

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

CASE NO WCHC: 10208/17

In the matter between:

THE CAPE WINDLASS ENVIRONMENTAL ACTION GROUP Applicant

and

THE NATIONAL MINISTER FOR AGRICULTURE, FORESTRY AND
FISHERIES, now THE NATIONAL MINISTER FOR
AGRICULTURE, LAND REFORM AND
RURAL DEVELOPMENT First Respondent

THE LAGOONBAY LIFESTYLE ESTATE (PTY) LTD Second Respondent

THE MEC FOR LOCAL GOVERNMENT, DEVELOPMENT
PLANNING AND ENVIRONMENTAL AFFAIRS,
OF THE WESTERN CAPE Third Respondent

THE GEORGE MUNICIPALITY Fourth Respondent

AFFIDAVIT
IN SUPPORT OF THE APPLICATION FOR CONDONATION FOR THE LATE
FILING OF AN AMENDED NOTICE OF MOTION & SUPPLEMENTARY
PAPERS

I, the undersigned,

WILHELM ANTON GERICKE

do hereby make oath and say that:

1. I am the Applicant's chairman and I have been duly authorized by the Applicant to depose to this affidavit.
 - 1.1 The facts deposed to in this affidavit are within my personal knowledge or derive from documentation at my disposal, unless stated otherwise or the contrary appears from the context.
 - 1.2 Where I rely on information conveyed to me by others, I indicate the source of the information. I believe that such information is true and correct.
 - 1.3 Where I make legal submissions, I do so on the advice of Applicant's legal representatives.
 - 1.4 I adopt the same abbreviations as used in the Supplementary Founding Affidavit.
2. The purpose of this affidavit is
 - 2.1 to support and confirm the Supplementary Founding Affidavit, filed herewith, deposed to by Glyn Eric Williams, Applicant's attorney of record (hereinafter "Williams");

- 2.2 to confirm that the Applicant has waived attorney/client privilege where Williams discloses information contained in his files or the files of Cullinan's;
- 2.3 to set out the motivation for the application for an extension of the time period for filing the amended Notice of Motion as well as the Supplementary Founding papers; and
- 2.4 to seek, insofar as necessary, the above Honourable Court's condonation for the late filing of these papers.

CONFIRMATIONS

- 3. On 8 June 2017 I deposed to Applicant's founding affidavit in this matter. I confirm the contents of that affidavit.
- 4. In his Supplementary Founding Affidavit Williams also refers to certain aspects of my affidavits in earlier matters relating to the Developer.
 - 4.1 I confirm the contents of my Founding Affidavit and Supplementary Founding Affidavit, including annexures, in WCHC case no 22855/2009 by the Applicant against the Minister of Local Government, Environmental Affairs and Development Planning and Lagoonbay Lifestyle Estate (Pty) Ltd (hereinafter "the Environmental Review 2009"). Likewise I confirm the contents of

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my Answering Affidavit in WCHC case no 10751/2011 by the Second Respondent ("the Developer") against the MEC, Applicant and 24 others (hereinafter "the Zoning Review 2011").

4.2 I ask for the contents of these two related matters to be incorporated herein as background information, insofar as relevant to this Application. I have been advised that both files will be available to the above Honourable Court at the hearing of the matter.

4.3 I perused a scanned copy of the signed Supplementary Founding Affidavit by Williams and confirm that its contents are true and correct insofar as they refer to me.

CONDONATION

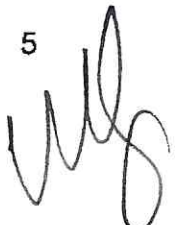
LITIGATION UNDER BUDGET CONSTRAINTS

5. I refer to Williams's affidavit and its Annexure "A" and submit the following additional facts that are relevant to this application for condonation:

5.1 As stated in my Founding Affidavit in this matter, the Applicant is a local NGO which has been acting in the public interest to assert the public's constitutionally enshrined administrative and environmental rights.

