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

CASE NO: 14195/2022

In the matter between:

OBSERVATORY CIVIC ASSOCIATION	Applicant
and	
JODY AUFRICHTIG N.O.	First Respondent
JAMES OTTO TANNEBERGER N.O.	Second Respondent
NICHOLAS SCOTT FERGUSON N.O.	Third Respondent
ALLAN JAMES FLYNN MUNDELL N.O.	Fourth Respondent
ADAM JOHN BLOW N.O.	Fifth Respondent
CITY OF CAPE TOWN	Sixth Respondent
THE MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS & DEVELOPMENT PLANNING, WESTERN CAPE PROVINCIAL GOVERNMENT	Seventh Respondent
WESTERN CAPE FIRST NATIONS COLLECTIVE	Eighth Respondent
GORINGHAICONA KHOI KHOIN INDIGENOUS TRADITIONAL COUNCIL	Intervening Party

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JUDGMENT DELIVERED ELECTRONICALLY ON TUESDAY 20 SEPTEMBER 2022

DOLAMO, J

INTRODUCTION

[1] The applicant is seeking an interdict, on an urgent basis, prohibiting the respondents from undertaking further construction of the development on the River Club site, being erf 151832 Observatory. The order is to operate as an interim interdict pending the determination of the contempt application brought under case number 11580/2022.

THE PARTIES

[2] The applicant is the Observatory Civic Association (OCA), a voluntary association established to provide a forum for the community of Observatory to express their concerns and opinions about the range of civic issues affecting residents. The applicant avers that the application is supported by the trustees of the Southern African Khoi and San Kingdom Council. The respondents are the trustees of the Liesbeek Leisure Properties Trust (LLPT) and are cited herein in their representative capacities as trusties. The City of Cape Town (the City), The Minister of local Government Environmental Affairs and Development Planning, Western Cape Provincial Government, and the Western Cape First Nations Collective, the sixth, seventh and eighth respondents, respectively, elected not to participate in the proceedings since no relief is sought against them. I shall refer to the applicant as simply the applicant or OCA and the respondents participating in this application as the respondents or the LLPT.

HISTORY OF THE LITIGATION

[3] The applicant together with a second applicant, purportedly the Goringhaicona Khoi Khoin (GKKITC) who are First Nations descendants, brought an application in two parts under case number 12994/2021. In Part A the applicant sought an interim interdict preventing the respondents from continuing with construction work on erf 151832 Observatory pending the review and setting aside of the development approvals granted in terms of National Environment Management Act[1] (NEMA). The application was heard by Goliath DJP and on the18 March 2022 granted an order in the following terms:

> *"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 an 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.*
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> *145.2 The three applications to strike are dismissed.*

[1] Act 107 of 1998.

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

145.4 Costs of this application are to stand over until the finalisation of the review application.

145.5 the parties are granted permission to approach this Court for further Directives to facilitate an expedited review in this matter, and are also herein hereby given leave to amplify or amend the terms of this order as so to give practical effect to the orders granted herein."

[4] The respondents were aggrieved by this order and brought an application for leave to appeal. Goliath DJP dismissed the application. The respondents were, however, not dissuaded and they went on to petition the Supreme Court of Appeal (SCA) which granted leave to appeal to the full bench of this division. The appeal is to be heard on the 11 and 12 of October 2022.

BACKGROUND

[5] It is apposite to set out the lead-up to the present application after leave to appeal the judgment of Goliath DJP was granted by the Supreme Court of Appeal. On 29 June 2022, upon the granting of leave to appeal by the SCA, LLPT recommenced construction, claiming that the order of Goliath DJP was suspended by virtue of the provisions of section 18(1) of the Superior Courts Act[2]. This led to the applicant protesting that the respondents were in contempt of court since they have been interdicted from continuing with the

[2] Act 10 of 2013.

building programme. As a result, on the 8 July 2022, the applicant brought a contempt application under case number 11580/2022. The contempt application was to be heard on the 22 August 2022 but, for reason that are not clear, did not proceed. Instead the applicant brought the current urgent application for an interdict restricting the respondents from building on the River Club side.

