Hands off our Intangible Cultural Heritage - *Khoin v Jenkins in re: Observatory Civic Association v Trustees for the Time Being of the Liesbeek Leisure Properties Trust*

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Abstract

This case note analyses an appeal decision (*Khoin v Jenkins in Re: Observatory Civic Association v Trustees for the Time Being of the Liesbeek Leisure Properties Trust* [2023] 1 All SA 110 (WCC)) handed down in 2022 by the Western Cape High Court, its purpose being to identify the strengths and weaknesses of the decision and to comment on possible future developments. The text of the judgment is interpreted in the light of judicial precedent, literature and domestic (South African) and international law. One of the key findings is that "intangible heritage" is an integral part of both domestic and international law, and the *Khoin*-case gives judicial recognition to the concept as a part of South African heritage law. One of the main criticisms levelled against the judgment is that it does not adhere to judicial precedent in failing to find that the right to consultation of First Nations Peoples before administrative action is taken that allegedly violates their constitutional rights to intangible heritage is sufficient to satisfy the test for the existence of a *prima facie* right for the purposes of obtaining an interim interdict.

Keywords

First Nations Peoples; failure to consult; violation of fundamental rights; intangible heritage; heritage law; urgent interdict; *prima facie* right.

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1 Introduction

The case of *Khoin v Jenkins in re: Observatory Civic Association v Trustees for the Time Being of the Liesbeek Leisure Properties Trust* [2023] 1 All SA 110 (WCC) (referred to as *Khoin*) raises the issues of whether the violation of a fundamental right is insufficient on its own to require a court to grant an interim interdict, and whether intangible heritage cannot be harmed by a tangible development. The case comprises two judgements of the full bench of the Western Cape High Court,[1] ("the court" or "the appeal court"), after hearing two applications together, the first for the rescission of, and the second appealing against, a decision of the court *a quo*[2] to grant an urgent interdict in the context of an alleged failure to consult First Nations Peoples in regard to their cultural heritage rights, halting the development pending the determination of two review applications[3] and consultation with First Nations Peoples. The outcome of the case was that the rescission application was granted, the appeal was upheld and the interim interdict was overturned.

This note focusses on the appeal judgment and argues that the violation of the right to be consulted before administrative action is taken, particularly where it involves the cultural rights of First Nations Peoples, should be sufficient to establish the breach of a *prima facie* right as one of the requirements for an interim interdict; that the current state of the law is that it is insufficient on its own to require a court to grant an interim interdict; that the concept of "intangible heritage" is an important part of heritage law; and that while there may be circumstances in which intangible heritage will not be harmed by a tangible development, this is not necessarily the case.

The first part of the paper deals with the factual background whereafter the second part ventures into the reasons why the court *a quo* interdicted the development. The third part then considers why the appeal against the decision of the court *a quo* to grant the interdict was upheld. The next part

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1 Per Baartman, J (Slingers and Lekhuleni JJ concurring).

2 *Observatory Civic Association v Trustees for the Time Being of Liesbeek Leisure Properties Trust* (12994/2021) [2022] ZAWCHC 2 (18 March 2022) per Goliath, J. There were numerous parties to each case before the appeal court, some of them parties to both cases.

3 A review of the environmental authorisation granted in terms of the *National Environmental Management Act* 107 of 1998 (NEMA), and a review of the planning approval granted in terms of the *City of Cape Town's Municipal Planning By-law*, 2015.

discusses the implications of this case with a conclusion following on some reflective perspectives on future judicial and research developments.

2 Factual background

The River Club development site is on the banks of the Liesbeek River in Observatory, Cape Town, near its confluence with Salt River. The site, although badly degraded, has a rich cultural heritage, mostly intangible, primarily the product of memory and historical association. It was occupied by indigenous people, used as a grazing place for livestock and served various social, ecological, and sacred functions. The approved mixed-use development included the rehabilitation of the river corridor, open spaces, a heritage museum and affordable housing, along with commercial premises and public transport.[4]

Many affected First Nation Groups supported the development, but the respondents cried foul, citing heritage issues and a lack of proper consultation. Development of the site commenced some eight months before the interdict was granted by the court *a quo*. The developer appealed against the interim interdict and continued with construction.[5]

