buildings would have on the views of Table

Mountain; and

80.3. The development must establish and take into account the narratives, comments and proposals of the Indigenous First Nations' people that regard the area and resource as sacred.

81. Notably, despite the valuable submissions received from the parties, none of the submissions have provided this Appeal Tribunal with a complete understanding of the intricate and complicated heritage value of the TRUP area and resource. Therefore some value may be achieved in allowing parties further interaction that will hopefully lead to a better understanding of the issues, and/or allowing the Respondent to complete its assessment of the conservation aspects and its current investigations into the protection of heritage resources in the TRUP area as well as the resource, in a participatory and collaborative manner.

82. The logical and appropriate way to honourably commemorate and preserve the very high heritage value of the area and resource, will be to continue the process of meaningful negotiations until a solution on conservation and protection measures is found that satisfies the Respondent.

83. It is however not clear from the NHRA precisely what heritage management process must be followed henceforth, since the timeframe associated with the section 29 provisional protection process will soon end on 20 April 2020 and the conservation and protection measures have not been determined and formally agreed upon.

84. It is evident that the matter of establishing principles of conservation and then protecting the resource and the larger TRUP area is far more complicated than perceived at first glance. This is further complicated by the many stakeholders involved who have a real and substantial interest in the area and the resource.

85. Although there have been many efforts to conserve and protect the area and the resource, one of the tangible heritage resources in the area was only recently formally acknowledged by the national heritage resources authority of South Africa.

86. On 21 December 2018, the South African Heritage Resources Agency (SAHRA) officially declared the South African Astronomical Observatory (SAAO) as a National Heritage Site, thereby opening the way for the area and the resource to follow suit and similarly be declared a National Heritage Site.

87. This development for the SAAO, recognises its heritage significance over the past two centuries, and will ensure the conservation and protection of this heritage. The declaration was made with the understanding that the area is to remain a working area, and that its heritage status will not curtail the primary function of the SAAO as a world-class observatory. Consequently, SAHRA issued the following statement:

*'SAHRA identified the site as having qualities so exceptional that it is of special national significance and warrants declaration as a National Heritage Site.'*⁹

88. Having regard to this significant development and the challenges within the current context, one could argue that the past two years could have been spent on a better understanding of all the heritage issues in the area that are at stake, and to allow the Respondent to fast track and conclude any ongoing heritage investigations unhindered by political posturing.

89. Instead, it seems to have been spent on fruitless and wasteful contestations that appear to have been driven mainly by the Third Respondent (represented by the Acting TRUP Programme Manager) and the Fourth Appellant (ostensibly from the Executive Mayor's office). They did not serve the interests of their department, the CoCT or the public interest and their conduct warrants review and censure, where appropriate.

90. Notable and alarming at the same time, is the concern that government officials who are meant to serve the people of this country and should be loyal and

⁹ Website of the South African Astronomical Observatory <https://www.saa.ac.za/>

respectful towards each other, are perceived to form alliances with other tiers of government and developers, instead of aligning the scarce resources, with experience skills and expertise to cooperatively solve complicated heritage issues cooperatively, internally, and in good faith.

91. The policy of maintaining control over one's subordinates or opponents by encouraging dissent between them, thereby preventing them from uniting in opposition, is evident in this matter. Conservation efforts to preserve the heritage of the Indigenous First Nations' people and communities and protect their cultural rights, have been hamstrung by the 'politics of divide and rule'. In a divided and disparate society that can benefit from and become unified through knowledge of each other's cultures and heritage, the current situation is not a good scenario to be in and this is unfortunate.

92. In these circumstances, none of the parties achieved any win for the acknowledgement, protection and conservation of this very complicated and delicate area and resource, which is unique in its own right and potentially the first of its type.

93. In spite of the above unfortunate scenario, the impasse from these contestations gave the Indigenous First Nations' people and communities, for the first time, a voice and a platform to enunciate their case for heritage conservation and protection.

