



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 25/08

OUDEKRAAL ESTATES (PTY) LTD

Appellant

and

THE CITY OF CAPE TOWN

First Respondent

**THE SOUTH AFRICAN HERITAGE RESOURCES
AGENCY**

Second Respondent

SOUTH AFRICAN NATIONAL PARKS

Third Respondent

Neutral citation: *Oudekraal Estates (Pty) Ltd v The City of Cape Town and others* (25/08) [2009] ZASCA 85 (3 September 2009)

CORAM: NAVSA, VAN HEERDEN, PONNAN, MHLANTLA JJA and
WALLIS AJA

HEARD: 18 August 2009

DELIVERED: 3 September 2009

CORRECTED:

SUMMARY: Application for review — to set aside decision to approve township in 1957 — failure to take into consideration religious and cultural rights of Muslim community — application of delay rule — unprecedented time lapse — unique circumstances — discretion exercised to set aside decision.

ORDER

On appeal from: High Court, Cape Town (Van Reenen J (Yekiso J concurring) sitting as a court of first instance).

The following order is made:

1. The appeal is dismissed with costs.
2. The costs in paragraph 1 will include in the case of the first and third respondents jointly the costs of two counsel as if they had been represented collectively by two counsel and in the case of the second respondent the costs of one counsel.

JUDGMENT

NAVSA JA (VAN HEERDEN, PONNAN, MHLANTLA JJA and WALLIS AJA concurring):

[1] There is no natural or other phenomenon in South Africa quite as iconic as Table Mountain, which stands like a sentinel overlooking the Mother City. The Cape Peninsula National Park, now renamed the Table Mountain National Park (the Park), comprising the mountain and tracts of land beyond it, was established in terms of the National Parks Act 57 of 1976. It borders the northeast corner of portion 7 of the farm Oudekraal (portion 7) and surrounds it on its eastern and southern sides. The development of portion 7 as a township by the appellant, Oudekraal Estates (Pty) Ltd (Estates), is in issue in the present appeal. The local authority within whose jurisdiction portion 7 is located and which is responsible for urban planning is the first respondent, the City of Cape Town (the City).

[2] The second respondent, the South African Heritage Resources Agency (SAHRA), established in terms of s 11 of the National Heritage Resources Act 25 of 1999, is the successor to the National Monuments Council and is statutorily

charged with the responsibility of protecting South Africa's heritage resources which are of cultural significance or other special value for the present community and for future generations.

[3] The third respondent, South African National Parks (SANPARKS), is a statutory body charged with the protection of our country's natural and cultural heritage.¹ One of its stated goals is to establish and consolidate the Park to ensure its long-term ecological, economic and social sustainability. The attainment of this goal is premised on a number of objectives, the first of which is to incorporate into the Park all land within the Cape Peninsula Protected Natural Environment (CPPNE), as well as other conservation-worthy areas outside of it.

[4] The CPPNE covers an area of approximately 30 000 hectares, running from Signal Hill all the way to Cape Point. The bulk of the CPPNE has already been incorporated into the Park. A part of portion 7 of Oudekraal falls within the cadastral boundaries of the CPPNE. SANPARKS considers it vital that portion 7 be incorporated into the Park.

[5] The Park is one of eight areas constituting the Cape Floral Region (the CFR) of South Africa. In 2004 the CFR was listed as a World Heritage site, thereby achieving renewed and elevated recognition as a site of outstanding significance to humanity. The CFR is regarded as the world's 'hottest hot spot' for plant diversity and endemism. Covering less than 0.5% of the continental area of Africa, it contains nearly 20% of its flora and, in an area smaller than 4% of Southern Africa, it has nearly 44% (comprising some 20 000 species) of the sub-continental flora. The CFR has more endemic species of plants than any of the other 18 'hotspots' in the world. In addition, it has by far the highest species density and species rarity of any Mediterranean-type climate region in the world.

¹ It was established in terms of s 5 of the National Parks Act 57 of 1976, with effect from April 1976. The National Parks Act was repealed on 1 November 2004 by s 90(1) of the National Environmental Management: Protected Areas Act 57 of 2003, but SANPARKS' continued existence was provided for in s 54 of the latter Act.

It is indeed one of the richest areas for plant diversity when compared with any similar sized area in the world.

[6] The floral vegetation of portion 7 consists of (amongst other species) Coastal Renosterveld, which has been identified as the most critically endangered ecosystem in South Africa.

[7] The farm Oudekraal represents one of the few instances in the Peninsula where there is a preserved connection between high altitude zones and the coastline — in conservation terms this is known as ‘coast to crest conservation’. This is important not only for aesthetic reasons, but also because it provides protection for the complete set of what are referred to as eco-tonal and habitat changes which occur along steep gradients.

[8] Opposite Oudekraal is a deep reef environment which is the breeding ground and habitat of rock lobster and a fish species called Cape Hottentot. Both species are under moderate threat of over-exploitation. There is also a contiguous marine reserve, approved as such, in terms of the Marine Living Resources Act 80 of 1988. The reserve stretches from portion 4 of Oudekraal, which marks the beginning of the CPPNE. At present the portion of coast immediately opposite portion 7 is a buffer zone. It is a conservational imperative to have a buffer zone at the edges of a fully protected nature area because of the natural movement of species.