[6] There is a dispute as to who is the real GKKITC and authorized to participate in this proceedings. There is this one faction (I use the word faction for lack of a better word to describe the different groups and not as a sign of disrespect) which is represented by Cullinan and Associates Attorneys, who is also the attorney of record for the OCA. This faction participated in the proceedings when the application first came before Goliath DJP. Then there is another faction that is represented by TJC Dunn Attorneys, that claims to be the real GKKITC. On the 25 July 2022 the latter faction brought an application for the rescission of the judgment by Goliath DJP, alleging that it was fraudulently obtained. This faction, concomitantly with the rescission application, also brought an application in terms of Rule 41 seeking leave to withdraw as the second applicant from the contempt of court application under case number 11580/2022. This is also the faction that has brought an application to intervene in this proceedings, seeking the following relief:

> *"(1) The Goringhaicona Khoi Khoin indigenous traditional Council is granted leave to intervene in the main application and will from here on the cited as the ninth respondent.*
>
> *(2) The Observatory Civic Association's attorneys in the main matter, Cullinan*

and Associates are to pay the costs of this intervention application on an attorney and client scale, including the cost of two counsel. The main matter is dismissed with Observatory Civic Association's attorneys in the main matter Cullinan and Associates jointly with Observatory Civic Association to pay the costs of this intervention application on an attorney client scale, including the cost of two counsel.

(3) The main matter is dismissed, with Observatory Civic Association's attorneys in the main matter, Cullinan and Associates jointly with Observatory Civic Association to pay the costs of this intervention application on an attorney client scale, including the cost of two counsel."

[7] The rescission application is set down to be heard on 11 and 12 October 2022 together with the appeal. On the other hand, the Rule 41 application was set down for hearing on 22 August 2022 but, like the contempt application, could not proceed as scheduled. What appears to have thwarted the hearing of these applications was the plethora of interlocutory applications and counter-applications that were launched by the warring factions but, in my view, these developments did not necessarily engage the applicant herein. The offshoot of all these interlocutory applications which are pending is the institution of the current application, which was launched on 26 August 2022 and set down for hearing on 2 September 2022. I proceed to set out the contentions of the applicant, the respondents as well as the intervening part, respectively.

THE APPLICANT'S CASE

[8] The applicant contends that the application is urgent, that it has established that it has a clear right and that it has satisfied all the other requirements for this court to grant it an interim interdict.

THE RIGHT

[9] The applicant submitted that it was relying on the rule of law as its right to seek the interdict. The applicant submitted that the order of Goliath DJP is a lawful order, issued by a properly constituted court having jurisdiction and therefore must be obeyed. This, the applicant submitted, was not disputed by LLPT and that, accordingly, it has a clear right to the enforcement of the interdict, which was issued by Goliath DJP and, as it is interlocutory, continues in operation by virtue of the provision of section 18(2) of the Superior Courts Act notwithstanding any appeal lodged against it. Support for the contention that a lawful order must be obeyed was found in the judgment of the Constitutional Court (CC) in *Ndabeni*[3] where it reiterated that court orders must be obeyed and that no one should be left with the impression that court orders, including flawed court orders, are not binding or that they can be flouted with impunity.

[10] On whether the order made by Goliath DJP in paragraph 145(1)(b) of her judgment is an interlocutory order not having the effect of a final judgment, for purposes of section

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[3] *Municipality Manager OR Tambo District Municipality and Another v Ndabeni* [2022] 5 BLLR 393 (CC) at par 23-26 and 33-34

18(2) of the Superior Court Act, the applicant submitted that it was imperative to interpret that order to determine its objective. The starting point in this exercise, the applicant correctly pointed out, is the language of the judgment or order read as a whole and having regard to the relevant background facts which culminated in the granting of the judgment, of which the order is merely the executive part. In this respect the applicant referred to a number of authorities on the topic, in particular *Eke v Parsons*[4] where, quoting a passage from its judgment in *South African Broadcasting Corporation v National Director of Public Prosecutions and Others*[5] the CC held that[6]:

> *"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."*

Counsel also referred to *HLD International (South Africa) Pty Ltd*[7] where *Eke* was quoted with approval and applied.

[11] The applicants argued that the LLPT's contention that the order is final in effect and that therefore its operation was suspended in terms of section 18(1) of the Superior

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[4] *Eke v Parsons* 2016 (3) SA 37 (CC).
[5] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007(1) SA 523 (CC).
[6] Para [29].
[7] *HLB International (South Africa) Pty Ltd v MWRK Accountants and Consultant (Pty) Ltd* [2022] JOL 52821 at paras [27] and [28].