94. During the appeal proceedings they frequently mentioned that this Appeal Tribunal is the first government structure that provided them with an unequivocal and an unprecedented opportunity to provide their opinions and to raise their concerns. This in itself is a very exciting development for the Indigenous First Nations' people of the province and concerning for not having happened sooner.

Conservation Needs and Protection Measures – A Work in Progress

95. There are two important questions that still require clarification in the process of identifying conservation principles and determining protection measures in the

process going forward:

- 95.1. The exact geographical area that needs to be mapped in relation to key heritage resources.
- 95.2. The heritage resources that require conservation and protection, and importantly, how these resources will be portrayed on the entire area.
- 96. This is no doubt a very complicated process but entirely rational, reasonable and necessary to complete. If, for example, the heritage resources are intangible and refers to the silhouette of a mountain, and this view is blocked by a proposed development, it stands to be protected and the reasons for conservation need to be clear and unequivocal.

Further Meaningful Negotiation and Consultation

- 97. Notably, while all the parties agreed that the area has significant heritage value, some chose to disagree on the interpretation of legislative mandates and put colleagues in a bad light. This, instead of ensuring that reasonable measures are implemented to ensure that the conservation principles applicable to the resource under consideration are properly identified and measures put in place for its protection.
- 98. In failing to achieve this simple goal during the past decade at least, a unique opportunity in taking the lead to acknowledge the role of Indigenous First Nations' people in the history of South Africa has been missed.
- 99. During the appeal proceedings, the view was expressed that the conservation of the area and resources can only reasonably be achieved through a negotiated agreement and proper consultation with the Respondent, the various I&AP's - including the indigenous groups or tribes that we came to learn about, the owner of the resource, the relevant Western Cape Provincial Departments, and the City of Cape Town.

100. However, this list is not a closed list of stakeholders. There are indications of a far greater number of stakeholders that have a real and substantial interest in the area and resource. Indeed any threat to the heritage conservation of the area and resource can be alleviated by open and honest negotiation and consultation amongst all relevant stakeholders.
101. The provisional protection has a deeming provision with a minimum duration of 30 days (section 29(5) of the NHRA) and a maximum duration of 2 years (section 29(1)(a) of the NHRA), allowing parties a clear and certain timeline without placing a bar on development indefinitely. Given the potential heritage value of the TRUP area as a whole, allowing for further meaningful negotiation and consultation beyond the ambit of section 29 of the *NHRA*, which might have the effect of delaying development somewhat, seems a small price to pay considering the benefits and gains of conducting a proper assessment of the conservation needs and investigating the protection of heritage resources.

Other Grounds of Appeal

102. On 7 February 2020, the Independent Appeal Tribunal heard argument that:
- 102.1. The directive issued on 29 January 2019 was not properly carried out and that the Respondent has not complied with section 10 of the *NHRA* and section 3 of the *PAJA*.
- 102.2. The Respondent was obliged to determine the duration of the provisional protection order and the failure to do so invalidated the order.

Compliance with the Appeal Tribunal Directive issued on 29 January 2019

103. This Appeal Tribunal cannot direct the Respondent on how to fulfil its legislative mandate. It can however urge the Respondent to find ways to involve the relevant

stakeholders and communities associated with the area and resource, who have a real and substantial interest therein, thus ensuring that the right to be heard is respected and fulfilled and the goals of heritage conservation, and particularly the legacy of the formally disregarded Indigenous First Nations' peoples of South Africa, is acknowledged, protected, developed and managed.

104. Since the onset of these appeal proceedings it became clear that all the parties who have a real and substantial interest in the area and heritage resource had not been heard on the issues relating to conservation measures to alleviate any threat to and the protection of the heritage resources.

