IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 8112/04

In the matter between:

THE CITY OF CAPE TOWN 1st
Applicant

THE SOUTH AFRICAN HERITAGE RESOURCES AGENCY 2nd
Applicant

SOUTH AFRICAN NATIONAL PARKS 3rd
Applicant

and

OUDEKRAAL ESTATES (PTY) LIMITED 1st Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE 2nd Respondent

THE REGISTRAR OF DEEDS 3rd Respondent

THE SURVEYOR GENERAL 4th Respondent

JUDGMENT: 9/10/2007

VAN REENEN, J

[1] The applicants are seeking an order in the following terms against the respondents:

‘1.1] Declaring invalid and unlawful the grant of approval by the then Provincial Administrator of the Cape of Good Hope on 17 September 1957, in terms of section 18 of Ordinance 33 of 1934, of the application of Sir Henry Phillip Price for permission to establish a township named Oudekraal, consisting of the erven and public places depicted on Plan P.A. 16/A/1/36-A, as amended, on the remainder of the farm Oudekraal situate within the Cape Division and then held by Deed of Transfer No. 725 dated 28 January 1954 (‘the decision’).

1.2] Reviewing and setting aside the decision

2 Pursuant to the setting aside of the decision:

2.1] Authorising and directing the Fourth Respondent to cancel the General Plan approved by the Fourth Respondent on 10 April 1961 under reference number TP 1781 LD (“the General Plain”) in respect of Portion 7 of the Farm Oudekraal, now known as erf 2802 Camps Bay (‘the property”) and currently registered under Deed of Transfer No. T13636/1965 (‘the title deed”).

2.2] Authorising and directing the Third Respondent:

2.2.1 to endorse the title deed to record that the General Plan has been cancelled and that accordingly, no transfer may be effected of the erven depicted on the General Plan, formerly known as erven 1-240 Oudekraal Township

and Public Places 241-252 and now described as erven 2803-3042 and Public Places 3043-3054, Camps Bay.

2.2.2 to record a caveat in the Third Respondent's records reflecting the cancellation of the General Plan and that the owner's title deed in respect of the property is to be similarly endorsed if and when it is lodged in the Deeds Registry".

[2] The Farm Oudekraal, which is located between the suburbs of Camps Bay in the East and Hout Bay in the West, is bounded by the Atlantic coastline and the Twelve Apostles mountain range, originally belonged to Dirk Gysbert van Reenen van Breda who, during his lifetime, disposed of and transferred portions 1 and 2 thereof to new owners. Upon his death the remainder of the farm Oudekraal 902 was sold and transferred to Sir Henry Phillip Price (Price) during 1954 who, in turn, had portion 3 thereof transferred to a new owner during 1955. Price applied for and on 17 September 1957 was granted permission by the Administrator of the Cape of Good Hope (the Administrator) in terms of Section 18 of the Townships Ordinance, No. 33 of 1934 (Ordinance 33 of 1934) to establish a township on the remainder

of the farm Oudekraal. Such approval was for the establishment of a township which consisted of the area depicted on a plan PA16/A/1/36-A (the Oudekraal Township) as well as three extensions numbered 1, 2 and 3 respectively. The area depicted on the said plan later became portion 7 and is presently known as erf 2802 Camps Bay (portion 7). It is situated immediately adjacent to the suburb of Camps Bay and is approximately 41.488 hectares in extent. The areas encompassing Extensions 1, 2 and 3 later became portions 6, 4 and 5 respectively and Certificates of Registered Title in respect thereof as well as portion 7 were issued to Price on 1 November 1961. As Price failed to timeously comply with the provisions of section 19 of Ordinance 33 of 1934 with regard to the submission of general plans in respect thereof the granting of the Administrator's approval in respect of portions 4, 5 and 6 is deemed to have lapsed by virtue of the provisions of subsection 19(2) of the said Ordinance and explains why the relief which is being sought in this application has been restricted to the approval for the establishment of a township on Portion 7 only. Oudekraal Estates (Pty) Ltd (the first respondent) became the registered owner of Portion 7

on 28 May 1965.

[3] Of the Respondents, only the first respondent actively resisted the granting of the relief claimed by the Applicants. It is common cause that the second Respondent - the Minister of Environmental Affairs and Development Planning, Western Cape - is the legal successor to the erstwhile Administrator for the purpose of the provisions of the Land Use Planning Ordinance 15 of 1985 (LUPO) and that the Premier of the Western Cape, who has not been cited as a respondent in these proceedings, - is his successor for the purpose of the provisions of Ordinance 33 of 1934 and that both have adequately signified their intention of abiding this court's judgment. Also the Registrar of Deeds (the Third Respondent) has signified his preparedness to abide the decision of this court. The Surveyor General (the Fourth Respondent) has not formally opposed the granting of the relief claimed but has filed and delivered a report in terms of the provisions of Section 97(1) of the Deeds Registries Act, 47 of 1937 in which he drew attention to certain statutory provisions which are required to be complied with as a pre-condition to the granting of the relief

claimed in prayer 2.1.

[4] As the decision of the Administrator which forms the subject-matter of this review had been taken on 17 September 1957 and this application was instituted only on 23 September 2004, the consequences and impact of a delay of such magnitude on the applicants' entitlement to the relief claimed by them, was focused upon intensely in the voluminous papers that have been placed before this court and in counsels' able and helpful arguments.

