REPORTABLE.

IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

Case No. 7699/01

In the matter between:

OUDEKRAAL ESTATES (PTY) LIMITED **Applicant**

and

THE CITY OF CAPE TOWN **First Respondent**
THE MINISTER OF LOCAL GOVERNMENT AND DEVELOPMENT PLANNING, WESTERN CAPE **Second Respondent**
THE SOUTH AFRICAN HERITAGE RESOURCES AGENCY **Third Respondent**
SOUTH AFRICAN NATIONAL PARKS **Fourth Respondent**

JUDGMENT DELIVERED: 20 JUNE 2002.

DAVIS J

Introduction.

On 4 September 2001 applicant brought an application for relief in the following form:

1. Declaring that the extensions of the period for submitting to the Surveyor General the General Plan for Erf 2802 Camps Bay in the Municipality of Cape Town, Western Cape Province (previously known as Portion 7 of the Cape Farm 902) ("Oudekraal") that were granted by the Administrator of the erstwhile Cape Province from 1958 to 1960 were ***intra vires*** his powers under section 19(1) of the Townships Ordinance, 33 of 1934 ("the Ordinance") and of full force and effect, and that, as a consequence –

1.1 General Plan T.P. 1781 L.D. for Portion 7 of Oudekraal was submitted to the Surveyor General within the extended time period permitted by section 19(1) of the Ordinance;

1.2 the approval of General Plan T.P. 1781 L.D. for Portion 7 of Oudekraal by the Surveyor General in April 1961 was ***intra vires*** and of full force and effect;

1.3 the application for the establishment of a township on Portion 7 of Oudekraal did not lapse in or about 1958, 1959 or 1960 by virtue of non-compliance with section 19(1) of the Ordinance.

2. Declaring that the extension of the period for lodging with the Registrar of Deeds the approved General Plan T.P. 1781 L.D. for Portion 7 of Oudekraal that was granted by the Administrator in 1961 was ***intra vires*** his powers under section 20(1), read with section 20(3), of the Ordinance and of full force and effect, and that, as a consequence –

2.1 the application for the establishment of a township on Portion 7 of Oudekraal did not lapse in 1961 by virtue of non-compliance with section 20(1) to (3) of the Ordinance; and

2.2 the opening of a township register and the registration certificate of title in respect of Portion 7 of Oudekraal in November 1961, in terms of section 46 of the Deeds Registries Act, 42 of 1937, was ***intra vires*** the powers of the relevant official and of full force and effect.

3. Declaring, in addition and in any event, that the Applicant's development rights

over Oudekraal Township (General Plan T.P. 1781 L.D.), on Erf 2802 Camps Bay in the Municipality of Cape Town, Western Cape Province (previously known as Portion 7 of the Cape Farm 902), notification of the approval of which was published in the Provincial Gazette on 19 January 1962, under Public Notice 59 of 1962, are of full force and effect, and that the Applicant has the right to subdivide the aforementioned land in accordance with General Plan T.P. 1781 L.D.

This application was opposed by 1st, 3rd and 4th respondents.

Background.

The nature of this application necessitates a brief examination of the history of the ownership of the land which is the subject of this application. In the 19th century and in the first quarter of the 20th century the quitrent farm 'Oudekraal' extended around the Atlantic coast from Camps Bay to Hout Bay. At the time of the abolition of the Quitrent Act in 1934, the farm Oudekraal ('the farm') belonged to Dirk Gysbert van Reenen van Breda.

In September 1941 portion 1 of the farm was framed under title deed 9541 and transferred to the State. Portion 2 of the farm was framed under title deed 10186 and transferred to the then City Council in June 1949. The remaining portions of the abolished Quitrent land were transferred from the Estate of G.D. van Reenen van Breda to Sir Henry Philip Price under title deed 725 dated 28 January 1954.

On 10 February 1955 Sir Henry Price framed portion 3 of the farm under title deed 9272 and sold that portion to one Emily Bolton. Portion 3 was part of the farm that contained a dwelling erected in 1929 by the van Breda family.

On 21 July 1954 an application was made on behalf of Sir Henry Price for permission to lay out a township called Oudekraal on the remainder of the farm. This application was approved by the Administrator of the Cape Province on 17 September 1957 subject to certain conditions in terms of section 18 of the Townships Ordinance 33 of 1934.('the Ordinance'). On the same day , 17 September 1957 , approval was also given for the establishment of townships on other portions on the remainder of the farm, later described as portions 4, 5 and 6. The townships on portions 4, 5 and 6 were to be called respectively Oudekraal township (extension No.1) Oudekraal township (extension No. 2) and Oudekraal township (extension No. 3).

On 14 November 1958 Stern and Korodetz, a firm of land surveyors, made application to the Administrator on behalf of Sir Henry Price for an extension of time for the lodgment of the general plan of the Oudekraal township in terms of a letter dated 11 November 1958 which was received by the Provincial Administration of the Cape of Good Hope on 14 November 1958. In terms of a letter of 22 November 1958 the Administrator extended the time period to 30 May 1959, within which period a general plan of the township had to be lodged with the Surveyor General. On 30 May 1959 Stern and Korodetz, in a letter dated 29 May 1959, made a further application for an extension of time within which to lodge the general plan. On 8 June 1959 the Administrator, in terms of section 19(1) of the Ordinance, extended the time period for the lodging of the general plan to 31 December 1959.

On 23 February 1960 Stern and Korodetz, in a letter dated 22 February 1960, made application for an extension of time within which to lodge the general plan to 30 July 1960. On 2 March 1960 the Administrator extended the time to lodge the general plan to 30 June 1960 in terms of section 19(1) of the Ordinance .
On 5 July 1960 a draft general plan was submitted to the Surveyor General for examination and approval by Stern and Korodetz under cover of a letter dated 30 June 1960. On 10 April 1961 the Surveyor General approved the general plan.