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- 5.2 The Applicant is not opposed to development *per se*, but to unsustainable development, be it in pristine nature areas, landscapes of heritage value or in high potential agricultural areas.
6. The Developer has been pursuing the development of Farm Hoogekraal 238 over a period of more than 15 years, first in the form of a very large golf estate, then a large equestrian estate and more recently as an agri-lifestyle estate of 200 subdivided portions of approximately 3 ha.
- 6.1 I respectfully submit that all these permutations in one way or another have been unsustainable, undesirable and in conflict with relevant agricultural legislation and policies for the protection of scarce agricultural resources, as has been pointed out by independent experts and environmental review consultants.
- 6.2 Accordingly, and without exception, various officials of the national and provincial departments of Agriculture and of the provincial department of Environmental Affairs and Development Planning, as well as the Municipality, have issued negative recommendations or refused approval in respect of this proposed development. In this respect I refer to paragraphs 33.1 – 33.4 of my Answering Affidavit in the Rezoning Review 2011.
- 6.3 Over the years I have observed a pattern running through the whole authorisation process of the disregard of professional advice and rejection of the recommendations of competent officials, followed by the political head of the relevant authority siding with the Developer and ultimately granting authorisation. In this respect I refer to the chronology "A", attached to Williams's affidavit, and paragraphs 33.3; 33.4; 43.1; 43.2; 43.3 of my Answering Affidavit in the Rezoning Review 2011.

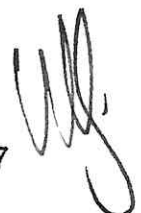
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- 6.4 Over the past ten years the Applicant has engaged responsibly in necessary litigation to have such unlawful approvals set aside. There would have been no need for the Applicant to step into the breach if financially stronger stakeholders or government authorities themselves had not failed to take steps to have such unlawful decisions set aside.
- 6.5 But while those unlawful decisions are standing and have not been reviewed and set aside, the Developer has consistently used them as a justification for seeking the next approval in the authorisation process – each unlawful approval being a stepping stone in the process of obtaining final approval.
7. Funding of litigation has never been easy. Applicant's members are not rich people. They are like me mostly self-employed or salaried professional people, some having retired by now. Due to the economic decline of the country over the past ten years, their income has shrunk as well.
- 7.1 They are people with a great commitment to environmental conservation and sustainable agriculture. They have invested many hours in the public participation processes relating to unsustainable developments in pristine nature areas or farming areas, of which the Developer's projects are a prime example.
- 7.2 The Applicant lined up with bigger organisations like the Wildlife and Environmental Society of South Africa ("WESSA") and the Centre for Environmental Rights ("CER") in order to get access to donor funding, initially for a review application of the environmental approval in the Lagoonbay development granted on appeal by the then MEC on 5 May 2009 in the Environmental Review 2009.

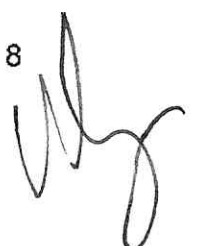
- 7.3 Apart from members' donations and occasional donor funding, Applicant received many professional services on a pro bono basis, including legal representation by senior and junior counsel and scientific advice. This significantly reduced Applicant's costs of litigation. Obviously the Applicant had to litigate as economically as possible within a limited budget avoiding unnecessary or premature disputes and interlocutory issues.
8. Litigation was unfortunately the only avenue available to achieve environmental justice.
- 8.1 *Inter alia* on the basis laid by the Applicant in the Environmental Review 2009 the current MEC refused the rezoning from agriculture to residential use in April 2011, which lead to the Rezoning Review, brought by the Developer. In this matter the Applicant was cited as Third Respondent, and assisted the MEC, then the First Respondent, in his opposition up to the Constitutional Court, where on 20 November 2013 judgment was given in favour of the MEC and Applicant, each party paying its own costs.
- 8.2 In the course of the Developer's rezoning review, the Developer as appellant exceeded the time limit for lodging its notice of appeal by six months allegedly for lack of funding. Condonation was granted.
- 8.3 After the Constitutional Court had brought the golf estate development to a halt, the Developer's environmental approval – at the time still under review - lapsed during October 2014. Consequently, the environmental review became moot and Applicant's legal costs were modest.