[5] Portion 7 has remained undeveloped. When the First Respondent, during August 1996, submitted an Engineering Services Plan compiled by Wouter Engelbrecht and Associates in respect of the approved township thereon to the Acting Chief Executive Officer of the Cape Metropolitan Council (CMC) for approval, as a prelude to implementing the development rights that flowed from the approval of the township, the first Applicant, at a meeting held on 31 October 1996, resolved not to approve the said plan as it had been advised that such rights had lapsed and informed its agent, the CMC, to advise the first respondent accordingly. As a result of

such refusal the first respondent instituted proceedings in this court against the applicants in which it sought declaratory orders the gravamen whereof was that the first respondent's development rights in respect of Portion 7 in accordance with general plan TP1781 LD were of full force and effect. Davis J (with whom Veldhuizen J concurred) dismissed the application with costs on the basis that the Administrator's extensions of the time limit within which the general plan had to be submitted was invalid and resulted in the approval for the establishment of the Oudekraal Township being a nullity. That decision was reported as **Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others** 2002(6) SA 573 (C) (the original application). Despite the fact that the legend to the Engineering Services Plan contains an item "graves" and a number of graves were clearly depicted thereon, the existence of approximately 3 kramats and 53 Muslim graves were identified on Portion 7 during an inspection undertaken during December 2001 at the instance of the third applicant (the third respondent in the original application) in preparation for the drafting of answering affidavits. Although evidence of the presence of

graves on Portion 7 had been placed before the High Court in the original application, the basis upon which that application was dismissed, obviated the need to have considered the impact of the presence thereon of graves and kramats of religious and cultural importance to the Muslim community had on the validity of the Administrator's decision of having approved the establishment of the Oudekraal Township.

[6] On appeal to the Supreme Court of Appeal the High Court's decision was upheld and the appeal dismissed but for different reasons. Howie P and Nugent JA took cognisance thereof that the Engineering Services Plan reflected the presence of 2 kramats and more than 20 graves of special religious and cultural significance to the Muslim community and that in particular the kramat of Sayed Jaffer was one of a number of graves situated approximately in the centre of an erf destined for the building of a school (on the facts before us it appears to be situated in a public open space); the other kramat was among another group of graves spread over what was intended to be residential erven; a number of other residential erven had graves within their

intended boundaries; and one grave was directly in the path of a proposed public road, and on the basis thereof, came to the conclusion that their presence on Portion 7 constituted a factor that should properly have been taken into account and evaluated even on pre-constitutional principles in the decision to have approved the establishment of the Oudekraal Township. The learned Judges of Appeal, on the evidence before them, came to the conclusion that the Administrator had either failed to take account of such material information because it had not been placed before him or, in the unlikely event that it had been, wrongly failed to have regard thereto but favoured the first-mentioned as the more likely. The Supreme Court of Appeal, on the basis thereof, concluded that such failure rendered the Administrator's decision unlawful and invalid from the outset and, in either event, ultra vires because it permitted subdivision and land use in criminal disregard for the graves and kramats because it would be impossible to avoid their desecration if the township had to be implemented as approved. The court in conclusion found that it followed inexorably from the finding that the Administrator's approval was invalid and that the first respondent

was not entitled to an order that its development rights in respect of the Oudekraal Township were of full force and effect or that it was entitled to the other relief which it found were no more than precursors thereto. That judgment is reported as **Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others** 2004(6) SA 222 SCA (the judgment in the appeal).

[7] Mr. Binns-Ward SC (who with Mr. Farlam and Ms Pillay appeared for the first Respondent), correctly in my view, did not in these proceedings endeavour to assail the correctness of the Supreme Court of Appeal's findings as regards the invalidity of the Administrator's decision to have approved the establishment of the Oudekraal Township. That stance is understandable as further investigations after the judgment of the Supreme Court of Appeal had been handed down have brought to light that there are a greater number of burial sites on Portion 7 than had been reflected in the papers in the original application. On the facts before this court 5 graves occur on areas intended for the building of roads in the proposed township; 4 on an erf reserved as a site for a school; 11, including

the kramat of Sayed Ahmed Mahdika, occur in areas intended to become residential erven and 37 graves, including the kramat of Sayed Jaffer, are situated in an area intended as a public open space for the purposes of the township. First respondent's counsel, on the strength of the Supreme Court of Appeal's finding of invalidity, contended that the relief claimed by the applicants in prayer 1.1 of the Notice of Motion is, strictly speaking, superfluous and I am in full agreement therewith.

[8] In view of the acceptance that the Administrator's decision to have permitted the development of the Oudekraal Township on Portion 7 was an invalid administrative act from its inception, its review and setting aside as claimed in prayer 1.2 of the Notice of Motion, should follow unless the granting thereof is precluded by virtue of the operation of the "delay rule". The reviewing and setting aside or the correcting of an administrative decision constitutes one of a number of discretionary remedies in which courts, in the exercise of their judicial discretion, may withhold relief on the basis of, inter alia, delay despite substantive grounds for the granting thereof having been made

out (See **National Industrial Council for Iron, Steel, Engineering and Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others** 1993(2) SA 245 (C) at 252 H-I). The delay rule in terms whereof review proceedings must be instituted within a reasonable time is fundamentally procedural in character (See **Scott and Others v Hanekom and Others** 1980(3) SA 1182 (C) at 1193 C-D) and was evolved by courts over time in the exercise of their inherent power to regulate and control their own procedures, as prior to the advent of the Promotion of Administrative Justice Act, No. 3 of 2000, no prescribed time-limits existed within which review proceedings had to be initiated. The raisons d'etre for its introduction were an acknowledgement of the inherent potential of prejudice to interested parties that may result from an unreasonable time-lapse as well as the public interest element in the finality of administrative decisions and acts (See **Associated Institutions Pension Fund and Others v Van Zyl and Others** 2005(2) SA 302(SCA) at para 46; **Gqwetha v Transkei Development Corporation Ltd and Others** 2006(2) SA 603(SCA) at para 22). As is apparent from the fact that it has been held in **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit**

Kaapstad 1978(1) SA 13(A) at 42 (C) that proof of prejudice is not a necessary precondition for the refusal to entertain review proceedings because of undue delay, the elevation of the raisons d'etre for the delay rule as constituting requirements thereof, should be guarded against.