On 22 August 1991 attorneys Rex Simpson and Kenneth Karr wrote to the Administrator as follows "The above township plan was approved by the Surveyor General on 10 April 1961-T.P. Plan 1761LD and shortly thereafter the Surveyors sent us copies of the Plans for lodgment with the Registrar of Deeds in terms of section 20(1) of the Township Ordinance No.33 of 1934. Unfortunately these copies became mislaid in our office and have only just been traced. In consequence the statutory period of three months within which they have had to be lodged with the Registrar of Deeds has expired. It will therefore be appreciated if you will give us an extension of time within which to lodge same with the Registrar of Deeds".
In a letter dated 25 August 1961 the Administrator, acting in terms of section 20 (3) of the Ordinance extended the time period to 31 October 1961 within which the general plan of the township had to be lodged with the Registrar of Deeds. On 9 January 1962 the general plan was eventually lodged with the Registrar of Deeds. On 11 January 1962 the Registrar of Deeds advised the Provincial Secretary that the requirements of section 20 of the Townships Ordinance had been met with regard to the general plan and that the Administrator could accordingly cause the approval of the Township to be gazetted in terms of section 20(6) of the Township Ordinance. On 19 January 1961 notification of approval of the Oudekraal township general plan T.P. 1781 L.D appeared in Provincial Notice PM 59/1962.

Very little of relevance then took place between 1962 and 1996, save that applicant acquired the property on 28 May 1968 from the deceased estate of Sir Henry Price. According to Mr Casper Wiehahn, who deposed to an affidavit on behalf of applicant, his father, who had been the driving force behind the acquisition of the property in

1968 was 'in no rush' to develop any part of the farm. Mr Wiehahn stated that his father was of the view 'that a single residential grid layout of the township of portion 7 which he had acquired had already been outdated since being approved.'
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No serious attempts were made to develop the land until 1996, shortly after Mr Casper Wiehahn assumed control of applicant. Mr Wiehahn states in his founding affidavit that he 'took over Oudekraal' in 1995 at which time 'I turned my attention to portion 7'. He first entered into a Memorandum of Understanding with Devland Construction (Pty)Ltd. Eventually it appears as if this arrangement was 'called off.' Mr Wiehahn then employed the firm of Wouter Engelbrecht and Associates to prepare drawings for civil work for portion 7 which drawings were completed in August 1996. The engineering services plan for portion 7 was submitted to the Acting Chief Executive Office of the Cape Metropolitan Council for approval. In response to that application, applicant received a letter from the Acting Chief Executive Officer dated 11 November 1996 to the effect that 'With reference to your application in the above regard, I have to advise that the Cape Town City Council at its meeting held on 31 October 1996, considered the attached reference from the Engineering Services Committee (C.7) and resolved as follows: 'That the Cape Metropolitan Council be informed that, as the City Council has been advised that development rights over Oudekraal township on Cape farm 902/7 had lapsed, it is not legally competent to approve the provision of services related thereto.

As agent to the Cape Town City Council you are accordingly informed that this Council is not in a position to approve your application for approval of the engineering services plan.'

On 16 November 1996 the then attorneys of applicant addressed a letter to the Acting Chief Executive Officer of the Cape Metropolitan Council requesting that it be furnished with reasons in writing why the engineering services plan had not been approved. On 19 December 1996 attorneys Fairbridge Arderne and Lawton, acting on behalf of first respondent, wrote to inform applicant that its client had been advised by senior counsel that 'the Oudekraal Township application had lapsed'. A number of reasons were given to justify this conclusion, including (a) that a general plan had not been submitted to the Surveyor General within the twelve month period prescribed by section 19(1) of the Township Ordinance, (b) that, as the Administrator's extensions of the period within which a general plan was to be submitted to the Surveyor General, were granted, after the lapse of twelve months from the date on which the Administrator had notified the then owner of the land that the application had been granted the Administrator had cited ***ultra vires*** his powers in terms of section 19(1), (c) that the Administrator's 'purported' extensions granted on or about 8 June 1959 and 2 March 1960 respectively were ***ultra vires*** his powers in terms of section 19(1) of the Ordinance in that the section did not admit of more than one such extension being granted, and (d) that the then owner of the land failed to lodge the approved general plan with the Registrar of Deeds within three months of approval thereof by the Surveyor General as

required by section 20(1) of the Ordinance. Fairbridges went on to conclude: 'In consequence of such failure the grant of the application was deemed to have lapsed in terms of section 20(3) of the Townships Ordinance. Accordingly the Administrator's extension of that period on or about 24 August 1961 i.e. more than 3 months after approval of the General Plan was also ***ultra vires*** his powers in terms of section 20(3) of the Townships Ordinance.'

It appeared from press reports to which Mr Seligson, who appeared together with Mr Muller on behalf of first respondents, referred that Mr Wiehahn intended to proceed to court in response to this letter from Fairbridges. In this regard Mr Seligson referred particularly to a Sunday Times Metro report of 17 November 1996 in which the following appeared:
'Oudekraal land owner Cassie Wiehahn told Cape Metro that the legal battle was on – and that it was only a matter of getting a court date to launch a counter attack in defence of his rights. "Our legal opinion has it that our rights are in place, I'm just waiting for an opening in court." He disclosed on Wednesday in reaction to the Cape Metropolitan Council's official notification earlier in the week that it was not in a legal position to approve services plan for the controversial development.'

Contrary to these reports no such legal application was launched. According to Mr Seligson, applicant elected instead to pursue a political approach to the problem, and then only belatedly. For example Mr Wiehahn in his founding affidavit states 'During 1998, I therefore met with Provincial Ministers Kobus Meiring and Lampie Fick. They indicated that the Province was not prepared to become involved. I then proposed a complete redesign of the thousand potential plots on Portions, 4, 5, 6 and 7 to provide for a higher density development, protection for Muslim Kramats, a donation of a portion of the land to the National Parks Board, and the construction of a monument at the entry and exit to the development and a marina in one of the bays along the route. I offered to donate a percentage of the sale proceeds for the purposes of constructing housing for the poor. ….. This idea was put to Mr Ebrahim Rasool ,the leader of the ANC in the Western Cape. Again, however, this proposal came to naught. So did subsequent discussions with the province in respect of a land swap'.
Nothing further of significance occurred until receipt by first respondent's attorneys on 8 May 2001 of a letter from applicant's attorneys in which ***inter alia*** it was said 'In the light of your client's reaction to the submission of the services plans, our client has not approached your client nor endeavored to negotiate and/or discuss with your client any of the remaining issues and we would be pleased if you would, for the sake of formality, confirm that it would be appropriate for our client to accept that for the same reason set out….your client would refuse and/or fail to deal with any issue raised in the conditions of approval which require our client's participation.' First respondent's attorneys confirmed this position in a letter of 7 June 2001. After further correspondence between the attorneys this application was eventually launched.