[9] Furthermore, parts of the land around Table Mountain, particularly the ravines below the Twelve Apostle peaks, are of great historical, cultural and religious significance. From the turn of the 18th century, the land was used as a refuge by slaves who had escaped from their masters and the colonial authorities. Among them were Muslim spiritual leaders who had led uprisings against slavery in the Dutch East Indies and who had been captured and brought to the Cape. These leaders taught their disciples in the seclusion and safety of

these ravines and in this way fostered and kept Islam alive at the Cape. Prominent leaders who attained spiritual levels equivalent to Christian saints were buried there, these burial places being known as kramats. The kramats are visited regularly by members of the Muslim community who regard that area as sacred. A large number of Muslim graves are also to be found in these parts.

[10] Portion 7 lies between Rontree Estate and Llandudno, below the Twelve Apostles peaks and alongside the Cape Atlantic coast. In commercial terms the land in issue would be described as exclusive and prime real estate. Translated into potential monetary value, and given the description of its environs set out above, preceding and present litigation in relation thereto is more readily understandable. The background to that litigation is set out hereunder.

[11] The farm Oudekraal was first surveyed in 1818. On 18 August 1836 it was granted into exclusive private possession by way of perpetual quitrent to Michiel van Breda. Thereafter, ownership passed to Dirk Geysbert van Breda. In 1954 it passed from the latter's estate to Sir Henry Price (Price), an English national with business interests in South Africa, for a purchase consideration of £60 000. Certificates of title to portions 4, 5, 6, and 7 were issued to him on 1 November 1961. Following his death, portion 7 was transferred to Estates, a subsidiary of Castle Estate Agency (Pty) Ltd (Castle Estate), on 28 May 1965 for a purchase consideration of £50 000. On the same date portions 4 and 5 were transferred to Oudekraal Properties (Pty) Ltd, another subsidiary of Castle Estate, for a purchase consideration of £2 500 and portion 6 was transferred to yet another subsidiary of Castle Estate, also for a purchase consideration of £2 500.

[12] On 21 July 1954 Price's land surveyors applied for the establishment of Oudekraal Township on behalf of Price. In terms of the then prevailing legislation, it was envisaged to be a White group area, with an area close by reserved for domestic workers. In the application, what was proposed was a development to

be compatible with and to rival the 'much admired Riviera of the South of France'.

[13] Building regulations then in force required an applicant for township development to disclose all physical features such as watercourses, dongas, pipelines etc. It is of significance to the present litigation that, although all other important physical features of the land were set out in the application on behalf of Price, the existence of two kramats and of many other graves on the land was not disclosed. The details and importance of these kramats and graves will be dealt with later.

[14] The application for the approval of the township was in respect of 1 109 erven, within a composite township encompassing portions 4, 5, 6 and 7 of Oudekraal. On 17 September 1957 approval for four separate townships on each of portions 4, 5, 6 and 7 was granted by the then Administrator of the Western Cape Province. The approval in relation to portion 7 and its consequences are central to this appeal.

[15] The approval was ultimately in respect of 237 saleable erven on portion 7. It is common cause that the approvals in respect of the proposed extensions to the township, on portions 4, 5 and 6, lapsed by virtue of Price's failure to lodge a general plan timeously or at all. They accordingly have no bearing on this dispute.

[16] On 5 July 1960 a general plan was submitted for approval to the Surveyor-General and was thereafter approved on 10 April 1961. There was a dispute about whether the Administrator lawfully granted extensions of time within which the owner could lodge a general plan, subsequent to the approval of the establishment of the township on portion 7. For present purposes, and for reasons which will become apparent, this is an issue with which we need not be concerned. A notification of approved township was published in the Provincial

Gazette on 19 January 1962. As indicated above, Oudekraal Township was then acquired by Estates on 28 May 1965.

[17] Estates did nothing to develop portion 7 until 1996, some 31 years later, and four years after the advent of Constitutional democracy in South Africa. In that year Estates commissioned engineers to prepare drawings for civil engineering services in relation to the township on portion 7. These were completed during August 1996 and civil engineering services plans were submitted to the City on 29 August 1996. These drawings were circulated in the ordinary course within the City's engineering department for a technical evaluation. At the same time Estates announced to the media that it intended developing a township on portion 7 of Oudekraal. Predictably, that provoked a public outcry.

[18] The announcement led to the formation in early September 1996, at a public meeting attended by approximately 2 000 people, of a coalition called the 'Environmental and Mazaar Action Committee'. The coalition included members of the Save the Mountain Campaign, the Wildlife and Environmental Society of South Africa, the Muslim Judicial Council, the Islamic Council of South Africa, the Islamic Unity Convention, the Cape Mazaar Society² and other organisations. At a rally held on 15 September 1996, speakers from the Muslim Community and environmental groups appealed for united action against the development of portion 7 on religious, cultural and environmental grounds. Thus commenced the journey that led to protracted litigation culminating in the present appeal.

[19] The public outcry, including a flood of letters to and articles in the press, prompted the City to investigate the history of the Administrator's September 1957 approval, before considering the engineering services drawings submitted by Estates. It also took legal advice on the validity of the development rights

² The Cape Mazaar Society was founded in 1982 to protect and preserve kramats and Muslim graves in the Western Cape.

claimed by Estates. The Cape Metropolitan Council (the CMC) similarly took legal advice.³

[20] After receiving such advice, both the City and the CMC concluded that the Administrator's approval in respect of portion 7 had lapsed and that he had acted beyond his powers in granting Estates the extensions referred to in para 16 above.