[9] In the context of applications for review it is now generally accepted that an application of the delay rule requires that consideration be given to firstly, whether there has been an unreasonable delay with the institution of review proceedings and if so, secondly, whether such delay should be condoned (See **The Associated Institutions Pension Fund** case (supra) at paragraph 47). The first enquiry entails a determination whether, in all the circumstances of a particular case, the delay was reasonable and implies the making of a value judgment and not the exercising of a judicial discretion and comparisons with delays which in other cases have been held to be unreasonable serve no useful purpose See **Seksokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie** 1986(2) SA 57 (A) at 86 G). The second enquiry, if the need for it arises, entails the exercise of a discretion

on the basis of all the relevant circumstances of a particular case (See the **Associated Institutions Pension Fund** case (supra) at paragraph 48). The need to enter into the second enquiry only arises if the first enquiry results in a conclusion that the delay was unreasonably long and in such an event the court is obliged to consider whether it should be condoned or not (See **Mamabolo v Rustenburg Regional Local Council** 2001(1) SA 135 (SCA) at paragraph 11 and the other cases cited there).

[10]Because of the conclusion arrived at later in this judgment as regards the question whether the applicants individually delayed unreasonably in connection with the institution of the present proceedings, it is unnecessary to resolve the much debated and vexed issue whether the commencement of the delay should be assessed with reference to their direct or imputed knowledge of the existence of the Administrator's decision or their knowledge of the grounds on which the validity thereof could be assailed. What however, does require to be considered is the submission of Mr. Seligson (SC) (who with Mr. Muller (SC) and Mr. Edmunds appeared for the First Applicant) that the delay rule, as a

manifestation of the common law, should be developed in terms of sections 39(2) and 173 of the Constitution of the Republic of South Africa, 1996 in order to promote the spirit, purport and objects of the Bill of Rights and also in the interests of justice. The only reported case in which, to the best of my knowledge, the constitutionality of the delay rule was challenged was **Bellochio Trust Trustees v Engelbrecht NO and Another** 2002(3) SA 519 (C) in which Hlophe JP concluded that it does not entail a blanket restriction of access to courts and therefore does not offend against the provisions of section 34 of the Constitution and that, in any event, it constituted a justifiable limitation of such right in terms of section 36(1) of the Constitution. Being a rule of procedure, the only manner in which the delay rule could possibly impact upon the normative values of the Constitution, is in the consequences of its application. As is apparent from what has been set out above, both legs of the enquiry that needs to be undertaken in terms of the delay rule, require a consideration of all relevant facts and circumstances. In the first place, to enable the court to make a value judgment as regards the reasonableness or otherwise of the time-lapse

and in the second place, to enable it to exercise a judicial discretion as regards whether any unreasonable delay should be condoned or not. That discretion is wide of ambit and enables courts to have regard to a "number of incommensurable and disparate features in coming to its decision" (per E.M. Grosskopf JA in **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996(4) SA 348 (A) at 361 I) and encompasses the criteria to which, in terms the Constitution, regard should be had in developing the common law. As, in my view, the application of the delay rule is sufficiently flexible and adaptable to be capable of accommodating and being applied in a manner that promotes the spirit, purport and the objects of the Bill of Rights and take the interests of justice into account, there is no need to develop it (Cf **K v Minister of Safety and Security** 2005(6) SA 419 (CC) at paragraph 23). That conclusion not only makes it unnecessary to consider the submission based on the conclusion reached in **ex parte Minister of Safety and Security:** In re **S v Walters** 2002(4) SA 613 (CC) at 646 G that this court is precluded from developing the common law, but appears to be consonant with the approach of Plaskett J in **Ntame v MEC for Social Development,**

Eastern Cape, and two similar cases 2005(6) SA 248 (ECD) at paragraphs 24 – 29. Bearing in mind that the Constitutional Court has consistently held that courts in promoting the objectives of section 39(2) are under an obligation to develop the common law where it is deficient (See **First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance** 2002(4) SA 768 (CC)), it is not insignificant that the Supreme Court of Appeal in the most recent reported cases that dealt with the delay rule (See **Mamabolo v Rustenburg Regional Local Council (supra); Lion Match Co Ltd v Paper Printing Wood & Allied Workers Union and Others** 2001(4) SA 149(SCA); **Associated Institutions Pension Fund** case (supra); and **Gqwetha v Transkei Development Corporation Ltd and Other** (supra), did not consider it necessary for it to be developed: on the contrary, the rule was applied uncritically.

[11]In addressing the question whether their clients have delayed unreasonably before instituting the present proceedings Mr Seligson, Mr Breitenbach (who with Ms Bawa) appeared for the second applicant, and Mr

Petersen SC (who with Mr Fagan) appeared for the third applicant, divided the 47 year period between 17 September 1957 and 23 September 2004 into three segments: from 17 September 1957 when the impugned decision was taken by the Administrator, to 29 August 1996 when the first Respondent submitted the Engineering Services Plan to the CMC for approval (the first period); from 29 August 1996 to 28 May 2004 when the Supreme Court of Appeal handed down its judgment in the original proceedings (the second period) and from 28 May 2004 to 23 September 2004 when the present proceedings were instituted (the third period).