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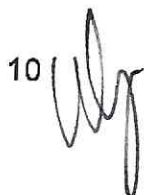
- 8.4 At the end of the aforesaid litigation senior counsel indicated that he was no longer available to act on a pro bono basis. Junior counsel who had carried the burden of the work, was diagnosed with cancer in September 2013, underwent treatment for nearly a year and felt no longer physically fit to practice. She retired from practice altogether at the end of 2014.
9. Applicant's members continued to monitor developments on Farm Hoogekraal 238, because the Developer carried on submitting amended development plans for the approval of agricultural lifestyle estates of different varieties and densities.
- 9.1 At the end of 2016 Applicant found out about the November 2014 consent under circumstances set out in my Founding Affidavit.
- 9.2 It was patent that this consent was tainted with gross irregularity and was in conflict with the objectives of SALA and relevant policies, and against the weight of expert evidence. In this respect I refer to the report and affidavit by Dr P J Nell, Annexure "WG5" to my Founding Affidavit and Annexure "P" to the Supplementary Founding Affidavit, respectively.
- 9.3 Applicant's committee deliberated the matter as to the funding of a new review application within a limited budget.
- 9.4 One of Applicant's members contacted the retired junior counsel, who was familiar with the matters concerning development on Farm Hoogekraal 238, to find out whether she would be available again. She agreed to assist on a limited brief with the necessary chamber work of settling papers.

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- 9.5 Applicant accordingly instructed Williams to bring the review application. When some donor funding fell away the Applicant alerted Williams by the end of July 2017 that it would have to terminate his mandate and switch to a firm of attorneys who were prepared to work in public interest matters at a reduced rate.
- 9.6 Williams correctly described the further conduct of the matter after he had handed over the files to Cullinan's in the middle of September 2017.
- 9.7 I need to add that from 31 October 2018 until January 2020 the Applicant was effectively without an attorney. Walter Anderson had left Cullinan's in June 2018 and the handover to another attorney was of short duration, as the latter also left the firm a few months later. Applicant, however, was not concerned that the matter could suddenly become urgent, as there were the standing instructions from the Surveyor General, dated 6 March 2018 (Annexure "I") which assured it that no registration of subdivided smallholdings could take place without the prior subdivision and rezoning approval by the Municipality.
10. Applicant considered the further conduct of the matter and decided not to rush to court, but rather to keep the matter pending until one or the other resolution to the dispute would emerge.
- 10.1 I respectfully submit that Applicant was not acting in wilful disregard of the Rules of Court. As the matter could be settled or become moot, the Applicant did not want to waste the Court's time nor spend its funds prematurely on preparing for an opposed hearing.

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- 10.2 Since the Minister had admitted of having acted *ultra vires*, the Applicant believed that a settlement on that basis was a reasonable possibility. I submit that Applicant was justified to expect that the Minister would rectify the error he had conceded.
- 10.3 Furthermore, the Applicant believed that there was a reasonable possibility that the matter might become moot as a result of a subsequent refusal that would put a halt to the development. I submit that under the circumstances proceeding with the application would have amounted to a piecemeal approach.
- 10.4 Moreover, the MEC's circular (Annexure "G" to the Supplementary Founding Affidavit) and its standing instructions to the Surveyor General and the Deeds Office provided sufficient safeguards and prevented the Developer from effectively creating a *fait accompli* by having 200 portion of 3 ha each registered solely on the strength of the Minister's consent, purportedly granted in terms of Section 4(2) of SALA.
- 10.5 The Minister had not yet filed the Rule 53 Record, and the Applicant for understandable financial reasons did not want to waste its limited funds on interlocutory applications nor on the premature preparation of supplementary papers.
- 10.6 Neither the Minister nor the Developer were prejudiced by this approach, as they clearly attached no urgency to the conduct of the matter.
11. At the beginning of this year several committee members were wondering whether the project was still alive. To Applicant's surprise it came to light on

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16 April 2020 that the project was far from dead, and that a new proposal was on the table.