At the time of the decision of the appeal court the construction was already several storeys high. The developer was left to continue with the construction of the River Club development pending the outcome of review proceedings.[6]

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4 *Khoin v Jenkins in re: Observatory Civic Association v Trustees for the Time Being of the Liesbeek Leisure Properties Trust* (12339/2022;12994/2021) [2022] ZAWCHC 227 (8 November 2022) (hereafter *Khoin*) paras [6]-[8]. The process had a long history, detailed in the judgment *a quo* in *Observatory Civic Association v Trustees for the Time Being of Liesbeek Leisure Properties Trust* (12994/2021) [2022] ZAWCHC 2 (18 March 2022), with many heritage studies, starting with a baseline heritage study for the wider Two Rivers Urban Park area in 2016 and a heritage impact assessment. All internal appeals were dismissed. Heritage Western Cape had issued a provisional protection of the area in terms of the *National Heritage Resources Act* 25 of 1999, which lapsed after two years.

5 A contempt of court application was brought against the developer followed by an urgent interdict pending the outcome of the contempt of court application, which was dismissed on 20 September 2022: see *Observatory Civic Association v Aufrichtig (Goringhaicona Khoi Khoin Indigenous Traditional Council Intervening)* (14195/2022) [2022] ZAWCHC 189 (20 September 2022) per Dolamo, J.

6 At the time of writing the review applications have not yet been decided.

3 The reasons why the court *a quo* interdicted the development

The court *a quo* found that there had been inadequate consultation with First Nations Peoples, who have a deep, sacred link to the development site through lineage, oral history, past history and narratives, indigenous knowledge systems, living heritage and collective memory, and a fundamental right to their to culture and heritage had been established and was under threat of irreparable harm in the absence of proper consultation.[7]

The court *a quo* found that the requirements for an interim interdict had been met – violation of a *prima facie* right, irreparable harm, the lack of an adequate alternative remedy and the balance of convenience, showing judicial willingness to intervene to protect the right of First Nations Peoples to be consulted before administrative action is taken that affects their constitutionally protected cultural rights. The court *a quo* stated:

> The fact that the development has substantial economic, infrastructural and public benefits can never override the fundamental rights of the First Nations Peoples.[8]

4 Why the appeal against the decision of the court *a quo* to grant the interdict was upheld

The appeal court found that the respondents failed to establish any of the requirements for an interim interdict.[9] Although this note focusses on the appeal judgment, the judgment granting the rescission application is of contextual interest since the appeal court found, in the rescission judgment, that the interdict granted by the court *a quo* had been induced by fraud by a person purportedly representing the First Nations group concerned.

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7 *Observatory Civic Association v Trustees for the Time Being of Liesbeek Leisure Properties Trust* (12994/2021) [2022] ZAWCHC 2 (18 March 2022) para [143]. It also appears from the judgment of the court *a quo* at para [120] that a group under the umbrella First Nations Collective was in favour of the development, which conserved a riverine corridor.

8 *Observatory Civic Association v Trustees for the Time Being of Liesbeek Leisure Properties Trust* (12994/2021) [2022] ZAWCHC 2 (18 March 2022*)* para [143].

9 *Khoin* paras [51]-[52]. Three other issues in the appeal were also decided in favour of the appellant, set out at para [34] of the appeal judgment: the effect of abandoned relief relating to consultation, the lack of authority of a person who is not a legal practitioner to represent a party in court, and grounds to grant an application to strike out impermissible evidence.

4.1 No prima facie *right*

4.1.1 Reliance on the right to review

It was common cause in the appeal that the development site had symbolic and actual associations with early confrontations between indigenous peoples and early settlers. The site's heritage resources, said the appeal court, are mostly intangible, primarily the product of memory and historical association.[10] The court pointed out that the respondents had, in the interdict application, asserted that the First Nation Groups have a right to have their culture respected and heritage sites protected.[11] However, the court singled out the respondents' allegation that they had established

> a strong *prima facie* right warranting protection by this court, namely a right to review of the unlawful decisions at issue, which themselves have compromised the rights of the applicants to lawful action that conserves South Africa's heritage for the benefit of present and future generations, and to the lawful implementation of the spatial planning instruments affecting the area of Observatory.[12]

Having done so, the court found that the respondents relied on a violation of their right to review the "unlawful decisions at issue".[13] The court implied that the violation of no right other than the right to review was relied on for the purposes of the interdict.