I am in full agreement with the submissions of counsel for the Applicants that as their clients are different and distinct organs of state within the definition thereof in section 239 of the Constitution, the question whether there was an unreasonable delay should be assessed with reference to the conduct of each of the applicants independently in respect of each of the aforementioned periods and that the granting of the relief claimed should follow upon a finding that any one of them had not delayed unreasonably during the

whole of that period before instituting the present proceedings.

[12]To the extent that the absence or inadequacy of an explanation for delay in an applicant's founding papers may be a factor in the assessment of whether to consider the merits of a review application (See **Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union and Others** (supra) at 158 C – D; **Scott and Others v Hanekom and Others** (supra) at 1192 E – 1193 C); **South African Transport Services v Chairman, Local Transportation Board, Cape Town, and Others** 1988(1) SA 665 (C) at 668 F; **Jeffery v President, South African Medical and Dental Council** 1987(1) SA 387 (C) at 390 D), I agree with the submission of the first Respondent's counsel that the averments thereanent made on behalf of the first applicant in its founding affidavit, are not compatible with the facts. As pointed out by the applicants' counsel their clients' explanation of the delay is not limited to only a single paragraph in the founding affidavits of Richard Keith Wootton (Wootton) but is also dealt with by him in paragraphs 130 to 139; by the first respondent in paragraphs 84 to 92 of its answering affidavit; and

also amplified by Wootton in paragraphs 8 to 42 of his replying affidavit. What has been pointed out as important by the second applicant's counsel is that the first respondent failed to avail itself of the opportunity of filing further affidavits in amplification of its case as regards the inadequacy or implausibility of the explanation for the delay (See **Scott and Others v Hanekom and Others** (supra) at 193 E –F) as one would have expected if it had been prejudiced thereby. In my view the applicants, as is to be expected in the light of the self-evident magnitude of the delay, explained their delay for the initiation of the present proceedings adequately and timeously.

[13]The first respondent's counsel during argument, put forward a theory to the effect that it cannot be excluded that there is a possibility that – as happened in the case of the old Muslim Cemetery in Green Point as well as the office and retail site in Prestwich Street in Green Point - the Administrator and perhaps the members of the Townships Board also, could have thought when the development of the Oudekraal Township was considered, that the human remains on Portion 7

could be exhumed and reinterred and the graves and kramats relocated without contravening any laws or offending any religious practises or cultural sensitivities. Because of an absence of any reference to graves and kramats on plan PA 16/A/1/33-A (the plan that accompanied the application) and in the conditions of approval, that theory, in my view, is so far-fetched that it can safely be rejected as improbable. In the light of the further documentation which has been placed before this court, the only reasonable inference is that all concerned with the approval of the Oudekraal Township were ignorant of the presence of the Muslim graves and kramats on Portion 7. I fully agree with the submission of the first- and third applicants' counsel that - as happened in the case of the kramat of Tuan Mobeen on erf 448 (later erf 474) - if cognisance had been taken of the graves and kramats on Portion 7 at the time, they would have been recognised not only in the township layout but also in the conditions of approval. That conclusion is consistent with the stance adopted by the first respondent in this application, namely, that the basis upon which the Supreme Court of Appeal found that the Administrator's decision was

invalid was “not an obvious review ground”. Such ignorance could, however, not have persisted after the first respondent had instructed Wouter Engelbrecht and Associates to prepare the Engineering Services Plan and submitted it for approval to the CMC (the successor to the Cape Divisional Council) within whose area of jurisdiction Portion 7 was situated as agent for the then City of Cape Town Municipality (who until 4 December 2002 was the predecessor of the first applicant). The first applicant has from that date assumed all the rights and obligations of the CMC as well as the City of Cape Town Municipality in terms of the City of Cape Town Establishment Notice (PN 472 of 22 September 2000) as read with sections 12 and 14 of the Local Government : Municipal Structures Act, No. 117 of 1998. It appears to be common cause that the first applicant and the CMC independently sought the advice of counsel when they were called upon to approve the Engineering Services Plan. The first applicant, who required to be advised as regards the “validity of the development rights at Oudekraal”, received advice to the effect that the approval had lapsed because the extensions granted by the Administrator for the lodging of the

general plan with the fourth respondent and the third respondent, were unlawful and that it was not only entitled to, but legally precluded, from approving it. It is accentuated that the advice was that the approval had lapsed and not that it was invalid as was repeatedly and misguidedly stated in the first respondent's counsels' heads of argument. The CMC was similarly advised by its counsel. The first applicant's counsel conceded in their heads of argument that they and their clients "were aware of some kramats and graves on Portion 7" but submitted that in the light of the conclusion that the approval had lapsed it would be artificial and unrealistic to conclude that consideration should have been given by the first applicant and the CMC to other grounds on which the validity of the Administrator's approval could possibly be set aside. That they and their client as well as the CMC must have been aware of the presence of graves and kramats is apparent from the fact that a number of graves were demarcated and clearly identified as such on the Engineering Services Plan which was the subject-matter of the opinions that were being sought at the time. As the said plan received the attention of not only the CMC's Acting Executive