Court Act was erroneous. That the order is provisional, the applicant submitted, is apparent from the ratio for its granting, which can be found in paragraphs 141,135,136 and 137 of Goliath DJP's judgment. These paragraphs are to the effect that if the LLPT was not interdicted from further construction, it may build itself into an "*impregnable position*"; that any relief that may be granted by the review court may then be a *brutum fulmen* order, and that in the circumstances the court has to ensure that the party that is ultimately successful received adequate and effective relief.

[12] The applicant consequently submitted that the issue to be determined is whether the order by Goliath DJP in paragraph 145(1) is an interlocutory order not having the effect of a final judgment for purposes of section 18(2) of the Supreme Court act. In this respect, the applicant stated that there was no doubt that the purpose of the interdict granted by Goliath DJP was to do no more than grant interim relief so as to maintain the *status quo* pending the final determination of the issues in the part B review proceedings. The applicant based its submission on the principles applicable to the interpretation of court orders and on the leading cases on when is an order final and definitive or merely interlocutory. The applicant found support in the leading authority on this subject in *African Wanderers Football Club*[8] where the Appellate Division held that it was apparent from Howard J's judgment in the interdict application that he did not intend to finally dispose of the issues raised before him, but that he intended the issues raised before him to be finally resolved in the action to be instituted and that all he was called upon to do was to

[8] *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club Football Club* 1977(2) SA 38(A).

grant an order which will operate *pendente lite*[9]. Counsel also relied on the judgment of SCA in *Cronshow and Another (Pty) Ltd*[10] in which the judgment of Howard J was considered and applied[11]. There the court held that:

> *"The form of the proceedings before Howard J was that of an interdict pendente lite in which lis the very matters on which the interdict was sought would be in issue; and the balance of convenience was considered in respect of the interim period. This Court held that Howard J had no intention of making a final and definitive order, with the result that the order pendente lite could not support a finding of res judicata".*

[13] In the same judgment of *African Wanderers* Muller JA state that the test formulated in *Bell's*[12] case was no longer considered to be a proper and acceptable test. In the Learned Judge's view the proper test was established in *Pretoria Garison Institutes*[13], namely:

> *"The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit. I do not think that we should pass*

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[9] At page 47H.
[10] *Cronshow and Another (Pty) Ltd v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (SCA).
[11] *Cronshow supra* at 689 J – 690 A.
[12] *Bell v Bell*, 1908 T.S. 887.
[13] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839.

upon the correctness of the interpretation given to the earlier decisions in the Globe and Phoenix case or re-examine, in the light of the practice in Roman-Dutch times or earlier, the test which the case has adopted. It has been understood in Provincial Courts as providing the long-sought-for guidance ..."

[14] The respondents did not take any issue with the authorities referred to by the applicant but were of the firm view that the applicant was incorrectly applying these authorities to the facts of the case. According to the respondents the order by Goliath DJP, in particular paragraph 145(1)(a) was final as it imposed immediate obligations to consult, premised on the final findings of inadequate consultation with the First Nation People.

IRREPARABLE HARM

[15] The applicant submitted that it has a clear right and that therefore the requirement of a well-grounded apprehension of irreparable harm if the interim relief is not granted falls away. The applicant, however, argued that if it is to be found that the applicant only has a *prima facie* right, that the irreparable harm requirement would have been satisfied. According to the applicant, the harm flows from the fact that every day on which construction continues the applicants are being substantially prejudiced in that the further the construction process advances, the less likely that the applicants in the Part B proceedings would be granted effective relief, if they are successful. The applicant submitted that this was the finding of Goliath DJP which is in accordance with binding

precedents in this division. Reference was made to the judgment of Dlodlo J in *Camps Bay Residents and Ratepayers Association*[14].

BALANCE OF CONVENIENCE

[16] The applicant submitted that the decisive consideration is that LLPT started building work well aware that a review application was going to be launched and therefore did so at its own risk. The applicant further submitted that the LLPT will accordingly not be prejudiced if interim interdict is granted and, relying on the judgment of Goliath DJP, argued that the LLPT should not benefit from its decision to proceed with building work by placing itself in a position where only limited relief would be available. The LLPT cannot complain of prejudice in the circumstances, it was submitted. In this respect, the applicant submitted, the critical consideration is "*the rule of law harm*" which is analogous to the "*separation of powers harm*" identified by the CC in the *OUTA* [15]. In paragraphs [46] and [47], the CC held that:

> *"[46] Two ready examples come to mind. If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought.*

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[14] *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 (6) AS 190 (WCC) at par [10].
[15] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223(CC) paras [46], [47], [63] and [68] judgment.