Issues to be determined.

Flowing from the facts as outlined, the following issues require determination by this Court:

1. Has the applicant succeeded in establishing that the Administrator's approval on or about 17 September 1957 of the application by Sir Henry Price for permission to establish a township on what is now portion 7 Oudekraal was validly obtained and granted in terms of the Ordinance

2. If the answer to (1) is affirmative , were the periods for submitting to the Surveyor General the general plan for the township so approved validly granted by the Administrator in terms of section 19 of the Ordinance.

3. If (2) is answered positively, was the general plan TP 1781 L.D duly submitted to the Surveyor General within 'such further period' as contemplated by section 19 of the Ordinance and validly approved by the Surveyor General in terms thereof.

4. The further questions then arise:

   4.1 Was this extension of the period for lodging the general plan with the Registrar of Deeds validly granted by the Administrator in terms of section 20 of the Townships Ordinance?

   4.2 Was the general plan duly lodged with the Registrar of Deeds within 'such further period as contemplated by section 20 of the Ordinance and an endorsement on the owner's title deed validly made by the Registrar of Deeds pursuant to such lodging?

4.3 Once portion 7 was sub-divided from the rest of the farm Oudekraal and subsequently transferred to the applicant separately from the remainder of Sir Henry Price's land comprising land designated for 'commonage', did any township rights in respect of portion 7 survive , having regard to the provisions of paragraph 14 of the conditions which attached to the approval of the original application and the provisions of section 20 of the Ordinance?

5. Even if the court finds in favour of respondents on any of the points 1-4 (it being common cause that respondents would only need to be successful on any one of these challenges), was the fact that the development rights over Oudekraal township were endorsed against the title deeds of portion 7 in the Deeds Registry sufficient to render such rights of full force and effect in law?

6. Even if the applicant succeeds in respect of all these challenges including that set out in 4.3 above, the question arises whether the court, given all relevant circumstances, should exercise its discretion in favour of applicant and grant a declaratory order as sought by applicant in these proceedings.

The Question of the Administrator's Approval on or about 17 September 1957 of the application by Sir Henry Price for permission to establish a township.

Section 19(1) of the Ordinance reads as follows:

"If the application be granted the owner shall within a period of twelve months from the date of notification thereof by the Administrator, or within such further period as the Administrator may in each case determine, cause a general plan in accordance with the

conditions prescribed by the Administrator and showing the numbers assigned to the erven and also where necessary a diagram of the land included in the township or sub-divided estate, to be framed and submitted in duplicate to the Surveyor-General. The numbering of the erven shall be subject to the approval of the Surveyor-General in consultation with the Registrar."

Section 19(3) provides: "Should the owner fail to submit the general plan and, where necessary, the said diagram to the Surveyor-General within the said period of twelve months or within such further period as may have been allowed by the Administrator, a grant of the application shall be deemed to have lapsed."
Section 19(1) of the Ordinance required the general plan to have been submitted to the Surveyor-General within twelve months of the Administrator's approval. In the present dispute a period in excess of twelve months had elapsed from the date on which the Administrator gave notification of his approval of Sir Henry Price's application for township development (on 17 September 1957) and the application for an extension by land surveyors Stern and Korodetz for the period in which to submit the general plan (on the 14 November 1958).

Viewed within the context of the facts of the present dispute the questions raised by these provisions can be summarised thus:

1. Could the Administrator have extended the initial period of twelve months after the period had expired ?

2. Could the Administrator have granted extensions after expiry of the earlier extension?

Mr Heunis, who appeared together with Mr Binns-Ward and Mr Farlam on behalf of applicant, referred to the equivalent legislation in other provinces where the intention of the applicable legislation had been made clear. Thus section 11(1) of the Orange Free State Township Ordinance 9 of 1969 provides "An applicant shall within a period of one year from the date of the notification of the approval in terms of section 10(2) or within such a further period as the Administrator may in each case determine, lodge for approval

with the Surveyor-General the general plan and such diagrams as may be necessary for the establishment of the township."

Section 11(2) provides: "if the applicant fails to lodge the general plan and diagrams with the Surveyor-General within the period or further period contemplated in sub-section (1) the approval of the application shall lapse unless the Administrator, after consultation with the Board condones such failure."
In these sections, of which similar formulations appeared in the Natal Town Planning Ordinance No. 27 of 1949 and the Transvaal Town Planning and Townships Ordinance 25 of 1965, provision was made for the ***ex post facto*** condonation of non compliance with the requirements relating to filing and lodgment of the relevant documents within the prescribed period. Mr Heunis submitted that, since all these Ordinances were concerned with the filing and lodgment with officials appointed by the national level of government such as the Surveyor-General and the Registrar of Deeds and concerned the same subject matter, that is town planning, there was no apparent reason why the position which applied in other provinces should not also have applied in the Cape Province.

In addition Mr Heunis submitted that the wording of the Ordinance was clearly capable of sustaining such a regime, namely that the Administrator was empowered to extend the initial periods as well as extending any period after the expiry after the initial period.