Officer and the Engineering Services Committee, the Council of the first applicant's predecessor, as well as their experienced professional advisors, I incline to the view that the first applicant's predecessors, at decisionmaking- and executive levels, were in possession of sufficient facts from which it could have been inferred that the Administrator's approval was invalid. I say so because it would have been obvious from even a cursory perusal thereof that the township as approved – as was found by the Supreme Court of Appeal (at paragraph 35) of its judgment, "permitted subdivisions and land use in criminal disregard for the graves and the Kramats". Any lack of knowledge on the part of the first applicant's predecessors of the religious and cultural significance of the graves indicated on the Engineering Services Plan could not have persisted beyond the widely publicised and well attended mass rally against any development of the Oudekraal Township attended by approximately 20 000 Muslims and others, held just below the kramat of Shayk Mobeen in close proximity of Portion 7. Despite having been so alerted, and accepting that the first applicant's predecessors had not been in possession of documentation or

information that referred to or showed the presence of graves and kramats on Portion 7 or whether they had been taken into account by the Administrator in approving the Oudekraal Township, not even an iota of evidence has been produced of the taking of even the most self-evident steps such as to have compared the Engineering Services Plan against plan PA 16/A/1/36-A which had been filed in the offices of the fourth respondent and the third respondent. Such failure must be assessed in the light thereof that Brand JA in the **Associated Institutions Pension Fund** case (supra) at paragraphs 50 and 51, warned that applicants are not entitled to take a supine attitude but should "… take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision." Whilst the validity of the Administrator's decision might not have been of concern to the first applicant's predecessors prior thereto, the situation changed when they were required to consider the approval of the Engineering Services Plan. The first applicant's predecessors, having been advised that the Administrator's decision was invalid, adopted a supine attitude as

they had been advised to take no steps that could be perceived to be hostile to the interests of the owner of Portion 7 or the township developer. I agree with the submission of the first respondent's counsel that such advice amounted to an injunction not to take any positive steps and that it and its predecessor, deliberately chose to ignore the approval of the Oudekraal Township on the basis thereof. Accordingly the submission that the first applicant and its predecessors had until February 2002 – when the point was identified in the course of the preparation of the third applicant's answering papers in the original application – been unaware of the facts on which the Supreme Court of Appeal had found the Administrator's approval to be unlawful and invalid, is not accurate as such knowledge must be imputed to them as from the time they could reasonably have come into possession thereof namely at the end of 1996.

[14] The first applicant and its predecessors, despite having had either actual or imputed knowledge of the existence of facts on which the Administrator's decision could have been reviewed and set aside, deliberately refrained from taking any positive

steps to have it reviewed and set aside, but chose to raise such invalidity for the first time by means of a collateral challenge in the original proceedings instituted by the first respondent against the applicants on 31 August 2001 rather than taking steps to have it reviewed. They did so in circumstances where a challenge of that nature had not previously been recognised in our case law other than, where on the basis of the principles underlying the rule of law, a public authority sought to force a subject to comply with an unlawful administrative act in proceedings of a coercive nature (cf **The Photocircuit case** (supra) at 252J – 253 E).

[15]The other reasons advanced during argument for not having instituted review proceedings, namely, that the first respondent, on a number of occasions, indicated that it intended approaching this court for relief; that the first respondent made several attempts to resolve the dispute between itself and the first applicant and its predecessors on a political level and that the Supreme Court of Appeal had fundamentally developed the law in the field of permissible collateral challenge, in my view, lack

any merit. The third applicant having established the presence of graves and kramats on Portion 7 during December 2001 does not appear to have had any difficulty in grasping the consequences of their presence on the validity of the Administrator's initial decision and to gather the facts on the basis whereof the validity thereof was collaterally challenged in papers compiled during February 2002. Bearing in mind that the applicants succeeded in instituting the present proceedings within four months of the dismissal of the first respondent's appeal by the Supreme Court of Appeal, the first applicant, by having delayed from the end of 1996 before instituting the present proceedings, in my view, delayed unreasonably during the second period.

[16]There is no evidence that the second applicant, who was established only on 1 April 2000 by the National Heritage Resources Act 25 of 1999 (and its predecessor the National Monuments Council (NMC)), and the third applicant had or should have had any knowledge of the presence of graves and kramats on Portion 7 prior to their discovery during the inspection undertaken on behalf of the first applicant during December 2001 and raised

subsequently when answering papers were prepared in the original proceedings during February 2002. The third applicant, instead of instituting separate proceedings to have the Administrator's approval of the Oudekraal Township reviewed and set aside, contented itself with a collateral challenge of the validity of the Administrator's approval thereof and the first- and second applicants aligned themselves therewith both in the original proceedings as well as in the Supreme Court of Appeal. They did so despite the absence of any supporting legal precedent. The self-evidently long time-lapse since the Administrator's approval, and its function in the application of the delay rule, appears to be the obvious reason for why that modus operandi had been followed. The Supreme Court of Appeal, unlike the court a quo, found that the reliance on a collateral challenge of the Administrator's approval was misplaced because even an invalid administrative act is capable of producing legally valid consequences for as long as it is not set aside. It for that reason held that the first applicant and its predecessors, as public authorities, could not have refused approval of the Services Engineering Plan by simply ignoring the approval of the Oudekraal

Township on the basis of their perception of the invalidity thereof but were obliged to have approached the court to have it reviewed and set aside. By the time the present proceedings, which had been foreshadowed by the Supreme Court of Appeal, were instituted on 23 September 2004 a period of approximately 30 months had elapsed from the time the facts upon which the invalidity of the Administrator's approval was based came to light. Having regard to the factors that have in the past been taken into account by courts in the assessment of the reasonableness, or otherwise, of delays (See eg **Radebe v Government of the Republic of South Africa and Others** 1995(3) SA 787(N) at 799 B – F; **Liberty Life Association of Africa v Kachelhoffer NO and Others** 2001(3) SA 1094 (C) at 1112 G – 1113 A; **Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others** 2001(4) SA 294 C at 306 I – 307 B) and again using the fact that it took the applicants no longer than four months from the date of the Supreme Court of Appeal's judgment to launch the present proceedings, I incline to the view that the second- and third applicants (and also the first applicant) delayed

for an unreasonably long time during the latter part of the second period before instituting the present proceedings. The conclusion reached in this and in the immediately preceding paragraphs makes it unnecessary to consider counsels' painfully detailed, but nevertheless helpful, submissions about whether any of the applicants delayed unreasonably during the first and third periods.