105. Additionally, in coming to the conclusion that the Respondent had not complied with section 10(2)(c) of the *NHRA* relating to the procedural principle which entitled the First Appellant the right of appearance at its meeting, the Appeal Tribunal: -

105.1. Made the following findings: -

- 105.1.1. The Appellants had not shown that they had suffered any prejudice;
- 105.1.2. The First Appellant was not hamstrung by the provisional protection order from pursuing development proposals, provided it obtained a permit from the Respondent; and
- 105.1.3. The Appellants had not been deprived or expropriated of their existing rights and any diminution of their rights (if any) was reasonable and justifiable in an open and democratic society.

105.2. Took into consideration: -

- 105.2.1. The Respondent's submission that, the appearance of the First Appellant at the Respondent's meeting would not have made a difference to the decision to provisionally protect the heritage resource; and

105.2.2. The conduct of the Respondent had been mitigated by the steps it had taken, including ensuring that the agenda for the meeting was published on the (HWC) website; the meeting was open to the public; the (HWC) Council took into consideration the written submissions; and also considered the fact that the provisional protection was for a period of 2 years.

100.3 Directed the Respondent, in terms of a wide-ranging instruction, *'to find common ground on the implications of the provisional protection for the Appellants and the interests of the public'* and thereby: -

100.3.1 Remedy the procedural unfairness by granting the First Appellant a right of appearance at its meeting in terms section 10(2)(c) of the *NHRA*; and

100.3.2 Negotiate and consult all relevant parties, and investigate the protection of the heritage resource in terms of section 29(1)(a)(ii) and (iii) of the *NHRA*.

106. The thrust of the directive issued on 29 January 2019 was always to ensure that the Respondent complied with the procedures prescribed in sections 10 and 29 of the *NHRA* and section 3 of the *PAJA*. However, it went further than just focusing on remedying the procedural defects that had occurred prior to the decision; it also focused on the obligation of the Respondent to negotiate and consult the relevant parties by convening an oral hearing and meaningful engagement, and to report to the Appeal Tribunal, within 2 months on *'the implications of provisional protection'* i.e. the alleviation of the threats to conservation and the protection of the heritage resource.

107. Mindful of the time constraints and traditionally sensitive issues involved, the Appeal Tribunal directed the application of the participatory procedural principles in section 10 of the *NHRA* through the process of an oral hearing and meaningful engagement with all relevant parties (including the I&AP's), and thereby sought to facilitate the convergence of the two processes which are envisaged in section

29(1)(a) of the *NHRA* i.e. negotiation and consultation on the threat to conservation it believed existed and the investigation of the protection of the heritage resource.

108. Here it is necessary to further enunciate the view taken by the Appeal Tribunal that, in terms of section 29 of the *NHRA* and consistent with the *Arniston* judgement, there was no obligation on the Respondent to consult the owner of the resource (First Appellant) prior to the issuing of the provisional protection order. However, it found that the Respondent failed to comply with section 10(2)(c) of the *NHRA* by not affording the First Appellant the right of appearance at the meeting where the decision was made.
109. Although there are similarities, the right of appearance at a meeting is not exactly the same as the right to be heard and should not be conflated. Section 29(10) of the *NHRA* does not give the owner of the resource a hearing prior to a decision being taken to provisionally protect a heritage resource, but states that, '*a person who may be affected by a decision has the right of appearance at such meeting*'.
110. In the circumstances, the approach of the Appeal Tribunal to the principles and procedures prescribed in sections 10 and 29 of the *NHRA* is not inconsistent with the judgment in the *Arniston* case. However, the facts of that case are somewhat distinguishable from this case, largely because it involved an existing building structure which was older than 60 years, which was situated on a property that was zoned for development, while the local authority had already approved plans for alterations and where the owner/developer had ignored the provisional protection order and commenced building operations i.e. extensive building renovations were already underway for some considerable time. The hotel was the largest employer in Arniston, and employed some 60 people. A provisional protection order would have far-reaching consequences for the hotel, its development plans and its employees.
111. Notably, the *Arniston* case turned on whether the decision taken by SAHRA was procedurally fair to the Respondents and focused on the differences in the procedures to be followed in investigating the desirability of declaring particular areas as national heritage sites, declaring such places heritage sites and provisionally protecting such sites for the purposes of investigation.