Mr Heunis focused on the phrase in section 19(3) 'The grant of the application shall be deemed to have lapsed' in order to support his submission that this deeming provision connoted the meaning that 'lapsing' shall be regarded as having occurred unless the Administrator decides otherwise. The concept of a deemed lapsing must be distinguished from an actual lapsing since the deeming provision only became operative after the initial period (or any extension thereof) had expired. It followed that the Administrator could competently give ***ex post facto*** extensions. In this connection Mr Heunis relied upon the judgment in **S v Rosenthal** 1980(1) SA 65(A) at 75 H –76 A where **Trollip J A** said the following about the word 'deeming': 'The expression has no technical or uniform connotation. Its precise meaning, and especially its effect must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and the effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely ***prima facie*** or rebuttable. I should add that in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely ***prima facie*** or rebuttable is likely to be supplementary and not exhaustive'

Mr Heunis submitted that the deeming provisions in section 19(3) of the Ordinance fell

within categories (ii) and/or (iv) of the **dictum** of **Rosenthal,** particularly when account was taken of the context of the comparative provincial legislation.

Mr Seligson contended that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it, effect cannot be given to the statute as it stands. See **Rennie N.O. v Gordon and Other NNO** 1998(1) SA 1(A) at 22 E-G. In his view, what applicant sought to do was to read into the Ordinance a power given to the Administrator to condone, or undo the effect of section 19(3), that is to revive an application after the prescribed period had expired and thus where the application had lapsed. Accordingly the use of the term 'lapsed' in conjunction with 'deemed to have' left no other reasonable interpretation than that the legislature intended the deeming to be exhaustive and irrebuttable.

Mr Seligson contended that the construction relied upon by applicant would necessarily accord a power of revival or resuscitation to the Administrator after its lapsing had occurred. Thus the phrase: 'deemed to have lapsed' would effectively mean 'lapsed' unless the Administrator decides otherwise, at some undefined point which is cut off only after a reasonable time which is itself dependent on the particular circumstances. In argument, Mr Binns-Ward conceded that this formulation would be the meaning which would be given to the section, were applicant's contention, regarding the interpretation of 'deeming' as employed in this section, to be accepted. Manifestly this interpretation is a complicated offering of what appears to be a reasonably clear and unambiguous provision, namely that at the end of a prescribed period of time an approval must be regarded as having terminated.

To the extent that there is a difference between the Cape Ordinance and those of the other provinces, it is clear that the latter implicitly recognised that, in the absence of an express power of condonation the township application lapsed. Support for the proposition that in the absence of a specific provision which authorizes non compliance to be condoned the prescribed time period was definitive. See **Landmark Investments (Pty) Ltd v Port Elizabeth Municipality** 1968(2) SA 693 E; **S Bothma and Son Transport (Pty) Ltd v President of the Industrial Court and Others** 1998(3) SA 335(T) and **Port Elizabeth Divisional Council v Muller and Others** 1963(1) SA 99(E).

Contemporanea Expositio/Subsecuta observatio.

Contemporanea Expositio constitute explanations of the meaning of a piece of legislation offered by public officials more or less simultaneously with or shortly after its commencement. These expositions can be deduced from the manner in which the officials conducted themselves in relation to the legislation in the process of passing or either exercised their powers in terms thereof. The related doctrine is that of **subsecuta observatio** which constitutes a custom or continuous practice which emerges after legislation has commenced and which derives its authority from long duration. See in general Lourens Du Plessis **Re-interpretation of Statutes** (2002) at 261-262.

In **Nissan SA (Pty) Ltd v CIR** 1998(4) SA 860 (SCA) at 870 E-F **Marais JA** said of these doctrines: 'That relatively quickly jettisoned interpretation of the 1991 provision is not what is comprehended by the doctrines of **subsecuta observatio** and **contemporeana expositio**. Those doctrines rest upon two foundations. One is that there must at least be room for the interpretation in the language of the provision. The other is that the interpretation must have been accorded it for sufficiently long without it being gainsaid that it provides good reason for concluding that, that is what it was intended to mean'.

In seeking to rely on these doctrines, applicant referred to an affidavit of Mr Dennis Barker who, from 1966, was employed by the then Cape Provincial Administration to the assistant to the department of local government. Mr Barker later became the deputy director of the department of local government and planning of the Provincial Administration of the Western Cape. Mr Barker stated 'I hereby confirm that it was always my understanding and the understanding of my whole Department that we were entitled to grant extensions of time in terms of sections 19 and 20 of the Ordinance at any time even after the time period had lapsed and this was frequently done. This remained the position until the amendment to the Ordinance in 1974'. Mr Barker then referred in his initial affidavit to two cases where such extensions had been granted and in a further affidavit to three additional such examples.

In my view there are at least two unanswerable objections to the application of either of these aids to interpretation. Mr Barker's own affidavit does not constitute direct evidence as to the consistency of usage at the relevant time, that is in the early part of the 1960's. Official action was taken during the period 1958 to 1961; that is when the relevant purported extension was approved. The sole basis which he advances for his evidence regarding a practice in the years prior to 1966 is that he has 'no reason to

think' the practice was any different during the period when Sir Henry Price's application was submitted. This in itself does not constitute the kind of evidence which justified the application of these doctrinal aids to construction.

In **Nissan SA (Pty) Ltd, supra Marais JA** went on to say 'It is true that it was said in **Secretary for Customs and Excise v Millman**… that 'it may well be' that a departmental interpretation of an ambiguous provision is a factor which cannot be overlooked and that 'it may well be invoked to tip the balance where the language… may fairly be construed in either of two ways', despite the absence of any indication as to how long that interpretation had been accorded to it, but the observation was tentative and guarded and does not purport to be a considered and definite expression of opinion' (at 870F-G).

This ***dictum*** supports the proposition that usage cannot be invoked to alter the meaning of a statute where the meaning of the wording, upon a careful examination, turns out to be clear. Administrative sloppiness in interpretation and habitual practices which disregard the law cannot be legitimised by being invoked as an aid to statutory interpretation. Even were Mr Barker to have been able to testify as to a clear practice of the department throughout the period between 1958 and 1961, such evidence would only be of use to applicant if it could show 'the language may fairly be construed in either of two ways'. For the reasons already set out above, section 19(1) and (3) do not easily admit of the interpretation advanced by applicant. The version advanced by applicant is based upon an ambiguity which is but the product of creative linguistics. Thus the invitation to employ contemporaneous exposition and usage is of no application and cannot cure the fatal defect in its argument.