4.1.2 The right to review: no basis for an interim interdict

Referring to the well-known test for interim interdicts in *Setlogelo v Setlogelo* (hereafter *Setlogelo*),[14] the court relied on the judgement of the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance*[15] (hereafter *OUTA*) in finding that the right to review cannot form the basis for interim relief.[16] An inadequate consultation process, said the

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10 *Khoin* para [6].
11 *Khoin* para [41].
12 *Khoin* para [42].
13 *Khoin* para [43].
14 *Setlogelo v Setlogelo* 1914 AD 221. The requirements for interim relief are (1) a *prima facie* right though open to some doubt; (2) a well-grounded apprehension that the right will be irreparably harmed if the interdict is not granted; (3) the balance of convenience must favour the award of the interdict; (4) there must no alternative remedy available to the applicant.
15 *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC) (hereafter *OUTA*). The acronym *OUTA* is used by the court in that judgment to refer to the first respondent, and in used subsequent cases to refer to the case itself.
16 Para [43], quoting paras [48] to [50] of *OUTA*.

court in *OUTA*, refers to past action and cannot be rectified with an interim interdict.[17]

The court in *OUTA* endorsed the test for an interim interdict in *Setlogelo*, adding that the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution, which means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution.[18]

4.2 No harm to intangible heritage

The appeal court also held that although the heritage value of the site was undisputed, there was no tangible manifestation of the beliefs and interactions associated with the site. The respondents did not allege or demonstrate that the development would cause irreparable harm to the heritage resource.[19] On the contrary, said the court, the papers indicated that the development might enhance the resource having regard to the degraded state of the site when the authorisation was obtained. When the interdict was granted, the site had been transformed by construction.[20] The court concluded:

> Therefore, the respondents' allegation that the interdict was sought to prevent the destruction and transformation of the site does not demonstrate future harm, as the site had already transformed. However, the heritage value is apparently still intact and not under threat.[21]

5 Discussion

This case raised a couple of relevant questions and points in law which are commented on below.

5.1 Whether the violation of a fundamental right is insufficient on its own to require a court to grant an interim interdict

The appeal court quoted and relied on *OUTA* where it was expressed that although the right to review is based on the constitutional right to just administrative action,[22] the requirement to demonstrate a *prima facie* right for the purposes of an interim interdict requires more than merely the right to approach a court in order to review an administrative decision. The court in *OUTA* went on to describe the nature of such a *prima facie* right:

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17 *OUTA* para [48].
18 *OUTA* para [45].
19 *Khoin* paras [6] and [46].
20 *Khoin* para [47].
21 *Khoin* para [47].
22 Secton 33 of the *Constitution of the Republic of South Africa*, 1996.

> It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.[23]

The appeal court quoted the above excerpt in coming to its finding that no *prima facie* right had been established. However, the appeal court did not acknowledge that the paragraphs in *OUTA* upon which it relied, including the one quoted above, were *obiter dicta* - the Constitutional Court went on to say that it did not need to resolve whether a *prima facie* right had been proven since it had reached its outcome on other grounds and had assumed, without deciding, that the High Court had properly found that the respondents had established a *prima facie* right.[24] The Constitutional Court had started off its discursion on this point in *OUTA* by stating the following:

> 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.[25]

The constitutional right to just administrative action in the form of a right to review seemed to present itself to the Constitutional Court as a possible exception to the general approach quoted above, but the court refrained from deciding the point. Notably, in *OUTA* the review was not based on a failure to consult. In that case the Constitutional Court had overturned an order interdicting the authorities from levying and collecting toll on the Gauteng roads pending the final determination of their application to review and set aside the policy decisions to toll based on their alleged invalidity. Although the test for the existence of a *prima facie* right was assumed to have been met, the court found that the requirements of irreparable harm and the balance of convenience for an interim interdict had not been met.[26]