112. The court in the Arniston case held that, on the facts, the decision taken by SAHRA to extend the area of protection had not been procedurally fair. The flawed decision and particularly the 2-year period of suspension, which had serious and perhaps far reaching consequences for the Respondents and their employees, brought into sharp focus whether they should have had prior notice of SAHRA's intention to involve the provisions of section 29(10) of the *NHRA*.
113. In the nature of social legislation such as the *NHRA*, enacted post-1994 with its strong emphasis on negotiation, consultation and participation, the consequences and relevant circumstances have to be considered on balance and assessed accordingly.
114. In this case, the Appellants did not present cogent arguments on the consequences of the Respondent's decision to provisionally protect the heritage resource for a period of two years.
115. Importantly, the Arniston case did not feature any of the traditionally sensitive issues involving the conservation of the cultural heritage of the Indigenous First Nation's community. Indeed, their substantive historical narratives, which go to the merits of this case and weigh heavily with this Appeal Tribunal, indicate that the consequences for them are serious and perhaps far-reaching and, on balance, more so than for the Appellants.
116. Turning to the question of the measures which the Respondent took to comply with the directive, in the context of this matter this Appeal Tribunal considers the following factors to be important:
- 116.1. While the procedural flaw in terms of section 10(2)(c) of the *NHRA* was addressed and this aspect of the directive discharged, there are deficiencies in the Respondent's consultation and negotiation on the alleviation of the threats to conservation and the protection of the heritage resource, which are evidenced in the abridged report that it submitted to the Appeal Tribunal a few days before the hearing on 21 November 2019.

- 116.2. Almost all the parties appear to have experienced some frustration with the processes and the manner in which the Respondent engaged with them on the section 29(1)(a)(ii) (consult and negotiate) and (iii) (investigate) processes.
- 116.3. A formal application for the postponement of the appeal hearing was filed on 21 November 2019, which was granted by the Appeal Tribunal and directives issued on the further conduct of the matter in terms of which the Respondent was afforded a further opportunity to undertake meaningful engagement and to file its report by 31 January 2020.
- 116.4. Notwithstanding the directives, by the time the hearing (on the merits) convened i.e. on 6 and 7 February 2020, the Respondent had still not carried out aspects thereof sufficiently to demonstrate that meaningful negotiation and consultation had taken place or that the investigation of the protection measures were completed.
- 116.5. It became clear to the Appeal Tribunal at the hearing convened on 6 February 2020 that the Respondent was experiencing capacity constraints and it also became necessary to censure the Respondent for failing to: (a) provide a proper explanation for its conduct and (b) timeously communicate with the Appeal Tribunal on the challenges it was facing in fulfilling its legal obligations. The appeal proceedings could not be completed on 7 February 2020 and this prompted a further postponement of the hearing.
- 116.6. In the meantime, the Appeal Tribunal addressed a formal letter to the Provincial Minister, Ms. Anroux Marais, dated 21 February 2020 in which the impact of the Respondent's conduct and capacity constraints were highlighted and seeking her intervention and guidance. It is understood that the Respondent has now begun a process of addressing the capacity deficits since it still has a role to play in the conservation and protection of the heritage resources in the TRUP area.

116.7. On 13 March 2020, the appeal hearing convened with the view to finalising arguments on the merits.

117. It is perhaps lamentable but also understandable that the Respondent could not fulfil the directives issued to facilitate the processes envisaged in section 29(1)(a)(ii) and (iii) of the *NHRA* given the nature and complexity of the tasks. The capacity constraints experienced by the Respondent and its inability to carry out the directives do not concern questions of administrative law relating to the merits of the appeal and are beyond the scope and ambit of this appeal. No specific finding is made in this regard. However, it does undoubtedly impact on the processes and delivery of expected outcomes for purposes of deciding on future issues of conservation and protection of heritage resources, and the development of the TRUP area.