[21] Accordingly, the CMC sent a letter dated 11 November 1996 to Estates, which recorded the following resolution from the Engineering Services Committee:

'That the Cape Metropolitan Council be informed that, as the City Council has been advised that development rights over Oudekraal Townships...had lapsed, it is not legally competent to approve the provision of services related thereto.'

[22] In response, Mr Kasper Wiehahn, the sole shareholder and director of the holding company of Estates, stated publicly that he intended to approach the Cape High Court for appropriate relief. In the ensuing months, correspondence was exchanged and Estates took legal advice. In February 1997 Mr Wiehahn publicly repeated his threat to take the battle to court. Ultimately, however, this only occurred after more than four and a half years had passed. Estates launched proceedings in August 2001.

[23] The delay was explained by Mr Wiehahn on the basis that he had spent the intervening time trying to engage the relevant authorities and other interested parties and had made overtures that had been rebuffed, thereby compelling the approach to court.

[24] In the Cape High Court, Estates sought (inter alia) an order declaring the extensions granted by the Administrator for the lodging of the general plan to

³ At the time of the approval of the township, the Cape Divisional Council, was the authority within whose jurisdiction portion 7 was located. It was a predecessor of the CMC. The City ultimately was a successor to the CMC.

have been lawfully granted and further, declaring the development rights for portion 7 to be of full force and effect. In his founding affidavit Mr Wiehahn stated that he 'understands that there are no graves and kramats on portion 7' and that graves and shrines are located on other portions of the farm. This statement is patently incorrect. I will in due course deal with Mr Wiehahn's explanation for this error, as provided in subsequent litigation. Its importance is that it prompted an in-depth investigation by the City, SAHRA and SANPARKS into the question of graves and kramats on portion 7.

[25] In the short time allowed by the litigation, a limited investigation located 20 graves on portion 7. Because portion 7 comprises 50 hectares and is on steeply sloping ground, part of which has been invaded by dense alien vegetation, it was not possible to locate all the graves. It is undisputed that there are two particularly important kramats on portion 7.⁴ The first is that of Sayed Jaffer who is regarded by Muslims as having been amongst the most pious of men. The other is that of Sayed Ahmed Mahdi, an important teacher of Islam who contributed to the religion being kept alive at the Cape. Muslims in their numbers visit the kramats of these leaders and the graves of their companions. These kramats form part of the 'Circle of Islam' made up of kramats around Cape Town. Before going on pilgrimage to Mecca, many Muslims make it their duty to visit these kramats and graves. Cape Muslims, in their inimitable manner, speak of this practice as follows: 'om die kramats te groet'. Poor people, without the means to perform the Hajj, visit the kramats as a surrogate. Portion 7 and areas around it are referred to by the Muslim community as 'Belsfontein'. This area and the mountainside as a whole are regarded as sacred and a proper place for spiritual reflection and meditation.

[26] Against this background, SANPARKS raised the defence that the approval by the Administrator in 1957 was invalid because of the non-disclosure of the kramats and graves. The City and SAHRA aligned themselves with this defence.

⁴ It is in fact common cause that there are three kramats on portion 7.

[27] The Cape High Court (Davis J with whom Veldhuizen J concurred), dismissed the application by Estates, holding that the Administrator had acted beyond his powers in extending the time limit within which the general plan was required to be lodged. The court did not deem it necessary to deal with the defence raised by SANPARKS referred to in the preceding paragraph.

[28] Estates appealed against the decision to this Court. A judgment was delivered on 28 May 2004 (hereafter referred to as Oudekraal 1).⁵ This Court found it unnecessary to deal with the question of the validity of the extensions of time granted by the Administrator. It decided the matter on the basis of the non-disclosure of the kramats and graves.

[29] Paragraphs 24, 25 and the relevant part of 26 of Oudekraal 1, set out hereafter, are of significance:

[24] There can be no doubt, however, that the presence on the land of religious and cultural sites of particular significance to a sector of the Cape Town community was a factor that should properly have been taken into account and evaluated, also on pre-Constitutional principles, in coming to the decision whether to permit the establishment of a township.

[25] Whether the Administrator, as the ultimate decision-maker, was ignorant of the graves and kramats or not, the inescapable conclusion must be that he either failed to take account of material information because it was not all before him or if, in the unlikely event that it was before him, that he wrongly left it out of the reckoning when he should have taken it into account. In either situation his decision to lend approval on the terms he granted was invalid. It was, in addition, in either event *ultra vires* for the reason that it permitted subdivisions and land use in criminal disregard for the graves and kramats. It would be impossible to avoid desecration or violation if one were to make a road over a grave site or to build over it.

[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset...But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view,

⁵ Reported as *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA).

it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[30] Oudekraal 1 went on to point out that in any such subsequent application, when a court is called upon to decide whether to set aside the invalid administrative act, it would no doubt take into account the long period of time that had elapsed since the approval but that this factor in itself need not be decisive. Much would depend on the balancing of all the relevant factors, including the need for finality and the consequences for the public at large and indeed for future generations, of allowing the decision to stand.⁶ The following statement at para 46 is relevant:

'On the material that is before us it is by no means clear that the appellant — or any third party for that matter — has in fact acted in reliance on the approval notwithstanding the elapsing of some 40 years.'

[31] Unsurprisingly, the judgment of this court was followed by the litigation leading up to the present appeal. The City and the other two respondents launched review proceedings in the Cape High Court in September 2004, in terms of which they sought an order setting aside the Administrator's approval and actions consequent thereon.