The Constitutional Court had occasion to revisit the requirements for an interim interdict in *City of Tshwane Metropolitan Municipality v Afriforum*,[27] where the majority of the court overturned an urgent interdict against the municipality that required it to stop removing the old street names in the Pretoria area and to bring back those that had been removed already. Afriforum insisted on a right to a proper public participation process and

23 *OUTA* paras [49] to [50].
24 *OUTA* para [52].
25 *OUTA* para [46].
26 *OUTA* paras [53] to [72].
27 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC).

relied partly on section 31 of the Constitution, which affirms the enjoyment of a cultural, linguistic or religious right of a community and its members. While it was open to some doubt, the court was prepared to assume without deciding that Afriforum had established a *prima facie* right,[28] and based its ruling on the grounds that the remaining requirements for an interim interdict had not been met.[29]

The issue came before the Eastern Cape High Court in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*,[30] when the court was asked to interdict a seismic survey based in part on the applicant communities' right to be meaningfully consulted about the seismic survey because it would impact upon their customary rights, including their customary fishing rights. The applicants claimed that their constitutional rights in sections 24 (environment), 30 (language and culture) and 31 (cultural, religious and linguistic communities) of the Constitution were implicated.[31] In granting the interim interdict, the court held that the applicants' right to meaningful consultation constituted a *prima facie* right which deserved to be protected by way of an interim interdict. It relied on the passage in *OUTA* quoted above that says 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.[32] The remaining tests for an interim interdict were met and the interim interdict was granted.

The question arose again soon after that in the Western Cape High Court in *Adams v Minister of Mineral Resources and Energy*,[33] when the court was asked to interdict the conducting of seismic activities on the basis of a lack of public participation with small scale fishers and other communities. The applicants' apprehension of harm related to marine and bird life, food security, their livelihoods and their cultural rights. In granting the interim interdict the court adopted a different approach, describing the *prima facie*

28 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC) para [50].

29 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC) paras [51]-[76].

30 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 6 SA 589 (ECMk).

31 For a discussion on these rights see Glazewski *Environmental Law* 19-9; Woolman *et al Constitutional Law* ch 58 on the differences in meaning between language, culture and religion, and the importance of international law relating to civil and political rights.

32 *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 6 SA 589 (ECMk) para [34].

33 *Adams v Minister of Mineral Resources and Energy* (1306/22) [2022] ZAWCHC 24 (1 March 2022).

right infringed by the lack of public participation as being part of the right to *audi alteram partem*, which the court viewed as part of the right to the equal protection and benefit of the law contained in the right to equality in section 9 of the Constitution.[34] The remaining tests for an interim interdict were met and the interim interdict was granted.

It is submitted that the above cases correctly suggest that the failure to consult can meet the test for a *prima facie* right for the purposes of obtaining an interim interdict pending the review of administrative action. The administrative action concerned in each case implicated other constitutional rights, such as cultural rights. Had the appeal court in *Khoin* adopted the same approach it should have found, or at least have been prepared to assume, that a *prima facie* right had been established. In the context of the case it would not have changed the outcome since it was held that the remaining requirements for an interim interdict were not met.

It is submitted that it would be unfortunate if *Khoin* were to be followed in regard to the establishment of a *prima facie* right, particularly when First Nations People seek to enforce their right to consultation before administrative action is taken that affects their constitutional cultural rights.

The Court in *OUTA* considered whether the *Setlogelo* test should be retained and reflected that the test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the granting of interdicts in busy Magistrates' Courts and High Courts, and added the requirement, as stated above, that the test must now be applied in a way that promotes the objects, spirit and purport of the Constitution.[35]

It is submitted that the cases discussed above reinforce the applicability of the test for an urgent interdict in *Setlogelo*, suitably modified by our constitutional context, and show that the violation of a *prima facie* constitutional right on its own is insufficient to justify an interim interdict. The requirements of irreparable harm, the lack of an adequate alternative remedy and the balance of convenience must also be met.