[17]Having concluded that the applicants individually delayed unreasonably before instituting the present proceedings, I am obliged to consider whether this court, in the exercise of its discretion, should condone what has been found to have been an unreasonable delay.

[18]The fact that a court's discretion to condone an unreasonable delay in the institution or the prosecution of review proceedings is a wide one in which all the relevant circumstances are carefully balanced, does not in any way detract from its being a judicial discretion that has "to be exercised on judicial grounds, not capriciously but for substantial reasons" (See: **Rex v Zackay** 1945 AD 505 at 513). The Supreme Court of Appeal in

paragraph 46 of its judgment provided some guidance as to what the different factors are that could in the instant case have a bearing on the exercise by the court of its discretion. I am in agreement with the submission of Mr Binns-Ward that the reference to "discretion" and "the balancing of all the relevant circumstances" in the said paragraph strongly indicate that that court was contemplating the exercising of a discretion in relation to the second leg of the delay rule. Such circumstances, without pretending that it is a closed list, are the long period of time that has elapsed since the Administrator granted the impugned approval but with the caveat that it is not a decisive consideration; the need for finality of administrative decisions and the exercising of administrative functions; the extent to which the first respondent or third parties might have acted in reliance on the impugned decision and the consequences to the public at large and future generations of an invalid decision being allowed to stand. Those guidelines, some of which, to a certain extent, are either interrelated or overlapping, require a comparison of the possible impact upon the interests of all persons who may be affected should the impugned approval be reviewed

and set aside as well as the obverse. Should the administrator's said approval not be reviewed and set aside in this application, his admittedly invalid decision will become immune from attack and will in a sense be "validated" by virtue of the court's decision (See: **Harnaker v Minister of the Interior** 1965(1) SA 372 (C) at 381 C; **Mamabolo v Rustenburg Regional Local Council** (supra) at paragraph 13; **Lion Match Co Ltd v Paper Printing Wood and Allied Workers Union and Others** (supra) at paragraph 32) so that the respondent will be entitled to develop the Oudekraal Township as approved as long as its implementation does not conflict with other statutory or regulatory restrictions. That conclusion obviates the need to resolve the debate between counsel whether such validation is a consequence of an undue delay or the court's intervention. In the circumstances it is not surprising that the applicants' counsel in advancing grounds why this court should exercise its discretion of condoning the unreasonable delay in their clients' favour, in addition to relying on an absence of significant prejudice in the event of the application succeeding, focused intensely upon the consequences a refusal of the application would have

upon firstly, the right to freedom of religion of members of the Muslim community, in that their ability to practise their culture and exercise their religious beliefs by having access to and visiting the graves and kramats on Portion 7, will be infringed and secondly, the interest of members of the general public to have it preserved as a "heritage place" of "high significance"; a cultural landscape and an area of environmental importance. Also the Supreme Court of Appeal seems to have considered that infringements of the constitutional rights to religion and culture of the Muslim community would occur when it at 248 E – F (paragraph 41) said the following:

> "Even if the township had been lawfully established we have little doubt that the development of the land in accordance with the existing general plan is constrained by the protection that is afforded to culture and religious practices by section 31 of The Bill of Rights."

[19]From a historical as well as an environmental point of view, Portion 7 and the land immediately adjacent thereto is unique. On the uncontested evidence of Antonia Malan, an archaeologist and heritage practitioner, the graves and kramats came into being

during the 18th and early 19th century and precede the granting of private ownership in 1836 over farm Oudekraal 902. It appears from the undisputed evidence of suitably qualified experts placed before this court, that the graves and kramats in the Oudekraal area form an integral part of the cultural history of the Cape Muslim community which owes its existence to predominantly enforced Afro-Asian emigration to the Cape during the 17th- to the early years of the 19th century and consisted mainly of political prisoners, slaves and captured or exiled religious leaders – mostly learned and highly literate – from the mainland of India, Java, Batavia and Indonesia. The presence of the graves and kramats in the Oudekraal area is attributable to the fact that the graves of Cape Muslims were often established in isolated areas on the lower slopes of mountains near streams. The reason for that appears to have been that political prisoners from the Asian colonies of the Dutch were banished to isolated parts of the Cape Colony; slaves were not permitted to be buried in normal burial grounds; escaped slaves, for obvious reasons, went to live in isolated areas of the Table Mountain range and were

buried where they had lived and many Shaykhs sought the solitude of the mountain slopes for spiritual growth and seclusion and when they passed away, their religious adherents continued to visit their graves and when they in turn passed away were buried in close proximity. That explains why many graves are found in the vicinity of the kramat of Sayed Jaffer. The Muslim belief is that the mercy of God is continually present at the burial places of persons considered to have been righteous and accordingly a major socio-religious tradition has developed around such shrines. It is common for Muslims to visit such shrines regularly in order to recite litanies there and to seek God's blessings because it is believed that the obtaining of peace of mind and prayers are facilitated in such sanctified places. As pilgrimage to the Prophet Mohamed's grave is a central precept of the Muslim faith, those about to go on pilgrimage to Mecca visit the burial sites in the Oudekraal area accompanied by family members and friends in order to greet them and seek God's blessings in the belief that the departed will intercede with God on their behalf. The poor, unable to afford travelling to Mecca, would visit the kramats of those who are