[32] In its judgment, the Cape High Court (Van Reenen J, Yekiso J concurring), recorded that counsel for Estates, properly, did not endeavour to assail the findings of this Court in Oudekraal 1. The Cape High Court stated that this was understandable as a total of 57 graves had by that stage been located on portion 7. Thus, during proceedings in the Cape High Court, the appellants

⁶ See para 46.

accepted the correctness of the principal finding in Oudekraal 1, that the administrative act of approval by the Administrator was invalid from its inception.

[33] The 'delay rule' in relation to administrative review was the sole basis advanced on behalf of Estates to contest the application by the three respondents. In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion, in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense 'validate' a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts.⁷

[34] Van Reenen J first considered, whether there had been an unreasonable delay in the institution of the review proceedings. This, he stated, had to be predicated on a value judgment, having regard to all the relevant circumstances, and a resort to the facts of other cases was unhelpful.

[35] In determining whether there had been an unreasonable delay, the High Court had regard to the conduct of each of the three applicants from 1957 to 1996. It held that, whilst the validity of the Administrator's decision might not, during the apartheid era, have been of any concern to the City's predecessors, its attention to relevant matters such as the kramats and the graves would at the very least have been brought to its attention when the engineering drawings submitted on behalf of Estates during 1996 indicated some graves.

⁷ *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 380B-381D; *Wolgroeiërs Afslaeërs (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41; *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) para 13; *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA), para 46.

[36] According to Van Reenen J, the City had adopted a supine attitude, deliberately failed to take any positive steps to have the Administrator's decision reviewed and set aside and had been content merely to align itself with the defence taken by SANPARKS during the application brought by Estates. The explanation by the City that Mr Wiehahn had made a number of public announcements to the effect that he intended approaching the courts for relief — suggesting that the city was waiting for him and that this somehow excused the delay — was unacceptable. The learned judge concluded that the City had delayed unreasonably.

[37] In respect of SAHRA, the court took into account that *it* had only been established on 1 April 2000 by the National Heritage Resources Act 25 of 1999 and that there was no evidence that either it or SANPARKS had any knowledge of the graves and kramats prior to the inspection conducted during December 2001 on behalf of the City. However, SANPARKS had not instituted separate review proceedings, but had instead contented itself with what the court termed 'a collateral challenge' to the validity of the Administrator's decision. The City and SAHRA had aligned themselves with SANPARKS' defence both in the Cape High Court and before this court in Oudekraal 1. Van Reenen J then took into account that the proceedings before him were launched approximately 30 months after the respondents had become aware of the fact that the kramats and graves were a basis for invalidating the Administrator's decision. He regarded the fact that four months had passed since the decision in Oudekraal 1 as an aggravating feature. Thus, he concluded there was also an unreasonable delay by SAHRA and SANPARKS in bringing the application.

[38] Having decided that question, the court below went on to the second leg of the enquiry, namely, whether in the exercise of its discretion it should 'condone' the delay. The learned judge agreed that this exercise was to be conducted in a manner so as to promote the spirit, purport and objects of the Bill

of Rights. In accordance with the judgment in Oudekraal 1, he was careful to consider the period of time that had elapsed since the Administrator's decision, the extent to which Estates or third parties might have acted in reliance on the decision and, finally, the consequences for the public at large, including future generations, if the decision were allowed to stand.⁸

[39] The court took into consideration the right to freedom of religion and culture of members of the Muslim community, as well as the right of the broader community to have a heritage and environmental area of high significance preserved. In this regard ss 15, 24 and 31 of the Bill of Rights are of importance. Against the historical and religious background referred to above, Van Reenen J considered the decision by the Administrator to approve the Township without reference to these sensibilities to be egregious.

[40] Having regard to the environmental importance of portion 7, in its undeveloped state, the High Court concluded that it was without doubt conservation-worthy, not only for South Africans but for all humanity. The submission on behalf of Estates, to the effect that urban development would not have the adverse effects contended for by the respondents and that legislation regulating Township development and the environment could be applied so as to address religious, cultural and environmental concerns notwithstanding, Van Reenen J concluded that the proposed development would indeed severely devalue Table Mountain as a heritage resource.

[41] The learned judge balanced Estate's asserted rights in relation to portion 7, against the invalid decision by the Administrator. He also took into account the fact that Muslims have since time immemorial paid homage to the kramats and graves, that graves sites are sacred to Muslims and that the Muslim faith abhors exhumation. It was not insignificant that, given the overgrowth on some areas of

⁸ See para 32 above, referring to para 46 of the judgment in Oudekraal 1.

portion 7, the full extent of graves is as yet unknown. An additional consideration was that the Muslim community considered the entire area to be sacred.

[42] Regard was also had to the fact that much of the presently applicable regulatory framework in relation to the environment and township development is of recent origin and was not in existence at the time of the Administrator's impugned approval. The suggestions on behalf of Estates, about a restricted development to address the concerns referred to, were in the court's view, too vague and speculative.

[43] Dealing with the prejudice to Estates, the court noted that, according to the expert evidence adduced on Estates' behalf, the value in 2004 of portion 7 with and without development rights was R570 m and R20 m respectively. If the development were to go ahead, the windfall for Estates would be astronomical. Evidently, even without development rights, the return on its initial investment is substantial.

[44] The court measured prejudice with reference to actions taken based on the Administrator's decision. After the approval, Price appointed land surveyors to draw up and submit a general plan. Mr Wiehahn's father, who had acquired the land in question, had purchased it with the intention of subdividing and developing it at the most opportune time. It was submitted before the court below that he would not have done so had he known the Administrator's decision was liable to be set aside and that his capital could have been better employed elsewhere.