The case law underlines the discretionary nature of interim relief,[36] and it necessarily follows that the breach of a fundamental right per se does not justify the granting of an interim interdict, which remains a discretionary remedy. Whether the common law test in *Setlogelo*, as developed in

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34 *Adams v Minister of Mineral Resources and Energy* (1306/22) [2022] ZAWCHC 24 (1 March 2022) paras [47]-[48].

35 *OUTA* para [45].

36 For a discussion of the discretionary nature of an interim interdict, see Hoexter and Penfold *Administrative Law* 802-803.

OUTA, should be further developed in order to give primacy to the exercise and protection of fundamental rights in the constitution is a possible topic for further research.

A further topic for possible further research is the appropriate way in which to evaluate the requirements for an interim interdict when the constitutional cultural rights of First Nations Peoples have been violated, and how discretion should be exercised in regard to irreparable harm, adequate alternative remedy and the balance of convenience.

5.2 Whether intangible heritage cannot be harmed by a tangible development

The appeal court in *Khoin* effectively found that because the heritage resource was intangible, it had been left intact by the past transformation of the site and would remain intact if the development proceeded. The question of whether the development of a site can have an impact on a community's intangible heritage requires an inquiry into the meaning of "intangible heritage".

The concept of heritage in the *National Heritage Resources Act*[37] is broad,[38] and while it does not use the term "intangible heritage" it includes the concept of "living heritage" in its description of the national estate:

> the national estate may include - … 'places to which oral traditions are attached or which are associated with living heritage;[39]

The term "living heritage" refers to the intangible aspects of inherited culture, and is defined as follows:

> **"living heritage"** means the intangible aspects of inherited culture, and may include—
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> (a) cultural tradition;
>
> (b) oral history;
>
> (c) performance;
>
> (d) ritual;
>
> (e) popular memory;
>
> (f) skills and techniques;
>
> (g) indigenous knowledge systems; and
>
> (h) the holistic approach to nature, society and social relationships.[40]

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37 *The National Heritage Resources Act* 25 of 1999.

38 See the definitions of "national estate", "cultural significance" and "living heritage" in s 1 of the *National Heritage Resources Act* 25 of 1999.

39 Section 3(2)(b) of the *National Heritage Resources Act* 25 of 1999.

The *National Heritage Resources Act* was passed shortly before the *World Heritage Convention Act* was passed,[41] which adopted the *Convention Concerning the Protection of the World Cultural and Natural Heritage*.[42] That convention does not specifically mention intangible heritage. While the *National Heritage Resources Act* does not use the term "intangible heritage", notices issued in terms thereof do, with reference to living heritage.[43]

The Cultural Heritage Survey Guidelines and assessment tools for protected areas in South Africa[44] published in terms of the *National Environmental Management: Protected Areas Act*[45] contain the following definition of "intangible cultural heritage":

> **"intangible cultural heritage"** means the practices, representations, expressions, knowledge, skills, as well as the instruments, objects, artefacts and cultural spaces associated therewith, that communities, groups and, in some cases, individuals recognise as part of their cultural heritage; – something considered to be a part of heritage that is not a physical object or place, such as a memory, tradition, language, belief or a cultural practice, (as opposed to tangible heritage).[46]

While the *National Environmental Management Act*[47] does not specifically refer to living or intangible heritage, it does include among the principles of sustainable development that the environment must be protected as the people's common heritage, and requires that a relevant consideration is that the disturbance of landscapes and sites that constitute the nation's cultural heritage be avoided or at least minimised and remedied.[48] It also requires that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.[49] In *Fuel Retailers Association of Southern Africa v Director-General:*

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40 Section 1 of the *National Heritage Resources Act* 25 of 1999.

41 *World Heritage Convention Act* 49 of 1999.

42 *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972).

43 For example, GN 696 in GG 34562 of 2 September 2011: South African Heritage Resources Agency: Declaration of "Kaditshwene" Cultural Landscape as a National Heritage Site: "In terms of living heritage or intangible heritage, the cultural significance of Kaditshwene is based on interpretations emanating from the oral testimonies of the Bahurutshe community of Zeerust …".

44 GN 696 in GG 34562 of 2 September 2011: Cultural Heritage Survey Guidelines and assessment tools for protected areas in South Africa.