118. In the circumstances, this Appeal Tribunal and the Respondent will soon become *functus officio* when the provisional protection order expires on 20 April 2020. We strongly: -

118.1. Urge the Appellants and the Respondent (albeit in a different role) to complete the processes that are envisaged in section 29(1)(a)(ii) and (iii) of the *NHRA*.

118.2. Recommend that they do so in an participatory and consultative manner that is inclusive and addresses the concerns of the I&AP's, particularly in regard to the protection of the cultural heritage of the Indigenous First Nation's community and the planning concerns of the TRUP Association and Observatory Civic Association, who have gone to great lengths to ensure that their voices are heard by those in authority.

Duration of the Provisional Protection Order

119. The First Appellant invoked the judgment in the Arniston case and argued that the Respondent was obliged to determine the duration of the provisional protection

order and its failure to do so rendered the order invalid. In this regard, the Appeal Tribunal was referred to the minutes of the HWC Council, which failed to stipulate the period of the provisional protection order or that was to last for 2 years, and that for this reason the decision was fatally flawed. Further, the notice in the *Provincial Gazette* on 20 April 2018, which recorded the decision to provisionally protect the heritage resource, referred to a maximum period of 2 years but this did not cure the fatal flaw in the HWC Council decision. According to the First Appellant, the 'omission' of the duration in the minutes was therefore reviewable.

120. The question is whether the 'omission' falls foul of *PAJA*. The relevant provisions are those contained in section 3(1) and (2) of *PAJA*, which read as follows:

'3. Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.'

121. Since section 3(2)(a) of *PAJA* provides that, '*a fair administrative procedure depends on the circumstances of each case*' (own emphasis), in assessing the First Appellant's case and this submission it is necessary to review the

circumstances of this particular case by considering the HWC Council minutes and the notice to the owner of the resource in terms of section 29(4) of the *NHRA*:

HWC Council Minutes and the Resolution

121.1. The relevant part of the HWC Council minutes of 14 March 2018 records the resolution as follows:

'Council endorses the proposal that Erf 15183 known as the River Club Observatory should be provisionally protected under section 29 of the NHRA in order to further understand its heritage significance and provide a formal grading to the site.'

121.2. While no mention was made of the duration of the provisional protection order in the HWC Council minutes and resolution, there is nothing in the *NHRA* to suggest that the Respondent was required to determine the duration at that stage. The minutes and council resolution do not constitute a formality in terms of the requirements in the *NHRA*.

121.3. Mindful that the *NHRA* does not give the owner of the resource a hearing prior to a decision being taken to provisionally protect a heritage resource, the resolution *sans* the determination of the duration at that stage did not strictly constitute '*administrative action*' within the meaning thereof under *PAJA* as it did not materially and adversely affect the rights or legitimate expectations of any person.

121.4. Furthermore, it is reasonable to infer that the HWC Council, not knowing the scope and ambit of the work required at that stage (on 14 March 2018), could not determine the duration of the order on the basis of the information before it and that it afforded the Respondent and its CEO as the implementer with the necessary

agency, this prerogative and thereby the full benefit of the maximum period (of 2 years) to decide how to implement the resolution.

- 121.5. The Appeal Tribunal therefore finds the facts and circumstances of the Arniston case are distinguishable from these circumstances (for the reasons outlined herein) and this submission to be unmeritorious. It is accordingly dismissed.

Notice in terms of Section 29(4) of the NHRA

- 121.6. Once the Respondent decided to invoke section 29(1)(a)(ii) and (iii) of the *NHRA*, it undertook a wide mandate to negotiate and consult as well as investigate.