[47] The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.

ALTERNATIVE REMEDY

[17] The applicant refuted the submission by the respondents that the contempt application will be heard on 11 and 12 October 2022 as a basis for submitting that the applicant has an alternative remedy and that LLPT should be allowed to continue with the building process. The applicant submitted that, given the urgency of the relief sought, it is untenable to expect that the relief in the form of alternative remedy will be found in the hearing of the contempt application on 11 and 12 October 2022.

URGENCY

[18] With regard to urgency the applicant seems to hold the view that it was self-evident,

from the very nature of the harm sought to be prevented that the matter was urgent. The applicant argued that the enforcement of court orders is an inherently urgent matter and this court should not countenance the attempt by the LLPT to sidestep the scrutiny by resorting to objections of lack of urgency.

[19] The applicant further submitted that LLPT's claim that the application is not urgent is entirely opportunistic and in support of this contention referred to some background information which clearly, in the applicant's view, showed that they too regarded the application as urgent. According to the applicant on Friday 26 August 2022 LLPT's Senior Counsel called the applicant's counsel and stated that he would be out of town on Friday 2 September 2022. LLPT's counsel proposed that the matter be heard in terms of an agreed timetable early the following week, without suggesting that the matter was not urgent. However, on Monday 29 August 2022 LLPT's attorney stated in an email that its senior counsel's matter had collapsed, and that he would be available on 2 September 2022 and that "*after all*" the applicant had not made out grounds for urgency. Applicant concluded from this narrative that it is clear that LLPT's claim that the application is not urgent is purely expedient.

THE RESPONDENT'S CASE

[20] The respondents submitted that the applicant does not have a prima facie right to the enforcement of Goliath DJP's order. The respondents argued that this order is not a simple interlocutory order as contemplated in section 18(2) of the Superior Court Act but

is an order having the effect of final judgment which is automatically suspended pending appeal in terms of section 18(1) of the Act. After reviewing the judgement and the order of Goliath DJP the respondents submitted that it undoubtedly disposed of the issue of adequate consultation and, as it was held by the SCA in *Cronshow*, and "*irreparably anticipated*" the relief that may have been given in the review. The respondents argued that, in this respect, the judgment and order of Goliath DJP is distinguishable from the position considered by Howard J in the *African Wanderers Football Club* judgement.

Irreparable harm

[21] The respondent submitted that the applicant relies on the vague and speculative contention that the further the construction process advances, the less likely it is that the applicants in Part B proceedings will be granted effective relief, if they are successful and that it is far-fetched to believe, as the applicant suggest, that the construction that may be conducted over the course of the next month will have any material bearing on the review court's ultimate exercise of its remedial discretion. The respondents pointed to the fact that the photographs produced by the applicant demonstrated that the River Club Development is far from completion.

[22] The respondents also pointed out that the only other contention of harm is that of "*the rule of law harm*" On this issue the respondents submitted that this complaint assumes a contravention of the order of Goliath DJP which is an issue that will only be determined in the contempt application or in the appeal. The existence of this in any event,

according to the respondents, is disputed. The respondent accordingly argued that the applicant has demonstrably failed to show that it will suffer irreparable harm if the interdict was to be refused and the applicant has to wait the outcome of the contempt proceedings or appeal which will be in little more than one months' time.

URGENCY

[23] Respondent argued that the applicant has not made out a case of urgency. LLPT pointed out that the argument by the applicants that the construction work currently underway on the erf involved the infilling of the river and the floodplain was vague and was not supported by any evidence. Furthermore, LLPT argued that this was contested and in support of their position the respondents have produced the evidence of two experts, Martin Kleynhans, a water engineering expert, and Dr. Elizabeth Day a wetlands ecology and biodiversity expert, whose evidence is to the effect that the work currently underway involved only vertical work on the existing structure which has no bearing on the river corridor and the floodplain, as alleged by the applicant.

THE CASE FOR THE INTERVENING PARTY

[24] The GKKITC applied to intervene in these proceedings as respondents. They claim to have a direct and substantial interest in the matter. According to this faction, their interest lies in the fact that if the construction of the River Club Development does not proceed their constitutional rights to the recognition of their culture would be infringed. They seek leave to intervene, so that the construction can continue. Secondly, they claim

that they will be denied their constitutional rights of access to courts if leave to intervene is denied. They reiterate the position that the order obtained before Goliath DJP was fraudulently obtained and in due course will seek its rescission as it violates their rights.