[45] Van Reenen J accepted the submission on behalf of the three respondents, that the land had not been acquired by Mr Wiehahn's father solely on the basis of the layout of the township as embodied in the Administrator's approval. This is evidenced by correspondence emanating from Mr Wiehahn's

father as far back as the 1960's and subsequently by Mr Wiehahn himself, during 1996, in which the approved township plans were described as being presently unsuitable for the purposes of beneficial exploitation of the land.

[46] A submission by Estates that the three respondents had acquiesced in the Administrator's decision and had therefore forfeited the right to challenge it in the present proceedings was rejected. In this regard, the court below took into account the fact that the three respondents were public bodies acting in the public interest, seeking to set aside an invalid decision taken at the height of apartheid, on the basis of its momentous and deleterious implications for present and future generations.

[47] A further important consideration was that the Constitution and the rule of law, of which the principle of legality is an incident, required that as few invalid administrative decisions as possible should be allowed to remain intact.

[48] It had to be borne in mind that the overwhelming majority of Muslims were previously politically, socially and economically disadvantaged because of repressive and disempowering apartheid policies and were therefore unable to effectively assert and protect their interests. To refuse the order sought would be to keep intact an invalid decision, the implementation of which would violate the Muslim community's fundamental rights and offend against present-day conservation principles.

[49] Exercising the court's discretion in favour of the respondents, Van Reenen J disregarded the delay in launching the application and made an order reviewing and setting aside the Administrator's decision to approve the township. It is that order that is appealed against, with the leave of the court below.

Conclusions

[50] The parties were agreed that, in considering the correctness of the decision of the court below, the principles enunciated in *Wolgroeiërs Afslaers v Munisipaliteit van Kaapstad* 1978 (1) SA (AD) 13 at 39C-D had to be applied. The following is the relevant passage:

'Word beweer dat die aansoekdoener nie binne redelike tyd die saak by die Hof aanhangig gemaak het nie moet die Hof beslis (a) of die verrigtinge wel na verloop van 'n redelike tydperk eers ingestel is en (b), indien wel, of die onredelike vertraging oor die hoof gesien behoort te word. Weereens, soos dit my voorkom, met betrekking tot (b), oefen die hof 'n regterlike diskresie uit, met inagneming van al die relevante omstandighede.' (My emphasis).

[51] In *Setsokosane Busdiens v Nasionale Vervoerkommissie* 1986 (2) SA 57 (A) at 86D-E, with reference to *Wolgroeiërs*, the following was stated:

'Die ondersoek, wat (a) betref, het niks temake met die Hof se diskresie nie; dit behels 'n blote ondersoek na die feite ten einde te bepaal of die tydperk wat verloop het, in die lig van al die omstandighede, redelik of onredelik was.'

As stated by Van Reenen J, this entails a value judgment by the court in relation to its view of the reasonableness of the time that has elapsed in the light of all the circumstances. This should not be equated with the exercise of a discretion, which forms the subject of the second leg of the exercise. See in this regard *Setsokosane* at 86E-F and *Associated Institutions Pension Fund* at 321G-H.

[52] Before us it was contended on behalf of Estates that, in determining the reasonableness of the delay and, later, in exercising its discretion whether to disregard the time lapse, the court below had incorrectly had regard only to the period post 1996. It was submitted that the supine attitude of the City, SAHRA and SANPARKS and their predecessors should have been taken into consideration and that the period of delay should have been regarded as having commenced a short while after the approval of the township in 1957.

[53] It is true that, had the predecessors of these entities acted properly and in the interest of the broader community, rather than only in the narrow interests of the dominant White minority, they would have alerted themselves to the

presence of graves and kramats by that early stage. This was conceded by counsel for SAHRA. Similarly, even though they were operating in an era in which environmental concerns were not a priority, they ought, in any event, to have been more concerned with the conservation of Table Mountain and its surrounds. As far back as 1923 General J C Smuts said the following:

‘We, as a nation, valuing our unique heritage, should not allow (Table Mountain) to be spoiled and dispoiled, and should look upon it as among its most sacred possessions, part not only of the soil, but of the soul of South Africa. For centuries to come, while civilisation lasts on this subcontinent, this national monument should be maintained in all its natural beauty and unique setting. It should be symbolic of our civilisation itself, and it should be our proud tradition to defend it to the limit against all forces of man or nature to disfigure it.’

[54] Ironically, this statement by General Smuts was quoted by Mr J F Otto, the Director-General of the Department of Water Affairs, Forestry and the Environment, in a speech made in October 1980 to an interim management committee for Table Mountain and the Southern Peninsula mountain chains, at a meeting held under the auspices of that department. The management committee had a number of subcommittees and Mr P N Tomalin, the chief planner of the Divisional Council of the Cape was a member of the boundary subcommittee.

[55] This inactivity and lack of concern in relation to the Muslim community and their cultural heritage and religious beliefs, and further, in regard to the environment, by the predecessors of the respondents, insofar as this case is concerned, stretches at least as far back as 1957. In my view, it does not matter that the Administrator was the legal personality that made the decision to approve the township. At that time, portion 7 was within the jurisdiction of the Divisional Council. Clearly, if portion 7 had been of religious significance to members of the White community and had held historical and cultural significance for them, the predecessors of the three respondents would in all probability have been alert and prompt in either their opposition to the proposed township, or in the undoing of the decision to approve it.