- 121.7. The letter dated 28 March 2018, in which the Respondent gave the First Appellant notification in terms of section 29(4) of the *NHRA* manifested the decision to provisionally protect the resource. The relevant part of the letter reads:

'This letter therefore serves as a notice in terms of section 29(4) of the NHRA informing you of HWC's intention to provisionally protect the site in terms of section 29 of the NHRA. Please note that the site shall be deemed to be provisionally protected for 30 days from the date of service of this notice or until the notice is withdrawn or the resource is provisionally protected by notice in the Provincial Gazette, whichever is the shorter period.'

- 121.8. The reference in the notice to the deeming provision in terms of section 29(5) of the *NHRA* suggests that the Respondent sought to emphasise the provisional protection applies '*for 30 days from the date of service of this notice*'. The Respondent had indeed

determined the minimum duration of the protection in the notice and this was sufficient for it to comply with section 3 of *PAJA*.

121.9. Furthermore, the *Provincial Gazette* on 20 April 2018 determined the maximum duration of 2 years for the provisional protection order.

121.10. In the result, the Appeal Tribunal finds this submission unmeritorious and it is accordingly dismissed.

Section 38 of the NHRA

122. There is no merit in the submission that section 38 of the *NHRA* bars the Respondent from deciding to provisionally protect the area and resource in terms of Section 29 of the *NHRA*, and that a 'parallel' process amounts to fruitless and wasteful expenditure due to the duplication of functions.

123. In this regard, consideration should be given to the following important factors:

123.1. The Second Appellant, as the competent authority for environmental impact assessment¹⁰ spearheaded a process in terms of section 38 of the *NHRA* in which the Respondent's role changed from being a consenting authority to a commenting authority.

123.2. The Second, Third and Fourth Appellants all agreed that the development should go ahead, and that the Respondent was in a position to give input under Section 38 of the *NHRA*. This process culminated on 14 February 2020 with the comment by the Respondent's IACOM.

123.3. In view of the tensions between the parties, the lack of cooperative governance and complexity of the issues involved (some of which are

¹⁰ It is generally understood that the environment impact assessment involves a substantial enquiry into the social, ecological and economic sustainability of the proposed development.

highlighted herein), the Respondent and various I&AP's have cast serious doubt on whether the section 38 process will ensure the conservation and protection of the heritage resources under threat. Nevertheless, this avenue remains open to the parties.

123.4. The parties may engage in the public participation processes relating to the environmental and town planning schemes. Each has its own system that is regulated by a different set of legislation and regulations. These two systems, which fall outside the ambit of these appeal proceedings, should also allow issues relating to the conservation and protection of heritage resources and the concerns of the civic associations not wanting large urban development near to where they live, to be ventilated.

123.5. After the provisional protection order expires on 20 April 2020, it is conceivable that the Respondent and the I&AP's will engage with the section 38 process and, if that fails, they may pursue an application to declare the TRUP area as a provincial (see section 27(1) and (2) of the *NHRA*) or national (see section 27(5) and 27(8) of the *NHRA*) heritage site.

FINDINGS

124. This Appeal Tribunal finds that the area and resource require provisional protection, and that this will facilitate a better understanding of the heritage issues.

125. The procedures set by the *NHRA*, which the Respondent followed, may have contained a flaw but this was remedied on 24 May 2019 pursuant to the directive issued on 29 January 2019. It does not invalidate the decision to provisionally protect the heritage resource.

126. Having regard to the merits and the circumstances of this case, all the grounds of appeal are dismissed. The administrative challenges are unmeritorious and lacking evidence of arbitrariness and irrationality. The rationale and reasons for the Respondents decisions and processes are rational, reasonable and legally

sound. There was no ulterior purpose, *mala fides*, failure to apply the mind, consideration of irrelevant factors or disregard of relevant factors, vagueness or unreasonableness in the decisions and processes of the Respondent leading up to and including the provisional protection order.