On the basis of this conclusion it is unnecessary to examine other issues raised by respondents such as the submission of the general plan with the Registrar of Deeds after expiry of the period of three months from the Surveyor-General's approval, the submission of the general plan to the Surveyor-General after expiry of the first reported extension and the submission of the general plan to the Registrar of Deeds after expiry of the fourth extension do not require a decision.

Once the Administrator had granted the application for township approval on 17 September 1957, such permission lapsed after twelve months without the submission of the general plan. The extension of time was applied for on 14 November 1958 and granted on 22 November 1958. On the plain and unambiguous reading of section 19 of the Ordinance the approval, which did not comply with the prescribed time periods, was a nullity. No rights could be validly obtained by applicant as a result of the non compliance with the legislation .

Effective Registration of the Township.

It was common cause that township rights have been registered and endorsed on the title deed of the property in question. This registration took place in terms of section 3(1)(t)

read with section 46 of Act 47 of 1937 and s 20 of the Ordinance. Applicant purchased the property from the deceased estate of Sir Henry Price who had applied for and apparently obtained township rights for the property. According to Mr Wiehahn, in his replying affidavit, in ascertaining the rights and burdens attaching to the land that it proposed to acquire, applicant's representatives looked at the relevant information in the Deeds Registry. It appears that the township rights endorsed on title deed of Portion 7 resulted in the payment of the premium.

Mr Binns-Ward, on behalf of applicant, submitted that, having regard to the recognised object and purpose of the deeds office registration system, applicant's representatives were entitled to accept that the rights duly registered against the title deed of the property would accrue to applicant upon transfer of the property. The system of registration would serve no purpose if persons after referring to the information registered in the Deeds Office were expected to investigate the validity of the information in the absence of any indication that there was any defect in the formal registration of the right.

Mr Binns-Ward relied for this submission upon the judgment in **Knysna Hotel CC v Coetzee N.O.** 1998(2) SA 743 (SCA). As the significance of this case was hotly disputed, it is necessary to examine it in some detail.

The facts were briefly thus: Certain property in Knysna had been registered in the name of a husband and wife who were married in community of property. Upon their divorce an order was made directing that the assets in their joint estate be divided but the registration of the property remained unchanged. Subsequent to being divorced, both the husband and his wife were sequestrated and the respondent and C were appointed as trustees of their estates. Respondent had, without the knowledge or consent of C sold the property to appellant. Respondent had falsely given the Registrar of Deeds to understand that he was acting on behalf of the insolvent estates of both husband and wife. Transfer of the property was registered in the appellant's name by the Registrar. The registration was formally in order. When C heard about the sale and transfer of the property he launched an application in which both the respondent and appellant were cited as respondents, for the cancellation of the registration.
This dispute between the parties was settled in terms of an agreement which provided, ***inter alia***, that, against payment of a certain amount, appellant would have undisputed right to title and interest in respect of the property. The initial registration of the transfer remained intact. Approximately one year later respondent instituted an action against appellant in terms of which he, as seller, claimed payment from appellant, as purchaser, of the amount allegedly due on the purchase price in terms of the agreement of sale.

Appellant raised ***inter alia*** a special plea of prescription in which it was alleged that the moneys due in terms of the contract had become due on 21 September1990 and that in terms of section 11 of the Prescription Act 60 of 1969 any claim in terms thereof had expired three years thereafter. In his replication to the special plea of prescription, respondent alleged that the transfer was fatally defective in that neither the wife nor C had consented thereto. It was alleged that C had only ratified the transfer on 7 May 1993 and that the purchase price had only then become due. In the alternative he alleged that he had been prevented by superior force as contemplated in section 13(1)(a) of the Prescription Act from interrupting prescription until the registration had been ratified.
Eksteen JA distinguished between the negative system of registration, which operates in South Africa, and the positive system of registration in the following way:
'Hierdie stelsel word soms as 'n 'negatiewe' stelsel getipeer in teenstelling met 'n 'positiewe' stelsel waar registrasie 'n onomstootlike bewys van eiendomsreg is….' (at 753 C). He then went on to say: '[W]aar al die formaliteite van transport nagekom en deur die Registrateur van Aktes aanvaar is en waar transport deur hom in die akteskantoor geregistreer is, daar 'n formeel regsgeldige oordrag geskied het. Daardie oordrag mag, weliswaar aanvegbaar wees op 'n verskeidenheid van gronde, maar totdat dit tersyde gestel is deur 'n bevel van die Hof … bly dit 'n regsgeldige registrasie'(at 754 C.)
Eksteen JA concluded that on the facts in the Knysna Hotel case, the registration of transfer, which took place on 21 September 1990, had never been set aside or annulled or in any way been set aside. To the extent that an application for the cancellation of the registration had been brought by C, this had been abandoned pursuant to the matter having been settled between the disputing parties. For this reason the court held that as there had been compliance with all the formalities of transfer and had been accepted by the Registrar of Deeds, and as no challenge had been brought to have the registration set aside, there was no basis upon which it could be concluded that prescription, which should have commenced running from the date of the transfer, had been interrupted or delayed.

The judgment in **Knysna Hotel CC** confirms the operation of the negative system of registration in South Africa. The effects of this negative registration are succinctly set out by C G van Merwe **Sakereg** (2 ed) at 342-343 as follows 'In navolging van die gemenereg het Suid Afrika 'n negatiewe registrasiestelsel. Die bepalings in the Registrasie van Akteswet wat die aanspreeklikheid van die staat en registrasiebeamptes uitsluit in die geval van onjuiste inskrywings dui ook hierop. Hoewel eiendom in beperkte saaklike regte nie sonder registrasie oorgedra kan word nie, word nêrens gewaarborg dat die aktesregister 'n juiste beeld van die ware toedrag van sake gee of dat derdes absoluut daarop kan staat maak nie. Inteendeel, in talle omstandighede weerspieël die register 'n valse of onvolledige beeld van die regsposisie met betrekking tot onroerende goed.'