- 11.1 The Developer had been talking to the authorities for more than a year about its most recent proposal of a life-style agri-estate of 200 subdivided portions.
- 11.2 In February 2020 the Developer had launched the formal application for provincial planning approval.
- 11.3 Three months later this project had not yet been advertised for public comments. In this respect I refer to my Founding Affidavit where I set out how the Developer managed to obtain the November 2014 consent.
- 11.4 Despite the Minister's admission that his consent was invalid, the Developer continues to assert that on merit the project is supported by the National Department of Agriculture, and is not in conflict with the objectives of SALA and national policies to prevent the fragmentation of highly productive soils into uneconomical units.
- 11.5 Accordingly, Applicant took the view that it would be necessary to have the consent to subdivision set aside at this stage and not to wait until the whole application process has run its course.
- 11.6 Due to the lockdown, Applicant's counsel was hampered in her research of facts, as she did not have access to the complete files in the previous matters, but only to computer records of her own previous drafts of affidavits. This caused a further delay, although minor in the overall context and given the fact that due to the

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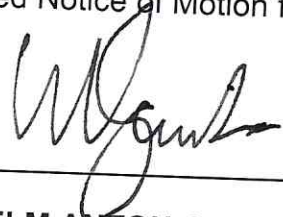
lockdown and the Covid-19 pandemic no early date for a hearing can be obtained, anyway.

12. It is respectfully submitted that the delay causes no prejudice to the Developer and that the balance of convenience between justice and certainty in this case favours the Applicant.
13. The Developer, has, over the years, taken the financial risk of investing considerable amounts of money into a project that did not have final approval. What I set out in paragraphs 48; 48.2; 48.3 and 49 of my Answering Affidavit in the Rezoning Review 2011 applies here *mutatis mutandis*. Already in November 2005 the Developer was warned by its senior counsel against the pitfalls of the application process, of "*running ahead of themselves*" and of "*accepting decisions of an inappropriately conditional nature*" (paragraphs 30, 30.1 and 30.2 and 40, 43 of my Answering Affidavit in the Rezoning Review 2011).
14. The Applicant has a material interest in due process as well as rational and uncompromised decision making, based on adequate and reliable evidence. The decision-making process by municipal and provincial authorities would be compromised if officials had to place reliance on unlawful and invalid prior decisions by the Minister.
15. The Applicant has an interest in the preservation of the more than 200 ha of Critical Biodiversity Areas of Farm Hoogekraal and the preservation of high potential agricultural soils in the interest of food security for future generations and/or affordable land for emerging farmers.
16. It is respectfully submitted that should the development be authorised by the Municipality and the MEC, but subsequently fail financially due to market forces or the "excessive risks for normal farming enterprises", as averred by

forces or the "excessive risks for normal farming enterprises", as averred by the Developer, such registered subdivisions would remain valid, and the damage to agricultural productivity of the land would be irreversible. There would then be no other option but to auction off 200 subdivided smallholdings of 3 ha each, which by themselves are uneconomical agricultural units.

17. Applicant has a material interest in preventing the further fragmentation of pristine nature areas and potentially productive agricultural land into unsustainable units.

18. In the premises, the Applicant asks for condonation, in so far as necessary, and for an order in terms of the Amended Notice of Motion filed herewith.



WILHELM ANTON GERICKE

Sworn to and signed in my presence, at Paarl on this 23 day of **JUNE 2020** by the Deponent who declared that he:

- (a) knows and understands the contents hereof;
- (b) has no objection to taking the prescribed oath;
- (c) considers the prescribed oath to be binding on his conscience;

and uttered the words: "I swear that the contents of this declaration are true, so help me God."

SECTION 70834512 ^{OST}

COMMISSIONER OF OATHS



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