127. The Respondent has not acted *ultra vires* the *NHRA*, in the sense that it has not exercised any powers or performed functions beyond that conferred upon it by law. This Appeal Tribunal will therefore not substitute its opinion of the best means of effecting the stated purpose in the *NHRA*, which is enabling and actively promotes the interests of communities and groups that were marginalized under colonialism and apartheid.

128. There are significant tensions between the Second, Third and Fourth Appellants and the Respondent (all being government bodies), which is suggestive of a profound lack of cooperative governance, as well as tensions involving traditionally sensitive issues affecting the I&AP's specifically relating to the cultural significance of the heritage resource and those affecting the civic associations, that do not bode well for any future development of the TRUP area.

129. On reflection, there is merit in pursuing a structured and formal mediation of the disputes, which will only continue to bedevil and hamstring heritage conservation and sustainable development, if left unresolved.

RULING

130. Having read the voluminous papers of record and having heard the submissions of the Appellants, the Respondent and all the I&AP's that have appeared variously at the numerous hearings, the following ruling is made in terms of sections 29 and 49(3) of the *NHRA*:

The Respondent's decision to provisionally protect the resource (which allows for a maximum period of two years) in terms of section

29 of the NHRA is upheld and shall remain in force. The appeal is therefore dismissed.

INDEPENDENT APPEAL TRIBUNAL



Ashraf Mahomed
(Chairperson)
14 April 2020

Concurred by:
Eureka Barnard and Piet Claassen
(Members of the Appeal Tribunal)

For the First Appellant:

Nicholas Smith Attorneys

For the Second Appellant:

Mr. Z Toefy

For the Third Appellant:

Mr. G Gerber

Mr. C Alexander

For the Fourth Appellant:

Kantor Legal Services CC

Ms. A Mohamed

For the Respondent:

- Ms. P Meyer
- Mr. M Dlamuka - CEO

Interested & Affected Parties/Objectors:

- Mr. T Jenkins obo Goringhaicona Khoi Khoi Indigenous Traditional Council (GKKTIC)
- Ms. T Valensky
- Mr. F Julies
- Mr. J Esau
- Mr. K King
- Mr. E Stephens
- Chief H Van Wyk
- Chief Z Khoisan
- Bi'd J Abrahams
- Mr. M Turok obo TRUP Association
- Prof L London obo Observatory Civic Association
- Mr. V Van Breda
- Adv W Erasmus
- Mr. S Van der Spuy
- Chief M Arendse
- Kaptein JC Wibooi
- Mr. P Windvogel
- Chief Krotoa Smith
- Chief Dalibuhle
- Mr. K Visser
- Mr. D Bolton
- Chief M Kreder
- Prince J Titus
- Dr. G Fick
- Mr. J Windvogel
- Mr. B Van Sitters
- Mr. K Geslin
- Chief Outso Mai
- Mr. L Adendorff obo ANC
- Mr. CG Linderoth
- Chief M Fortuin

- Mr. C Snelling
- Ms. B Moss
- Ms. R Abrahams
- Mr. KS Saralina
- Mr. JG Damons
- Mr. J Huber
- Ms. J Poking
- Mr. B Mars
- Paramount Chief M Fredericks
- Mr. K Adonis
- Ms P Lemmetjies
- Ms. L Williamson
- Mr. T Bukiwe
- Ms P Adams
- Mr. J West
- Mr. M Southgate
- Mr. D McLaurie
- Ms. F Taylor
- Ms S Schumann
- Dr. J Bam
- Mr. Q Charles
- Mr. J Jackson
- Mr. E Angler
- Mr. C Foutem
- Mr. K Smith
- Mr. P Agulhas
- Ms. F September
- Ms. L Lindberg
- Mr. A Barnes
- Ms. L Mahopo
- Ms. M Bester
- *And others who have not been mentioned herein*