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NEAG
ATT: RORY AND KATHI SALES
kathi@risingtide.co.za

our ref CDM/SAW/WC7026
your ref
date 10 January 2012

Dear Kathi and Rory,

RE: NEAG / THE TRUSTEES OF THE OLD CAPE VILLAGE TRUST

I refer to the above matter.

I attach hereto, for your perusal and records, a copy of the First and Second Respondents' application for leave to appeal.

I confirm I have forwarded a copy of the application to Advocate Van der Merwe for his perusal.

Advocate Van der Merwe and Advocate Bridgman will make arrangements with the Judge for the allocation of the date to have the application for leave to appeal heard.

Should you wish to discuss the matter, kindly do not hesitate to contact me.

Kind regards,

C&A FRIEDLANDER INC.

Per:

C D MIDDLEBROOK
chris@cafriedlander.co.za

C+A Friedlander

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 27009/2010

In the matter between:

THE NOORDHOEK ENVIRONMENTAL ACTION GROUP	Applicant
and	
JEREMY JONATHON FORTESCUE WILEY N.O.	First Respondent
AND JEREMY ROBERT WILDER (in their capacities as trustees for the time being of THE OLD CAPE VILLAGE TRUST)	Second Respondent
DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent
DEPARTMENT OF TRANSPORT AND PUBLIC WORKS	Fifth Respondent

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the First and Second Respondents intend to apply for Leave to Appeal against the whole of the judgment and order granted and delivered by her Ladyship, Ms Acting Justice Mantame on 13 December 2011.

Janice Fleischer Attorney (JG Fleischer)
Tel: 021 785 4361

BE PLEASED TO TAKE NOTICE FURTHER that the application will be made on a date and at a time to be arranged with the Registrar and the attorneys representing the other parties.

BE PLEASED TO TAKE NOTICE FURTHER that the application is based on the following grounds:

Another Court could reasonably come to a different conclusion for the following reasons:

1. It was argued before Mantame AJ that there were so many disputes of fact on the record that the only possible finding on the papers before the Court was that the application should be dismissed with costs. The rider to this argument was that there may be a referral to oral evidence to resolve the disputes of fact. The matter has not been referred to oral evidence and the argument remains that the application should have been dismissed.

2. The issue of the disputes of fact must be decided on the trite principles set out in *Stellenbosch Farmers' Winery v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 and *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 624. The judgment of Mantame AJ does not refer to Plascon-Evans or to Stellenbosch Farmer's Winery and does not apply the principles set out in those cases. No reason is given for not

following the principles set out in the abovementioned cases. Another Court could reasonably come to a different conclusion by applying the said principles.

3. The Plascon-Evans principle that an application must be decided on the version of the Respondent, together with those facts alleged by the Applicant that are admitted by the Respondent is a principle that should be applied to all the findings of fact in this application. It appears that Mantame AJ rejected out of hand the factual allegations made by Mr Wiley and Attorney Fleischer. Another Court, applying the Plascon-Evans principle could reasonably come to a different conclusion on all of the factual allegations.

4. The most important point argued before Mantame AJ, but not mentioned in her judgment is the point that, as a matter of fact and law, the City of Cape Town has the necessary authority to grant the relevant approvals **and has in fact done so.** In law, both the Constitution of the Republic of South Africa, 1996 and the Land Use Planning Ordinance, 15 of 1985, give the necessary planning authority to the City. The Constitutional point was set out in paragraphs 46 to 55 (pages 25 to 30) of the First and Second Respondents' Heads of Argument and will not be repeated here. Suffice it to say that the issue should have been dealt with in the judgment, but apart from a passing reference in paragraph 18, it is not mentioned.

5. The authority of the City of Cape Town in terms of LUPO is clearly alleged in Mr Wiley's affidavit (Wiley 163). His allegation is simply denied by Mrs Sales. Application of the trite principles of Plascon-Evans should resolve the dispute in Mr Wiley's favour. However, the affidavit of Mr Watters (page 469, paragraph 22) puts the matter even further beyond doubt. He says:

> "In terms of paragraph 3 of the letter, the competent authority to which I allude, in respect of the 51 parking bays on erf 453, is the City of Cape Town and not the Department of Transport and Public Works."

6. He refers to paragraph 3 of his much debated letter dated 29 July 2008, (Annexure "M" to the founding affidavit, page 91) which states:

> "Accordingly this Branch offers no objection to the approval of the provision of approximately 51 parking bays on erf 453, Noordhoek."

7. The affidavit of Mr Watters was filed after the First and Second Respondents' Heads of Argument were filed. Consequently this point was made only in oral argument.

8. As far as the facts are concerned, the First and Second Respondent relied on the approvals of Mr Fotiu of the Traffic Impact Section of the City of Cape Town (pages 399 to 402) as well as the email of Mr Fotiu dated 30

December 2010 (page 282: Annexure JW11). The factual approval of the signage columns by both the City and Province is dealt with in the Rule 42 application and need not be repeated here.