Professor van der Merwe goes on to say 'Hoewel eiendoms en beperkte saaklike regte nie

sonder registrasie oorgedra kan word nie, word nêrens gewaarborg dat die akteregister ‘n juiste beeld van die ware toedrag van sake gee of dat derdes absoluut daarop kan staat maak nie.‘ (at 342)

In no way does the judgement in the **Knysna Hotel** case disturb this analysis of the negative system of registration. In **Knysna Hotel**, a formally valid registration had been effected. It was never set aside nor annulled because the application designed to achieve such setting aside was never pursued once the matter was settled. The case, which became the subject of litigation, turned on whether a seller’s claim for the purchase price in respect of a sale of land had prescribed. Prescription began to run from the date on which the seller had performed his own obligations in terms of the contract of sale . As the registration had not been disturbed, the seller's obligation had been fulfilled and accordingly prescription began to run from that time.
Viewed in this context, the decision in **Knysna Hotel** is distinguishable from the present dispute. If the registration and proclamation of the township was ***ultra vires*** or invalid, a formal act of registration could not be held to be immune from being set aside. Indeed as **Eksteen JA** noted in the **Knysna Hotel** case ‘daardie oordrag mag weliswaar aanvegbaar wees op ‘n verskeidenheid van gronde’ (at 754C).

The question then arises as to whether the period of registration has a bearing on a legal challenge to registration. Most certainly the **Knysna Hotel** case is not authority for this argument namely, because some forty years had elapsed since the registration of the proclamation of the township, the township rights so registered were now immune from any form of legal attack.

The question arises however as to whether respondents are entitled to attack the registration and proclamation of the township in a case such as the present. Applicant seeks to rely on a registration of township rights in the deeds registry as justification for the relief sought from this court. Respondents resist the grant of such relief by challenging the validity of such registration, not directly in a review proceeding but indirectly or ‘collaterally’ in proceedings which are not in themselves designed to impeach the validity of the act of registration. This raises the question of the validity of a collateral challenge.

Collateral Challenge.

Mr Binns-Ward submitted that the relief sought by applicant in terms of paragraph 3 of the notice of motion as amended went no further than requiring the court to confirm the

existence of real rights as registered in the Deeds Registry. This application was necessary because of the stance adopted by first respondent which had sought to respond to applicant as if the registered rights attaching to the property could be ignored. Mr Binns-Ward contended that the attitude of respondents in so opposing the relief sought by applicants must be examined in terms of its effect which was to seek to achieve a 'back door review' of the registration of rights granted in the late 1950's and the early 1960's.

The length of time from the date of the registration of such rights raised the question of the 'delay rule'. The public policy basis for the delay rule (apart from consideration of prejudice to affected parties) was that it was in the public interest for finality to be achieved within a reasonable time in connection with judicial and administrative decisions. As support for this submission he referred to **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad** 1978(1) SA 13(A) at 44 D-E. Applicant thus contends that the length of time which had elapsed from the time of registration should constitute a fundamental obstacle to the kind of challenge now raised by respondents. This issue of delay requires consideration within then context of the concept of a collateral challenge. Smith, Woolf and Jowell **Judicial review of Administrative Action** (5 ed) at 265 set out the position in English law in relation to collateral attack thus:

'(1) Except possibly for a decision which is clearly invalid on its face, all official decisions are presumed to be valid until impugned by a court of competent jurisdiction;

2) An individual should in principle be able to rely on, as a defence in collateral proceedings before an appellate body, any invalidity, whether or not the source of invalidity is alleged to arise out of a jurisdictional or non-jurisdictional error (or whether the decision or instrument is 'void' or 'voidable');

3) To avoid 'cumbrous duplicity of proceedings' that challenge should where possible take place in the forum in which it is made, without adjournment to enable an application to be made for judicial review;

(4) In some situations collateral challenge may not be permitted on the ground that particular proceedings are inappropriate to decide the matter in question, (for example, where an allegation of procedural invalidity is made in the magistrate's court, or evidence that is needed to substantiate the claim, or whether the decision maker is not a party to the proceedings or where the claimant has not suffered any direct prejudice as a result of the alleged invalidity)'.

The concept of collateral challenge thus defined was canvassed in **National Industrial Council v Photocircuit S.A. (Pty) Ltd and others** 1993(2) SA 245 (C). As the implications of this case were also contested by all parties, it is necessary to examine the judgement in some detail.

The applicant, an industrial council established in 1944 in terms of section 16 of the (repealed) Industrial Conciliation Act 36 of 1937, sought an order against twelve respondent employers, ***inter alia***, directing them to render returns to applicant for the purposes of enabling it to levy contributions from them for some or all of four funds established in terms of industrial agreements. These agreements were made binding on all employers within the industry by approval of the Minister of Labour acting in terms of section 48(1)(b) of the Labour Relations Act 28 of 1956 (now repealed). The respondents, each of whom had come into existence between 1978 and 1989, that is long after the Industrial Conciliation Act had been repealed had not been parties to any of the agreements establishing the funds in question. They opposed the application ***inter alia*** on the grounds that the Minister's approval in 1944 of the applicant's

registration had been ***ultra vires*** the Industrial Conciliation Act.

Scott J (as he then was) considered whether, on a proper application of the rule in **Wolgroeier's** case supra, respondent should be precluded by delay from seeking to attack the Minister's approval granted in 1944. **Scott J** accepted that 'the validity of administrative acts and subordinate legislation can be challenged not only directly in review proceedings, but also indirectly or, as is sometimes said, collaterally, i.e. "proceedings which are not themselves designed to impeach the validity of some administrative act or order"…. Obvious examples are enforcement proceedings and criminal prosecutions, the latter according to Baxter …, being 'one of the hardiest methods of securing review'. In such proceedings, therefore, the need for judicial scrutiny of an administrative act or subordinate legislation arises not for the purpose of affording a discretionary remedy, viz review or a declaratory order, but for the purpose of determining the entitlement of the party seeking enforcement, or the guilt or innocence of an accused person. The defendant or accused in such proceedings cannot, it seems to me, be precluded from raising invalidity as a defence merely on the grounds of delay…

A Court, however will not in every case permit an administrative act to be challenged in collateral proceedings. Where, however, enforcement of such an act or order is resisted, whether in criminal or civil proceedings, on the ground that in making it the official acted beyond his powers, our Courts, to my knowledge, have never refused to allow the question of validity to be canvassed' (at 252J- 253G)

On this basis **Scott J** found that the respondents were not precluded from raising the validity of applicant's registration as an Industrial Council.