[56] In my view, it is not necessary to engage in any further debate concerning the question of unreasonable delay. I am willing to accept, for present purposes, in favour of Estates that there was an unreasonable delay commencing shortly after the grant of township approval in 1957.

[57] Before proceeding to the next leg of the enquiry it is necessary to pause briefly to reflect on the appropriate terminology. As can be seen from the highlighted part of the dictum from *Wolgroei* referred to in para 52 above, this court initially stated that in exercising its discretion a court had to consider whether the unreasonable delay ‘oor die hoof gesien behoort te word’. This was repeated in *Setsoke* at 87H. This phrase could be translated to mean ‘disregarded’ or ‘excused’ or ‘condoned’. This court has in subsequent decisions repeatedly referred to the delay being condoned.⁹ In my view, there is ultimately no substantive difference between those expressions, and all amount to saying that a court has a broad discretion to be exercised in the light of all relevant facts.

[58] I now turn to deal with the relevant factors in relation to the second leg of the enquiry, namely, whether the delay should be disregarded. It was submitted before us on behalf of Estates that, when it purchased portion 7, it relied on the fact of the approved township. The following was said in *Oudekraal 1* at para 46: ‘The appellant does not allege that it purchased the land in reliance on the fact that the township had been established. On the contrary, the deponent to the founding affidavit suggests that it was the location of the land, rather than the approval of the township, that caused the land to be purchased. At the time of the purchase...the deponent’s father...held the view that “land is close to, or on the slopes of Table Mountain is valuable land and should be acquired if and when possible”...Nor does the deponent’s father appear to have had any intention of developing the land in accordance with the approval that was granted because he was “also of the view that the single residential grid layout of the township on portion 7...had already become outdated since being approved.” It is difficult to see in those circumstances in what way the appellant, or any other person for that matter (other than the functionaries who played a role in the establishment

⁹ In this regard see *Mamabolo v Rustenburg Regional Local Council* op cit 141I-142A; *Associated Institutions Pension Fund v Van Zyl* op cit at 321G-H; *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) at 609G-I;

process), can be said to have placed reliance on the Administrator's approval in the time since it was granted.'

These findings are apposite.

[59] It is significant that it was Mr Wiehahn's practice to invest in land for the long term and to develop it when it was the optimum time to do so. Attendant upon this is the risk that all long-term property investors take, namely, that of changed market conditions, social and political changes, changing urban planning norms and strategies, shifting institutional attitudes, new scientific evidence and accumulating and incremental new found wisdom.

[60] In the period between the acquisition of portion 7 and 1996, Estates had tentative discussions and interactions with at least one contractor and at least one potential co-developer. No proof has been supplied, however, to show that there was any substantial monetary outlay by Estates in this regard. Although engineers submitted engineering services diagrams on Estates' behalf in 1996, it is also unclear whether this entailed any expenditure.

[61] We were urged to consider the loss in value of portion 7 in the event of a setting aside of the Administrator's approval. As pointed out above, according to the expert on behalf of Estates, the value of portion 7 with development rights was estimated at R570 m and R20 m without such rights. This of course does not even take into consideration the potential profits in the event of a successful marketing of the erven in what would potentially be the most exclusive of suburbs. It was submitted on behalf of Estates that, had it known of the problems that have now surfaced, it would have invested the amount paid for portion 7 elsewhere and its return on that investment would have been considerably more than R20 m.

[62] There appears to be some substance to the submission on behalf of the City that the patrimonial loss that might be occasioned by the City's delay in

reviewing the Administrator's decision, should not be calculated with reference to the present market value of portion 7 with development rights, namely R570 m, but should be calculated in accordance with the return on an investment of £50 000 in comparable property.

[63] Expert evidence was marshalled on behalf of the respondents to show that the return of R20 m on £50 000 was an even better return than would have materialised had the latter amount been invested in comparable property in nearby Camps Bay. In addition, we were urged by the respondents to consider that portion 7 had been acquired by Estates for a purchase consideration less than that paid for the property by Price. It is in fact evident from a statement made by Mr Wiehahn's father in a document before us that the purchase of portion 7 from the deceased's estate resulted in Estates acquiring the property not at a premium but at a discount.

[64] Whilst accepting that R20 m is still a substantial return on an investment of £50 000, it appears to me that it would be churlish not to accept that Estates will suffer some financial prejudice as a result of the respondents' failure to act promptly. However, the fact is that on any reckoning, the return on its initial investment is substantial and this cannot be disregarded.

[65] A further relevant factor in the second leg of the enquiry is that the township approval was sought without any disclosure of the graves and of what must have been the obvious significance of the site to scores of Cape Muslims. Even though Price was a British National and there is no evidence that he had acquainted himself with the terrain, the fact remains that township approval was obtained without disclosure of material information. At the very least, the professionals who had been instructed by him to submit the application for the approval of the township were remiss in not supplying the necessary information. Price ultimately must bear the responsibility for the approval having been obtained without proper disclosure.

[66] It is clear from Mr Wiehahn's founding affidavit in the first application in the Cape High Court that he too sought to suppress the presence and extent of the graves and kramats on portion 7,¹⁰ notwithstanding the full glare of publicity to which portion 7 was exposed. His explanation, proffered in the present litigation (at a time when it was no longer possible to conceal that fact) that he had denied the presence of the graves and kramats because he had recently undergone brain surgery and that his mental faculties must have been affected thereby, lacks credibility. It discounts the coherence and emphatic nature of his founding affidavit and his positive statement that the graves were located on other portions of the farm. Furthermore, it ignores the fact that he was assisted by attorneys and other professionals and that they would in all likelihood, in the prevailing circumstances, have ensured that investigations were properly conducted into the assertions by interested and aggrieved parties.