9. The judgment appears to make an incorrect reference in paragraph 29 where it deals with this point. It states, "Paragraph 4 was further explained as NOT constituting an approval." The reference should be to paragraph 3.

Notice of Application

10. The judgment does not deal with paragraph 2 of the Notice of Application dated 3 February 2011 (pages 146 to 148).

11. The judgment granted prayer 1 of the Notice of Application when the Department of Transport and Public Works was joined as Fifth Respondent in the Application. However, nowhere in the judgment is paragraph 2 of the Notice of Application dealt with.

12. In paragraph 31 of the judgment states:

> "I believe this is a matter that is capable of being decided on paper. Postponing or referring these proceedings to oral evidence would

amount to an abuse of process as this will drag the matter unnecessarily."

13. The judgment thus deals with the referral to oral evidence but does not deal with the application for a postponement pending the rectification application in terms of section 24G of NEMA (paragraph 2.1), the application for the amendment of the conditions of approval for the rezoning and subdivision of erf 270 (paragraph 2.2), the land use application to permit the current use on erf 453 (paragraph 2.3), and the application for the amendment of the Title Deed condition (paragraph 2.4).

14. The reasons advanced in argument that this is primarily an administrative matter which should be dealt with by the appropriate administrative bodies was not dealt with in the judgment of Mantame AJ.

15. Another Court, in considering the aforesaid application could reasonably come to a different conclusion.

16. Mantame AJ refused the application for referral to oral evidence by Mr Wiley "in order for me to arrange that the necessary officials be subpoenaed to give evidence." (Wiley 164 paragraph 35) Another Court could reasonably come to a different conclusion and conclude that the evidence

of the necessary officials is indeed necessary to get to the bottom of the issues.

Approvals

17. Paragraph 7 of the judgment of Mantame AJ is incorrect where it states that, "The said approval was in the form of a correspondence from the Department of Transport and Public Works dated 29 July 2008 that was addressed to the City of Cape Town and endorsed or copied to the other recipients which amongst others included First and Second Respondents." The First and Second Respondents relied also on the approval contained in the comments of Mr Arthur Fotiu of the Traffic Impact Section of the City of Cape Town (pages 399 to 402) as well as the email of Mr Fotiu dated 30 December 2010 (page 282: Annexure JW11), as well as the written approvals of the signage columns.

Environmental issue

18. In paragraph 16 of the judgment it is stated that "Third Respondent required him to appoint independent environmental assessment practitioner to draw up a rehabilitation plan for the restoration of Erf 453, but nothing came of it." The judgment fails to take into consideration the factual position that DEADP, the Third Respondent, made a decision that it was not an

environmental issue. See Wiley page 173 paragraph 69 and Fleischer page 317 paragraph 23 and page 318 paragraph 25.

Mala fides

19. The issue of the *mala fides* of Mr Wiley was debated at length before Mantame AJ, but the issue is not dealt with in her judgment. In *Fakie N.O. v CCI Systems (Pty) Ltd*, 2006(4) SA 326 (SCA), it was authoritatively stated that the Applicant must establish that the breach was committed "deliberately and *mala fide*". The Supreme Court of Appeal further found that "*a deliberate disregard of a Court Order is not enough*". No consideration is given in the judgment of Mantame AJ to the many allegations by Mr Wiley, supported by letters and reasons, that he believed that he was entitled to act the way he did. In the light of the centrality of this distinction in the leading SCA case of *Fakie,* the judgment of Mantame AJ should have dealt with this point.

20. No finding is made in the judgment of Mantame AJ that Mr Wiley was *mala fide*. It is implied by reference in the judgment, but another Court could reasonably come to a different conclusion on analysis of the allegations in the papers regarding Mr Wiley's *bona fides,* the inference to be drawn from such conduct and the application of the trite principals of Plascon Evans.

21. The defence of legal advice is not dealt with in the judgment of Mantame AJ. The legal advice given to Mr Wiley is set out in the numerous letters from his attorney and can not simply be ignored. The advice of his attorney and other professional advisors (Wiley 162 paragraph 31) should have been considered and cannot simply be ignored. Such advice is crucial to a finding relating to Mr Wiley's intention at the time and is directly related any inference to be drawn regarding Mr Wiley's actions following legal advice.

Paragraph 23 of the judgment of Mantame AJ

22. An analysis of the judgment of Mantame AJ could come to the conclusion that the *ratio decidendi* is contained in paragraph 23 of her judgment. In particular, the sentences:

> "There is no rule in our law that allows a Court (other than a Competent Appeal Court or Court of Review) to disregard or to ignore or to set aside the order of the same or another Court, in a matter that comes before it in respect of a claim for the same relief between the same parties. In my view, it is not permissible for the First and Second Respondents to simply announce their approval

that was received from the Premier without regard being had to the order of Davis J."