Mr Binns-Ward submitted that this judgment had no application to the present case. In the present dispute a local authority of which first respondent was a successor was aware of the decision from the time it was taken. Third respondent's predecessor in title appears also as to have been aware of the position from inception and in the context of its provisional declaration of other parts of Oudekraal farm as national monuments after 1995 eschewed taking any proceedings in terms of section 6 of the Deeds Registries Act in respect of the township registration which it must have known affected portion 7. The fourth respondent apparently acquiesced in the delineation of the Cape Peninsula National Park, taking into account the effect of the registered township rights on portion 7.

Mr Binns-Ward thus submitted that the allegation that the administrative act in question was ***ultra vires*** cannot, by itself, be a valid basis to exclude the operation of the delay rule. Furthermore, the exclusion of the application of a delay rule can only apply in cases where the administrative act in question is ***ultra vires*** on the basis of a complete absence of jurisdiction rather than on the basis of a misdirected application of powers generally within the functionary's jurisdiction but subject to certain procedural constraints.

This argument seeks to attribute a very narrow scope to the judgment in the

Photocircuit case. The broader interpretation of this judgment, as urged by respondents, has found favour with the **House of Lords** in **Wandsworth London Borough Council v Winder** [1984] 3 ALL ER 976 (HL). Respondent, when sued for payment of rent in respect of a house leased from the Council sought to challenge as unreasonable the local authority's decision to increase the rent under its statutory powers. The Council contended that the only procedure by which their decision could have been challenged was by way of judicial review, and that, being out of time, respondent had lost the opportunity to challenge the decision. Respondent accepted that judicial review would have been an appropriate procedure but maintained that it was not the only procedure open to him, and that he was entitled to wait until he was sued by the Council and then defend the proceedings in the way he had done.

Lord Fraser on behalf of the court said 'It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of an individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right whereas in an application for judicial review, success would require an exercise in the Court's discretion in his favour… He would certainly be entitled to defend that action on the ground that the plaintiff's plan arises from a resolution which (on his view) is invalid' (at 981 c –d.)

This approach, as adopted in the **Winder** case, has found approval in **Kayamandi Town Committee v Mkhwaso and Others** 1991(2) SA 630 (C) at 636 E-F. It is also in accordance with the critical importance attributed to the principle of legality within our law. As **Chaskalson P** (as he then was) said in **Pharmaceutical Manufacturers of S.A : in re Ex Parte President of the Republic of South Africa** 2000(2) SA 674 (CC) at 687 H 'The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.'

The debate between applicant and respondents as to the applicability of the distinction between void and voidable administrative decisions as set out in **Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC** 1990(4) SA 349(C) thus has no practical relevance to the present dispute. The essential issue is whether the Administrator's actions and the consequent registration of township rights were lawful. Were this Court, notwithstanding the finding that the Administrator's actions and consequent registration were not lawful, to grant applicant relief and hence proclaim that an illegal action had now transmogrified into a legal decision, it would undermine the very principle of legality which is now so central to our constitutional enterprise.

To the extent that the issue of delay and hence the **Wolgroeier's** principle constitutes an obstacle to this approach, the question is one of an appropriate exercise of the court's discretion. For this reason, it is necessary to turn to certain of the key facts in the present dispute.

In paragraph 60 of his founding affidavit Mr Wiehahn states 'I understand that there are no kramats and shrines on portion 7. Graves and shrines are only located on other portions of Cape Farm 902 to which this application does not relate'. It was common cause however, that a number of kramats and graves do exist on portion 7 and have manifestly so existed at all material times. Applicant has not disputed that these kramats and graves have considerable religious and historical importance to the entire Muslim community. In paragraph 56.1 of his replying affidavit Mr Wiehahn apologises for the mistake contained in paragraph 60 of his founding affidavit and admits the presence of kramats and graves on portion 7. Significantly, not only does he fail even to attempt to explain this mistake but at one point in the proceedings leading up to the hearing before this court he sought to strike out several passages of an affidavit deposed to by Mr Langley, who is the Park Manager of the Cape Peninsula National Park, which demonstrates the probability that Mr Wiehahn must have known of the presence of the graves and shrines at the time at which Mr Wiehahn deposed to the founding affidavit. Mr Langley said '…It appears both from the application for township development rights and from the conditions attached to the Administrator's consent that no attention was given to the fact that there are Muslim graves on portion 7. It appears that the township layout took no account of the need to preserve such graves'.

Mr Petersen, who appeared together with Mr Fagan on behalf of fourth respondent, submitted that the Township's Board, at the time the Administrator considered the

general plan for a township, did not take proper account of the existence of the graves and kramats on the land. Mr Petersen contended that a person or body which considered the application in terms of section 11(5) of the Ordinance would not have known from an inspection that there were any graves or kramats on the land. The conclusion to which I have arrived regarding the invalidity of the Administrator's extensions, makes it unnecessary to examine the validity of the approval of the Administrator in terms of this instructive argument.

However the argument is relevant to the exercise of a discretion insofar as a collateral challenge to the validity of the registration is concerned. The graves and kramats on the land of applicant are of profound religious, cultural and historical importance to the Muslim community. To exercise a discretion in favour of applicant and therefore to ignore the question of the legality of the registration of township rights would be to minimise the legitimate constitutional rights which are now enjoyed by the Muslim community. In 1994 the cultural, religious and ethnic diversity of the country finally was recognized as an asset of the entire South African nation. Unquestionably the exercise of township rights disputed in this case would have a significant effect on the religious rights of the Muslim community. By contrast applicant seeks to rely on approvals granted during the 1950's and 1960's under an egregiously immoral regime and in circumstances where the law, even at that time, was not properly followed; a conclusion which finds justification in the finding to which I have come regarding the decision of the administrator being **ultra vires**.