45 The *National Environmental Management: Protected Areas Act* 57 of 2003.

46 Section 1 of the GN 696 in GG 34562 of 2 September 2011: Cultural Heritage Survey Guidelines and assessment tools for protected areas in South Africa.

47 *National Environmental Management Act* 107 of 1998.

48 Sections 2(4)(a)(iii) and 2(4)(o) respectively of the NEMA.

49 Section 2(2) of the NEMA.

Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province[50] the Constitutional Court endorsed the concept of sustainable development, specifically including references to cultural heritage.[51]

The above definition is similar to the definition of intangible heritage contained in the *Convention for the Safeguarding of the Intangible Cultural Heritage*,[52] a treaty adopted by the UNESCO:[53]

> Intangible Cultural Heritage means the practices, representations, expressions, knowledge, and skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.[54]

The court *a quo* cited the above definition, summing it up as follows:

> The terms "intangible cultural heritage" has evolved through the years and generally includes objects, traditions or living expressions inherited from our ancestors and passed on to our descendants.[55]

The appeal court likewise accepted the concept of intangible heritage:

> The site's heritage resources are mostly intangible, primarily the product of memory and historical association. However, the Black and Liesbeeck Rivers' confluence in the area is accepted as the point where indigenous people crossed and met the Portuguese.[56]

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50 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC).

51 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) paras [63]-[69] and [75].

52 *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003).

53 The United Nations Educational, Scientific and Cultural Organisation.

54 Article 2 of the *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003).

55 *Observatory Civic Association v Trustees for the Time Being of Liesbeek Leisure Properties Trust* (12994/2021) [2022] ZAWCHC 2 (18 March 2022) para [99]; and at para [118] the court *a quo* referred to international instruments cited by the *amicus curiae* that had been admitted as a party: the *International Covenant on Economic, Social and Cultural Rights* (1966); the *African Charter on Human and Peoples Rights* (1981), and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

56 *Khoin,* para [6].

It is submitted that the concept of "intangible heritage" is an important part of heritage law and is an integral part of both domestic and international law.

It is further submitted that the references in the above definitions of intangible heritage to "cultural spaces associated" with the "representations" that can form part of a community's intangible heritage, and the "recreation" of intangible heritage "in response to their environment" and "their interaction with nature" indicate that intangible heritage can be inextricably linked to a particular place or site, or the remnants thereof.

It has been argued elsewhere that there can be a dynamic relationship between tangible and intangible heritage,[57] that this is a symbiotic relationship,[58] and that an holistic approach to heritage resources management symbolises the inextricable link between tangible and intangible resources.[59]

It is submitted that intangible cultural heritage as defined in the Convention for the Safeguarding of the Intangible Cultural Heritage can be associated with a site's strong historical links despite the past transformation of the site, and will remain associated with the site despite its further transformation, provided that enough remaining essential tangible features of the site, such as rivers and riverbanks, are retained.

As a result, it is submitted that the question of whether the development of a site could impact on intangible heritage is a question of fact to be decided in the light of all the relevant facts and circumstances of each case. The factual inquiry should include an assessment of the extent to which any remaining essential tangible features of the site that link it to inherited intangible heritage, such as rivers and riverbanks, will be retained.

The court in *Khoin* indicated that there was no tangible manifestation of the beliefs and interactions associated with the site on the facts before it.[60] What would or could constitute a tangible manifestation of intangible heritage is not clarified in the judgment.

An example of a tangible manifestation of intangible cultural heritage is traditional craftsmanship, where traditional skills and knowledge produce craft.[61] Another example is a landscape that is a key component of how people perceive, memorise and represent history since it leads to the

57 Perry, Ager and Sitas 2020 *IJHS* 603-618
58 Smith and Akagawa *Intangible Heritage* 133, 271.
59 Manentsi *Can Intangibles be Tangible?* 13
60 *Khoi* para [143].
61 UNESCO date unknown https://ich.unesco.org/en/traditional-craftsmanship-00057.

construction of the collective memory of a social group or population, which is one of the sources of identity.[62]

The appeal court implied that enough of the remaining features of the river would remain in place despite their transformation over time and their further transformation and rehabilitation in the development process, when it stated that the development application

> envisaged rehabilitation of the Liesbeeck River, public open spaces adorned with indigenous vegetation to replace the golfing greens, the establishment of a heritage museum, an amphitheatre for use of both the First Nation Groups and other members of the public …[63]

It is submitted that the court's conclusion that the tangible development would not affect intangible heritage is open to some doubt based on the facts of the case. A topic for possible further research is the intersection between tangible and intangible heritage and the circumstances in which intangible heritage could be affected by the transformation of a site or place.