considered to have been pious and friends of God as a surrogate for a pilgrimage to Mecca. The aforegoing explains why such graves and kramats were venerated in the past and continue to be so. All that remains today of the cultural origins of the Muslim community are its religion, some foreign words and the graves and the kramats. The visiting of the latter is considered as culturally precious and is deeply rooted in the Cape Muslim's religion and unwritten history. There are three kramats on Portion 7. Of those the most important one is that of Sayed Jaffer which forms part of the holy circle of Muslim graves and includes kramats extending from the top of Signal Hill across the Peninsula to Faure and ending on Robben Island. The other two kramats are those of Sayed Adnaan Khashoggi Ibre' Ali Rab Ra and Sayed Ahmad Mahdi Ra. From a religious point of view the kramats of Sayed Jaffer and that of Tuan Mobeen on the erstwhile extension 2 (now portion 5) are the second most important kramats in the Western Cape and are extremely popular because of their close proximity to the City Bowl and the Bo-Kaap. It is estimated that as many as fifteen thousand people, including two thousand pilgrims to Mecca currently, visit the graves and kramats on Portion 7

every year. According to oral tradition and living memory the graves and kramats on Portion 7 have been visited over a considerable period of time. That is corroborated by the observations of Brian James Mellon (Mellon) a professional landsurveyer, who, on the basis of his first-hand knowledge of the topography of Portion 7 and the evidence of footpaths depicted on aerial photographs taken in 1945, 1951, 1986 respectively, has concluded that they are still being used to access the graves and kramats situated thereon. As approximately a third of the area of Portion 7 is inaccessible due to heavy infestation by impenetrable alien vegetation it cannot be assumed that the 53 ordinary graves that have been located thereon are the only ones and Mellon anticipates that more graves would be visible if the terrain were to be cleared. Malan has classified Portion 7 as a heritage place of high significance for the purposes of preparing a Heritage Resources Management Plan for the Table Mountain National Park. Malan and Mowlam Yousoof Karaan (Karaan) – head of the fatwa committee of the Muslim Judicial Council (MJC) – consider the Oudekraal area as an informal burial ground and that it, as well as the area around the kramat of Tuan

Mobeen on portion 5, known as Belsfontein to observant Muslims, are regarded as holy or sacred. The first respondent's denial of the correctness of that view, however, is not supported by any expert opinion or evidence. In the absence thereof there is no basis on which the overwhelming expert evidence presented thereanent by the applicants can be rejected. Seen against the aforementioned factual back-drop, the egregiousness of the Administrator's decision to have approved the establishment of Oudekraal Township without having taken the presence of the graves and kramats thereon into account and, other than a formal technically worded notice hidden between a number of others in the Provincial Gazette and in two local newspapers, without any consultation with or involvement on the part of members of the Muslim community or the leaders of bodies that represented them in religious and cultural matters, becomes glaringly manifest. It is in the light of the aforegoing facts that the applicants' counsel contended that in the event of the application failing and the first respondent implementing the township as approved, the constitutionally guaranteed rights under section 15(1) and 32(1) of the Constitution of all members

of the Muslim community of the Cape to freedom of religion as well as the right to enjoy their culture and practise their religion would be infringed.

[20]In addition to the cultural and religious significance of Portion 7 due to the presence thereon of graves and kramats as well as footpaths providing access thereto, it is not open to doubt that the Oudekraal area, in its undeveloped state, is of inestimable scenic value and constitutes a national asset which not only adds to the overall tourist experience of the Cape Peninsula, but also to the recreational enjoyment and pursuits of Capetonians generally. The Oudekraal area, including Portion 7, adjoins the Table Mountain National Park which is part of the "Cape Floral Region" which is listed as a World Heritage Site and is universally considered to be of "outstanding universal significance to humanity". It is regarded as highly conservation-worthy in terms of the consolidation strategy of the conservation partnership between the World Wildlife Fund for Nature of South Africa, the Table Mountain Fund, the Ukuva Firestop Campaign, the first applicant and the Park Forum of the Table Mountain National Park. It

geographically constitutes an important missing component to nature conservation in the Cape Peninsula. Norman Guy Palmer, an ecologist, has expressed the view that all humanity would be poorer if township development thereon is to be allowed. Portion 7, which is situated in the transitional zone between mountain fynbos and Renosterbos, a habitat poorly represented in other parts of the Cape Peninsula and is recognised as being one of the most threatened eco-systems in the whole of South Africa, is considered to be very important from a biodiversity point of view. It furthermore is one of the few remaining instances where the connection between the high altitude mountain zones and the coastline has been preserved and, because of the vast variety of habitats supported by it, is of equal if not greater botanical importance than the land currently situated within the Table Mountain Natural Park. It harbours endangered species such as the vulnerable and rare “Scarce Mountain Copper” butterfly as well as a rare oil colleting bee which is rare or extinct in large parts of the Cape Peninsula and typically occurs in Renosterveld. Also present thereon is a dense population of Grey tree pincushions which support a population of Cape

Sugarbirds. It appears to be beyond dispute that urban development on Portion 7 would bring about a significant and possibly irretrievable loss of biodiversity to the possible prejudice of future generations. The first respondent generally did not take issue with the proposition that Portion 7 is worthy of conservation from an environmental point of view but it did take issue with the proposition that adverse effects are likely to result from urban activities in coastal developments on adjacent marine environments. The resolution of that factual conflict is not material to the outcome of this application. The statement of Dumisani Blessing Sibayi, Acting Chief Executive Officer of the second applicant, that the conservation of the Oudekraal area is critical to the conservation of Table Mountain in its entirety and that its development "would severely devalue Table Mountain as a heritage resource and its potential to be conserved for public benefit in perpetuity" has, significantly, not been placed in issue. The applicants' counsel, in the light of the facts enumerated in this paragraph, contended that in the event of the application being refused and the first respondent – as it is in law would be entitled to do – developing

the Oudekraal township as approved, the constitutional rights of everyone to an environment that is not harmful to their well-being and also to have it protected for the benefit of present as well as future generations as guaranteed by Section 24 of the Constitution, will be infringed.