The context of this racist history, during which period the voice of a community affected by such a decision would not have been treated with equal concern and respect at the time the decision was taken, constitutes a powerful reason as to why the Court should not apply the **Wolgroeiers** principle (assuming it to be applicable to such a collateral challenge) in favour of applicant and deny respondents the defence which they have raised in this application.

It is important to emphasize the extent to which it is permissible to make reference to the historical background of this case. Within the context of this dispute, the existence of the kramats and graves are relevant, only to the extent of the exercise of the discretion to allow a collateral challenge. By contrast Mr Breytenbach, who together with Ms Bawa on behalf of third respondent urged, within the context of a Court's discretion in terms section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 to grant a declaratory order, that the property rights gained by applicant within the context of apartheid rule and in the manner granted by the Administrator should not constitute the subject of legal protection.

Mr Breytenbach also referred to the creation of the Cape Peninsula Protected Natural Environment and the Cape Peninsula National Park which abuts portion 7 which should in themselves inhibit the development of portion 7. Furthermore he referred to a pending application to have the Cape Peninsula National Park declared a World Heritage Site, of which the development on portion 7 would detract from the application. There is considerable force in these arguments raised by Mr

Breytenbach. Our Constitution mandates the transformation of traditional legal concepts so that they become congruent with the constitutional society prefigured within the text. This mandate does demand that the concept of property be looked at afresh, arguably no longer to function completely as a trump but as a connecting m edium between the individual's needs and those of society (There is a burgeoning literature dealing with this issue see for example Van der Walt 'Tradition on Trial: a Critical Analysis of the Civil Law Tradition in South African Property Law' 1995 (11) SAJHR 169 at 204).

Given the conclusion to which I have come, it is not however necessary to decide on these arguments relating to the exercise of the courts' discretion to grant a declaratory order. Considerations of the environmental protection of the great glory of the Cape Peninsula, being the mountain range, as well as the safeguarding of the rights of the Muslim community to freedom of religion are relevant within the express context of this case to the exercise of the court's discretion in relation to the **Wolgroeiers** principle.

In summary, the potential for a breach of religious rights coupled to the fact that the exercise of applicants township rights would, in all probability, contravene a range of environmental rights justifies a decision to permit a collateral challenge. The issue of a collateral challenge brought against property rights is manifestly an issue which needs to be cautiously considered and sparingly permitted. In this case the unusual facts are of particular importance. Some thirty five years have elapsed from the

time that applicant purchased the land which was registered for township development.

Applicant suggests that the case turns upon the property owner asking for affirmation of development and sub-division rights that were registered against the title deed of the property at the time it purchased the land and which have remained so registered for some thirty five years. Mr Binns-Ward submitted that it would be contrary to public policy for a court to refuse to provide an appropriate declaration of the existence of these registered rights. He contended that a refusal to grant relief would amount to an indirect form of expropriation of development rights, even if the effect of a decision was but to allow a local authority to refuse to recognise these rights. The argument does have some bearing on the permissibility of a collateral challenge in that it raises the question of prejudice to applicant by a refusal to grant relief, caused by permitting respondent to challenge rights which have been in existence for so long a period.

This argument cannot be assessed in abstract. The context of the particular facts of the case becomes critical to its evaluation. It is common cause that for more than thirty years after acquiring portion 7 in 1965 applicant did not seek to develop its property. If the relief is granted, it would have the effect of declaring that applicant has township development rights in relation to a general plan which applicant itself admits is outdated (see paragraph 35 of Mr Wiehahn's founding affidavit). In the period of more than thirty years applicant did nothing to develop its land or exploit the rights that it claims. Significant changes to the legislative framework governing

the environment have taken place during this time. Since the 1960's the Cape Peninsula Protected Natural Environment has been proclaimed. On 28 May 1998 the Cape Peninsula National Park's boundaries (which coincide with those of the Cape Peninsula Protected Natural Environment) was proclaimed which would doubtless include the farm Oudekraal, but for the fact that an approved township existed. As Mr Petersen submitted, applicant appears to be saying 'I must be allowed, after all this time, to assert and establish the validity of what was done, but you the respondents, may not dispute the validity of what was done because that would be to 'mount' an impermissible belated collateral challenge'.

Certainty of administrative decisions and actions is an extremely important legal principle and must weigh heavily in the decision by a court to exercise its discretion in a matter such as the present dispute. Given the facts of this case, in which for so long a period nothing has been done with the rights which applicant claims, the argument focusing exclusively on the value of the certainty of property rights does not constitute a sufficient justification for the Court refusing to consider the collateral challenge. This is not a case where a refusal to grant declaratory relief would have the effect that applicant is forced to remove the product of any exercise of registered rights. After thirty years applicant wishes to exploit its rights which were granted in terms of a plan which even applicant considers to be outdated. In such a case, I am of the view that having satisfied the court that the rights were illegally granted, it would be an improper exercise of the court's discretion to refuse to allow this challenge solely on the grounds of delay. The fact that applicant did nothing to necessitate such a

challenge for more than thirty years must be an added consideration in the decision to allow respondents' challenge.

Conclusion.

For the reasons set out above, the grant of the application for a township approval on 17 September 1957 lapsed after twelve months without the submission of a general plan. Accordingly the approval which was eventually granted was a nullity.

The invalidity of the Administrator's actions cannot now be undone by the registration which appears in the Deeds Registry. It is permissible for respondents to raise the invalidity of the Administrator's actions as a defence to the application which has been brought by applicant. The effect of the invalidity of the Administrator's actions is that applicant cannot rely on the registered township rights to justify the relief which it seeks from this Court.

For these reasons the application is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel on behalf of first, third and fourth respondents.

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DAVIS J

I agree

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VELDHUIZEN J