[25] The GKKITC claimed that the current urgent application is an abuse and if it were to proceed before the rescission application is heard it will undermine their rights of access to courts. They further allege that the rescission application could not proceed as it is awaiting OCA's answering papers for some time. I understood this to imply that OCA deliberately delayed in filing its answering papers so as to delay the hearing of the matter.

[26] The intervening GKKITC do not oppose the River Club Development and submitted that they are being given more cultural recognition and a greater stake in the development than they have ever received in relation to any other development. It is for this reason, and the reason that the order obtained from Goliath DJP was fraudulently obtained, that they seek its rescission. For this purpose, they seek leave to intervene in this urgent application basically to oppose it. They alleged that OCA appears to be engaging in a systematic abuse of process to delay the hearing of the rescission application while simultaneously seeking to utilize the rescission application delay in order to justify an interdict to be granted halting the construction of the development.

[27] It is necessary at this juncture to briefly outline what were the nature of the interlocutory applications, referred to *supra*, that have been launched so far. As already

stated there rescission application was launched on 25 July 2022. Thereafter, the applicant issued a notice of abandoning the judgment of Goliath DJP and the withdrawal of the review application in case number 12994/2021 this occurred on the 28 July 2022. That was followed the next day, the 29 July 2022, by an application by GKKITC seeking leave in terms of rule 41 to withdraw as the second applicant in the contempt of court application. On 1 August 2022 OCA's attorneys issued a rule 7 notice challenging the GKKITC's attorneys' authority to act on its behalf. GKKITC responded to the rule 7 notice by launching an application to review and set aside as invalid the rule 7 notice. This, however, was not to be the end of the drama as OCA's attorney filed a counter-application to the rule 7 notice. The latter counter-application elicited GKKITC's response in the form of a rule 30 notice to remove the counter-application as an irregular step.

[28] What is evident from all these applications and counter application is that the dispute of who is the true GKKITC is fuelled by deep-rooted sentiments which will not be adequately addressed in this application. Clearly, these factions are determined to out litigate each other. Unfortunately, the important matter of the cultural rights of indigenous people are adversely affected.

[29] In *SA Riding for the Disabled Association*[16] the Constitutional Court stated the position with regards to intervention applications as follows:

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[16] *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017(5) SA 1 (CC) at paras [10] and [11].*

"[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In Greyvenouw CC this principle was formulated in these terms:

> *'In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.'"*

[30] In an application of this nature (the intervening application) in terms of rule 12 the question is whether the applicant is entitled to join as a party. An applicant must furnish *prima facie* proof pf his/her/its interest and that the application is not frivolous but need not further to satisfy the court that he/she/it will succeed in the end[17]. I am therefore satisfied that the GKKITC has shown that it has direct and substantial interest in the matter and it is accordingly granted leave to intervene in this matter.

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[17] See *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SECLD) at para [9].

[31] The issues that needs to be determined are, first, whether the application is urgent and, if so, whether it is necessary to determine whether the order of Goliath DJP is simply an interlocutory order as contemplated in section 18(2) of the Superior Court Act or an order having the effect of a final judgment, which is automatically suspended pending an appeal in terms of section 18(1) of the Act. Only if the matter is sufficiently urgent as to warrant being dealt with as such will it be necessary to determine the nature of the order granted by Goliath DJP.

URGENCY

[32] In urgent applications the applicant must show that he would not otherwise be afforded substantial redress at the hearing in due course. In this respect, the applicant must comply with the provisions of rule 6(12)(a) and (b) this sub-rule provides as follows:

> *"(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.*
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> *(b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is [sic] averred render [sic] the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[33] The provisions of this sub-rule were dealt with in the unreported judgment of *East Rock Trading 7 (Pty) Ltd and Another*[18]. The Learned Judge held that:

> *"[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.*
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> *[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard."*

[34] The respondents are arguing that the application is not urgent, while the intervening party argues that it is an abuse of the process. As stated *supra* the

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[18] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley* (11/33767) 2011 ZAGPJHC 196 (23 September 2011) at paras [6] and [7].

respondents argued that the applicant has not shown that the matter is so urgent that it cannot wait the determination of the contempt application in little more than one month's time and that the attempts to bolster its case on urgency by contending that the work currently underway involves the infilling of the river and the floodplain were vague allegations which were not supported by any evidence. The intervening party, on the other hand, argued that the applicant's approach to court, while the contempt application was pending was a "*fresh abusive of court process application.....that this application is the contempt application, dressed up as something else*"[19].