[67] However, even if one were to accept his explanation for initially denying the presence of the graves and the kramats, there are other negative features in relation to Mr Wiehahn. Subsequent to the public outcry and in exchanges with officials representing the City and with influential people, including the African National Congress and representatives of the Muslim community, Mr Wiehahn sought to achieve a political solution and, in the process, held out that he had development approvals for the other portions of Oudekraal. In the present case Mr Wiehahn, despite his attention being repeatedly and emphatically drawn to the fact, displays insensitivity to the abhorrence felt by Muslims for exhumation. As late as 9 March 2005, when he deposed to his answering affidavit, he stated the following:

'The only other reason advanced as to why the graves and shrines are located in Portion 7 pertains to "religious peace" in the mountain area. But such religious peace may be obtained in a range of other natural environments to which the shrines and graves may be relocated. It can also be preserved *in situ* by appropriate and sensitive development. That consideration accordingly does not justify the relief sought in the present application.

¹⁰ In his founding affidavit, Mr Wiehahn stated that graves were present on other portions on Oudekraal but not on portion 7.

I emphasize that I do not in any way dispute the value and significance that these graves and shrines hold for sectors of the Muslim community. However, that value need not necessarily be diminished by relocating the graves and shrines to alternative sites or protecting them where they are. That is, however, a matter that can be discussed with the Muslim community and its leaders at the appropriate time.'

It is, however, clear from the affidavits by experts and Muslim religious leaders in support of the respondents' case that exhumation is not a negotiable option.

[68] It was submitted on behalf of Estates that the application brought by the respondents and in particular SANPARKS, was no more than a thinly disguised effort to expropriate portion 7 without having to pay appropriate compensation. It was argued that, if this court were to set aside the Administrator's approval, it would have that effect. This, of course, ignores the fact that the three respondents were spurred into action because of public opposition and pressure and that legal advice from a number of sources and court decisions are what ultimately determined the litigation route up to this point. Furthermore, this litigation is not about expropriation and this court should not speculate on future developments but should rather devote itself to the task at hand. In appropriate circumstances s 25 of the Constitution affords protection to property holders.

[69] We were exhorted to guard against the emotive issues raised in this appeal and to seriously consider whether, as counsel for Estates put it, less invasive means could result in a 'win-win' situation for all interested parties. In this regard we were referred to the provisions of the Environment Conservation Act 73 of 1999, the National Environmental Management Act 107 of 1998, the Land Use Planning Ordinance 15 of 1985 and other related legislation which, it was submitted, provided mechanisms for the accommodation of environmental, religious, cultural and heritage concerns.

[70] It appears to me to be clear that the entire area is regarded as sacred by Muslims. The full extent of graves is as yet unknown. In Oudekraal 1 this court stated unequivocally that Estates is not entitled to proceed with the development

of the land in accordance with the general plan registered as part of the township approval process. This was because the plan contemplates the development of residences and roads on various burial sites. In my view, there is no basis on which this court can now engineer the 'win-win' situation postulated by Estates. It is our task to exercise our discretion either in favour of or against the application for review. The fact that the present development cannot continue as per the approved township plan as already determined in Oudekraal 1 is a significant factor to be considered in the exercise of that discretion.

[71] The description of Table Mountain and its surrounds set out at the commencement of this judgment, including the nature of the flora in the Park and the threatened species of Coastal Renosterveld and its importance to the country and humanity at large, is obviously also a vital feature. Portion 7 is situated on the uniquely beautiful western slopes of Table Mountain. It fronts on Victoria Drive, a scenic drive comparable to the most exquisite drives anywhere in the world. It has been likened to the Big Sur Drive in San Francisco, California. It offers integrity of scenery from mountain crest to sea, not easily found in such close proximity to major metropolitan areas elsewhere in the world. Its aesthetic value heightens its value for tourism.

[72] The momentous change brought about by the advent of constitutional democracy in our country is a further important factor. In *Amod v Multilateral Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) Mahomed CJ, in dealing with the right of a Muslim widow to compensation from the Fund, had regard to the fact that, previously, marriages solemnised in terms of Islamic law were held not to be deserving of legal protection. He contrasted this with the position of the recognition of marriages solemnised according to one faith or philosophy — marriages solemnised in church by a marriage officer or civil marriages concluded in terms of prevailing law. The following was stated:

'This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993.

The new ethos had already begun in 1989 with the publication of the report on Group and Human Rights by the South African Law Commission, recommending repeal of all legislation inconsistent with the negotiated bill of fundamental rights; it accelerated with the speech of the former State President on 2 February 1990 and the unbanning and the visibility of the previously prohibited political movements and finally became irreversible with the commencement and conclusion of negotiations at CODESA from 1991 until 1993. The new ethos was firmly in place when the cause of action in the present matter arose on 25 July 1993.'