6 Conclusion

It has been argued in this note that the failure to consult can meet the test for a *prima facie* right for the purposes of obtaining an interim interdict pending the review of administrative action; the violation of a *prima facie* constitutional right on its own is insufficient to justify an interim interdict, and the remaining tests for an interim interdict must be met; it would be unfortunate if *Khoin* were to be followed in regard to the establishment of a *prima facie* right, particularly when First Nations People seek to enforce their right to consultation before administrative action is taken that affects their constitutional cultural rights; the concept of "intangible heritage" is an important part of heritage law and is an integral part of both domestic and international law; there are circumstances in which intangible heritage may not be harmed by a tangible development, and the question of whether the development of a site could impact on a community's intangible heritage is a question of fact to be decided in the light of all the relevant facts and circumstances of each case; the factual inquiry should include an assessment of the extent to which any remaining essential tangible features of the site that link it to inherited intangible heritage, such as rivers and riverbanks, will be retained; and the court's conclusion that the tangible development would not affect intangible heritage is open to some doubt.

62 Muller 2008 *SAJAH* 120.
63 *Khoin* para [8].

In addition to these arguments, strong points of this case are that it gives judicial recognition to the concept of intangible heritage as a part of South African heritage law, and it reinforces the principle that when deciding interim interdicts, courts must promote the objects, spirit and purport of the Constitution. Weak points of this case are its failure to find that the right to consultation of First Nations Peoples before administrative action is taken that allegedly violates their constitutional rights to intangible heritage is sufficient to satisfy the test of a *prima facie* right for the purposes of securing an interim interdict, since it goes against the weight of judicial precedent; and the court's conclusion that the tangible development would not affect intangible heritage without investigating the possible links between tangible and intangible heritage.

Some of the remaining questions are whether an application for an urgent interdict, pending the outcome of a review based solely on the failure to consult before the impugned administrative action was taken, would satisfy the requirement of establishing a *prima facie* right if the right is framed as a breach of the constitutional right to just administrative action; the development of the test for establishing the violation of a right to consultation as a *prima facie* right for the purposes of securing an interim interdict by alleging that the failure to consult involves the violation of the right to administrative justice as well as the right to equality; and the establishment of links between intangible and tangible heritage as part of the constitutional cultural right.

More pertinent topics for further research emanating from the facts and outcome of the case are: whether the common law test in *Setlogelo*, as developed in *OUTA*, should be further developed in order to give primacy to the exercise and protection of fundamental rights in the constitution; the appropriate way to evaluate the requirements for an interim interdict when the constitutional cultural rights of First Nations Peoples have been violated, and how discretion should be exercised in regard to irreparable harm, adequate alternative remedy and the balance of convenience; and the intersection between tangible and intangible heritage and the circumstances in which intangible heritage could be affected by the transformation of a site or place.

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I wish to further conclude this paper by commenting on the fact that academics of the like of Willemien du Plessis have contributed enormously to the broader field of environmental law and governance over the years. This is evidenced by her many published academic articles and works, her

teaching of environmental law and helping to build one of South Africa's most accomplished environmental law faculties, at the North-West University, and paving the way for many illustrious academics who have followed in her footsteps. In addition, Willemien du Plessis has helped to found and establish the Environmental Law Association, serving as its secretary for many years and providing excellent secretariat support through the Faculty of Law, North-West University. Her contribution to the field of environmental law has been invaluable.

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List of Abbreviations

IJHS	International Journal of Heritage Studies
NEMA	National Environmental Management Act 107 of 1998
OUTA	Opposition to Urban Tolling Alliance
SAJAH	South African Journal of Art History
UNESCO	United Nations Educational, Scientific and Cultural Organisation