[35] None of the papers in the other applications referred to earlier where place before this court. It is however clear from the founding affidavit of the intervening party that the contempt application was launched on 8 July 2022. This was not disputed by the applicant. Such an application being urgent by its nature would have been heard by now, had the applicant concentrated on ensuring that it is enrolled and dealt with expeditiously. The proliferation of interlocutory applications and counter-applications referred to, *supra,* would have had no bearing on the contempt application. In fact, the contempt application was set down for hearing on 22 August 2022. There is no explanation proffered by the applicant as to why the application was not heard on that day. In my view, it is safe to say that the applicant got sucked into the dispute involving the splinter groups within the GKKITC, and could only be so sucked because OCA and the "*original*" GKKITC are represented by the same firm of attorneys.

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[19] See para [39] of the intervening party's affidavit on page 20 of the record.

[36] My understanding of the issues, with the many applications launched by the GKKITC factions, do not directly involve the applicant. The applicant would still have been able to obtain the relief which, in essence, would have stopped the continued building construction on the River Club Development, if it had made out a case that such was in contempt of the Goliath DJP order. A failure to proceed with the hearing of the contempt application on the 22 August 2022 without any reasonable explanation leads to the inescapable conclusion that the urgency in the current application is self-created.

[37] The circumstances of this case are different to those in *Nelson Mandela Metropolitan Municipality*[20] where the applicant was held not to have been dilatory in immediately bringing the application but first investigating the complaint and seeking an undertaking, only resorting to an urgent application when that was not forthcoming. Nor are they comparable to the facts in *Transnet Ltd*[21] where a month of negotiations was not considered be an undue delay resulting in a self-created urgency. The facts are on par with those in *Schweizer Reneke Vleis Mkpy (Edms) Bpk*[22] where it was said that even though an application under rule 6(12) can on its merits be considered to be urgent, the court will nevertheless refuse to dispense with the ordinary provisions of rule 6 if the matter has become urgent owing to circumstances for which the applicant is to blame.

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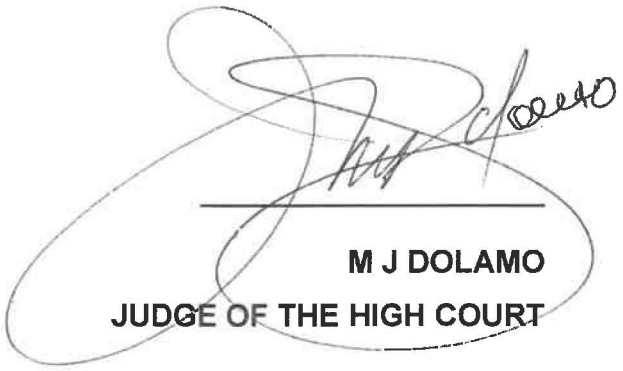
[20] *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SECLD).
[21] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA).
[22] *Schweizer Reneke Vleis Mkpy (Edms) Bpk* v *Die Minister van Landbou en Andere* 1971 (1) PH F11 (T) headnote.

[38] In the light of the conclusion that I have reached. I deem it unnecessary to deal with the question whether the interim order granted by Goliath DJP on 18 March 2022 is interlocutory or is final in effect. This will be for determination by the Court hearing the appeal and the contempt application.

[39] I am accordingly not persuaded that the matter is urgent as required by rule 6(12) (a) and (b). The order I make is therefore the following:

1. The applicant in the intervening application is hereby granted leave to intervene in this application and in case number 12994/2021 and where it shall henceforth be cited as the ninth respondent.
2. The costs in the intervention application shall be costs in the case number 12994/2021 and the other interlocutory application in which they are involved.
3. The application for an interdict to stop the first to fifth respondents from undertaking or progressing construction of any building or structure or any earthworks or any other work on erf 157832 Observatory pursuant to implementing the River Club development as authorised by the environmental authorization issued in terms of the National Enviromental Management Act 107 of 1998 on 22 February 2021 and various development permissions issued in terms of the City of Cape Town's Planning By-laws pending the determination of the application brought under case number 11580/2022 is hereby struck off the roll.

4. The costs of this application shall stand over for determination by the Court that will hear the contempt of court application brought under case number 11580/2022.



M J DOLAMO

JUDGE OF THE HIGH COURT