[73] It is not insignificant that insensitivity to the religious rights and cultural practices of persons other than those of the dominant political group has in the past regrettably received judicial sanction. The Cape Province was not an exception. Indeed, in *Bronn v Fritz Bronn's Executors and others*¹¹ the following was said by one judge:

'I trust that in a short time...the sacred institution of marriage will be brought by some well devised law within the reach of the people of this Colony who have not yet embraced the greater blessings which they would obtain by Christian marriage, by which I mean of course marriage to one wife, which, among the *heathen* ought to be sanctioned and encouraged by law. It is, even amongst them, an institution of a divine character — a glimmer of the light once shining in Paradise, which is still vouchsafed to them.'

and this by another:

'Equally so with the Mohammedans. If what they call marriage is not what we call marriage, in its essential requirements, but what the jurisprudence even of Christian Rome under the Emperors, up to the time of Leo the Philosopher, would call a recognised concubinage — we cannot, because of the ambiguity of the expression, make that marriage which is a wholly different relation.'

[74] In the *Amod* case, Mahomed CJ indicated the manner in which our law should evolve. At 1319-1330B the following appears:

'This important shift in the identifiable *boni mores* of the community must also manifest itself in a corresponding evolution in the relevant parameters of application in this area. "The common law is not to be trapped within the limitations of its past." If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.'

¹¹(1860) 3 Searle 313 at 318, 320-321 and 333.

[75] The right to exercise one's religion and culture, the recognition of the value of diversity and the obligation to be tolerant of the views and beliefs of others is now enshrined in the Bill of Rights. Section 15 of the Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion. Section 31(1) of the Constitution provides:

'(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.'

[76] Furthermore, the right to have the environment protected for the benefit of present and future generations through reasonable and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development is also provided for in s 24 of the Constitution.

[77] Regrettably, humankind has not always been aware of the importance of treading softly on this planet. Environmental concerns have only recently begun to receive the necessary attention and, even then, humankind is not always sufficiently aware of the environmental perils consequent upon deeds or inaction. In *Fuel Retailers Association v Director-General: Environmental Management and others* 2007 (6) SA 4 (CC) the Constitutional Court referred with approval to the following dictum of the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 37 ILM 162 (1998) 200 in para 140:

'Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration,

and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'

[78] Of course Estates' property rights deserve recognition. But, property rights have never been absolute. Estates has not been deprived of its property. Nor is portion 7 valueless without development rights. As pointed out above, this property, even without development rights, has considerable value. Estates' concerns in relation to future expropriation and adequate compensation can be met by resort to its rights set out in s 25 of the Constitution referred to earlier.

[79] It is true that the degree of delay in this case is unprecedented. The other circumstances are, however, equally unique. The ecology of the area, as has been described, is unequalled. Moreover, the entire area is regarded as sacred by a formerly marginalised section of South African society.

[80] I am mindful of the public interest in the finality of administrative decisions and acts. The other side of the coin is the public interest in portion 7 and its surrounding areas. In *Ras Behari Lal and others v The King Emperor* [1933] All ER Rep 723 [PC] the Privy Council set aside the convictions and allied death sentences as well as the sentences of imprisonment imposed by the High Court of Patna on the basis that one of the jurors did not understand English, the

language in which some of the evidence was adduced, the addresses of counsel were made and the judgment was delivered. Lord Atkin said the following:

'It would be remarkable indeed, if what may be "a scandal and perversion of justice" may be prevented during the trial, but after it has taken effect the courts are powerless to interfere. *Finality is a good thing, but justice is a better.*' (My emphasis).

[81] I agree with the court below that the result in this case should be driven by the principle of legality. In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC) at para 56 the following is stated:

'[A] local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition — it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law.'

[82] In the present case it is in my view possible to correct the monstrous wrongs and injustices of the past without doing violence to the property rights of Estates. It appears to me that, in the totality of the circumstances referred to above, to incline in favour of the respondents would be to exercise our discretion so as to promote the spirit, purport and objects of the Bill of Rights. In the circumstances of this case, by ensuring that an invalid decision does not stand, the principle of legality and the interests of justice will be advanced. For all the reasons set out above, the conclusion reached by the court below cannot be faulted and accordingly the appeal must fail.

[83] Costs is the remaining issue. The court below was generous in the cost order it made. The City was afforded the costs of three counsel and the other two respondents were each afforded the costs of two counsel. It was submitted on behalf of Estates that the order of the court below should be set aside and substituted with no order as to costs on the basis that the opposition to the application was reasonable and justified. It was submitted in the alternative that

all of the respondents should not be entitled to the costs of more than one legal team consisting of two counsel.

[84] Costs is a matter within the discretion of a court. The court below in para 48 set out in detail its reasoning for the order made by it. It took into account the

complexity of the issues and the voluminous record. It reasoned that each of the respondents were different statutory organisations and operated in different spheres and that the use of three separate teams was justified. There appears to me to be no basis upon which to interfere with the costs order by the court below.

[85] Before us the respondents were represented by three legal teams even though the first and third respondents presented a consolidated set of heads. The City was represented by three counsel, SANPARKS by two and SAHRA by one. Subsequent to the decision in the court below, the legal issues had crystallised and the respondents had made common cause. Having regard to the history of the protracted litigation, the nature and extent of the case and documentation all of which was well known to everyone, as were the relevant parts of the record. In my view, the alternative submission on behalf of the appellant, insofar as they pertained to costs in the present appeal, are justified in relation to the City and SANPARKS, who made common cause. SAHRA acted separately but should only recover the costs of one counsel. That means that the appellant will have to pay the costs of three counsel which matches the size of its own legal team.

[86] The following order is made:

1. The appeal is dismissed with costs.
2. The costs in paragraph 1 will include in the case of the first and third respondents jointly the costs of two counsel as if they had been represented collectively by two counsel and in the case of the second respondent the costs of one counsel.

M S NAVSA
JUDGE OF APPEAL

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