23. It must be pointed out that the above quoted statement of Mantame AJ is in conflict with the statement of Davis J in his judgment refusing the Application for Leave to Appeal where he says (Judgment: Annexure "D" page 226):

> "It must surely be the case that, in the event of duly authorised permission being granted to the first respondent to construct a permanent parking on erf 453, the order which was granted in this case wold have no application to such permission. Central to the judgment of this Court was a finding that, given the nature of the conditions and given the absence of permission, first respondent was not entitled to proceed with the construction of permanent parking. **The converse must apply: if permission is granted, the foundation for the order falls away."** (emphasis added)
>
> (And at page 229)"I should again point out that the far more expeditious avenue for First Respondent, as was debated in argument before this Court, is that legal permission should be sought and granted, and if that was the case this dispute would no longer be live. That is not an issue before this Court at present."

24. The judgment of Davis J was handed down on 21 April 2008. On 25 April 2008, four days later, Mr Wiley made his application to the Premier of the Western Cape (Annexure O to the founding papers: page 95). In effect, Mantame AJ is finding Mr Wiley guilty of contempt of Court because she disagrees with the advice of Davis J contained in his judgment. Put otherwise, Mr Wiley is being found guilty of contempt for the judgment of Davis J because he followed the advice contained in the judgment of Davis J.

25. Another court could reasonably agree with the advice of Davis J and come to a different conclusion.

26. The judgment of Mantame AJ follows the *ratio* contained in paragraph 23 by stating in paragraph 25, "Besides their failed attempts to appeal this judgment, First and Second Respondents have not advised this Court what else they have done in order to remove this cause for complaint."

27. The abovementioned sentence is not correct. It ignores a number of efforts made by Mr Wiley. It ignores the factual averments set out in the answering affidavit of Attorney Fleischer. These are set out in the chronology which was put before Court and which will not be repeated here. Some actions taken by Mr Wiley will be highlighted. Mr Wiley closed the parking lot on 14 July 2008. Numerous meetings were held, *inter alia* at the City on 12

August 2008. Onsite meetings were held with various officials. Attorney Fleischer and Mr Wiley addressed numerous letters to various authorities.

28. A summary of steps taken is contained in the letter of Attorney Fleisher (page 337 – 338, Annexure "JF 10"). These factual averments should not simply be ignored.

29. The reference to *O'Grady v Fisher & Others* 2007(2) SA 380 (CPD) at 386H to 387F is incorrect in paragraph 32 of the judgment of Mantame J. The case does not establish the principle that, "Before any structure is built, permission of administrator (Premier is the successor-in-title) should be sought." The case finds exactly the opposite. It finds that "minor building works" may be categorised by the building control officer of the local authority as such and in terms of section 13 of the National Building Regulations and Building Standards Act, 103 of 1977.

30. The Judgment of Mantame AJ fails to deal with the argument raised regarding costs. The case of *O'Grady v Fisher* is not authority for the proposition that Fourth Respondent (the City) should be ordered to pay the cost. The authority for that proposition is *Viking Pony Africa Pumps v Hydrotech Systems* 2011(1) SA 327 (CC), where the City of Cape Town was ordered to pay the costs on the basis that:

"The City's dereliction of duty is largely responsible for this protracted and expensive litigation. The fact that the City quietly slid away into the remotest back room of litigation ought not to be enough to exonerate it from the consequences of its failure to honour its Constitutional and statutory obligations. It may not be an inappropriate response to its generally lackadaisical attitude, to mulct it with the costs of this appeal." (Paragraph 57, page 347 of the judgment of Mogoeng J, as he then was.)

31. The statement in the judgment of Mantame AJ that "there is no rule in our law that allows a Court (other than a competent Appeal Court or Court of Review) to disregard or to ignore or to set aside the order of the same or another court..." must be read in the light of a recent decision of the SCA in Master of the High Court, North Gauteng High Court Pretoria v Motala N.O. and Others Case no 172/11, a copy of which is annexed hereto as it is not yet reported.

32. The issues raised in the case of the North Gauteng Master are precisely the issues raised in argument before Mantame AJ, regarding the status of the order of Davis J. In particular, the Constitutional issues raised before Mantame AJ, but not dealt with by Davis J, as set out above bear further consideration. The Master of the High Court case was not referred to in argument as it was not available at the time, as it was only delivered on 1

December 2011. Another Court could reasonably come to a different conclusion for the reasons set out in the Master of the High Court, Gauteng case.

33. This application should be heard together with the First and Second Respondents' Application in terms of Rule 42 (1)(b). In the event that the Rule 42 application is not successful, the reasons stated therein are included in this application as grounds for appeal.

Dated at CAPE TOWN on the 5th day of January 2012.

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TO: **THE REGISTRAR**
Western Cape High Court
CAPE TOWN

RECEIVED BY
06 JAN 2012
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AND TO: **C&A FRIEDLANDER INC**
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AND TO: **DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING**
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AND TO: **THE CITY OF CAPE TOWN**
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