[21]The first respondent's counsel, in countering the applicants' counsels' submissions on the constitutional infringements that would occur should the application fail and the township be developed as approved, inter alia, contended that the provisions of the Constitution cannot be used as a tool to undo rights that have vested or were acquired in the 1950's and 1960's as it has repeatedly been held that the Constitution does not find retrospective application and that the Bill of Rights does not apply to events that preceded its commencement. That submission appears to lose sight of the fact that this is not an instance where the relevant planning legislation or the Administrator's decision is being tested for invalidity against the provisions of the Constitution. In this matter the possible infringement of constitutional rights arise in the context of the impact an infringement of such

rights ought have on the exercise by this court of its discretion whether to condone the undue delay on the part of the applicants in instituting the present proceedings if the development of the township as approved were to proceed.

[22]The first respondent's counsel dealt with the applicants' arguments relating to the infringement of constitutional rights on two levels. The first was to question the permissibility of raising the issue of religious freedom in the context of the implementation of "facially neutral" planning provisions and decisions. The second was by referring in great detail to the existence of procedures and legislative- and regulatory measures that would be more than adequate to secure and protect the religious and cultural rights of the Muslim community as well as the protection of the environmental well-being of the public.

[23]I am in agreement with the first applicants' counsels' submissions that the correctness of the categorization of Ordinance 33 of 1934 as a "facially neutral" planning provision is questionable because section 3(b)(i) thereof

provided for the need of having regard to policy considerations such as whether, in all the circumstances, it was desirable that a township be established. The submission that the extent to which religious freedom can permissibly be limited - in the context of generally applicable planning provisions which inadvertedly i.e. without any intention of prejudicing a particular religion; in the absence of coercion violating any religious beliefs; and without penalising engagement in religious activities - is difficult and permits of no ready answer, was effectively countered by first applicant's counsel by having referred to the judgment of the Canadian Supreme Court in **Syndicat Northcrest v Anselem** 2004(2) SCR 551, as an illustration of the interface between facially neutral planning legislation and the right to religion. The majority of the judges in that case held that by-laws which, in the interests of achieving a harmonious external appearance of a block of flats and the use as fire-escapes of the balconies of individual flats prohibited "constructions of any kind whatsoever" thereon, infringed the religious beliefs of occupiers who for the duration of the nine day period of a Jewish

religious festival built temporary structures on the balconies of their flats. I am in agreement with the submission of the first applicant's counsel that the decision of the United States Supreme Court in **Lyng v Northwest Indian Cemetery Protective Association** 485 US 439 (1988) which, was referred to by the first respondent's counsel as being "of some relevance in this regard" i.e. that there is no need for this Court to intervene to protect the religious and cultural rights of Muslims, is not of much assistance. That case, which concerned the impact of the building of a road through a state-forested area used by contemporary Indians for specific spiritual activities and was positioned so as to avoid archaeological sites, turned on conflicting demands on state land and the negative formulation of the "free exercise" provision of the First Amendment of the Constitution of the United States of America which is radically different to section 15 of our own Constitution. The submission that if any action or conduct on the part of the first respondent in implementing the Administrator's decision which may require the first applicant's prior approval, and, if granted, would infringe the Muslim community's constitutional rights to freedom

of religion, would constitute a legitimate ground for the refusal thereof and, in any event, could be interdicted, is unconvincing, in my view. Not only would such an application be required to be assessed on the basis of the existence of valid township development rights if this application were to be refused, but it in my view, would not be appropriate for this court to have regard, in the exercise of its judicial discretion, to postulate ill-defined remedies that might be invoked or decisions that might be taken in the future, the effect whereof could be that any possible infringement of the religious and cultural rights of Muslims is avoided. In my view, such nebulous considerations would not constitute a legitimate basis upon which this court could decline to exercise its discretion.

[24]The first respondent’s counsel submitted that in the assessment of the extent to which this court should have regard to the infringement of the Muslim community’s religious and cultural rights in the exercise of its discretion should the development of the approved township proceed, is complicated by the fact that such rights must be weighed against the first respondent’s right to property and that, in

the instant case, one is not dealing with considerations of limitations-clause nature but with a conflict of constitutional rights. I have a number of difficulties with that submission. The first is the notion of a diminution of property rights flowing from an invalid township approval before it has been "validated" by this court by declining to entertain the application. The second is that it fails to give sufficient recognition to the fact that the Constitutional Court in **Prince v President, Cape Law Society, and Others** 2002(2) SA 794 (CC) at paragraph 24, held that the constitutional right to practise one's religion is of fundamental importance in an open and democratic society and is one of the hallmarks of a free society. It also fails to take account thereof that the alleged conflict is limited to the first respondent's ability of implementing the approved township, the granting whereof is invalid and in law incapable of having contributed anything to the bundle of rights constituting the respondent's rights of ownership in Portion 7. The third is that it completely disregards any possibility of the curtailment of the first respondents rights of ownership as a result thereof that, on the facts

before this court, members of the Cape Muslim community have since time immemorial exercised rights of access to the graves and kramats on Portion 7 for the purpose exercising their religious beliefs and culture and in doing to established rights in favour of the public by operation of the legal notion of vetustas or immemorial user (See: Nel v Louw and Another 1955(1) SA 107(C) at 110 H – 111B and generally CG van der Merwe: Sakereg (2nd Edition) at 544/550).

[25]The first respondent's counsel also submitted that a further factor that should be borne in mind by this court is that, on the papers before it, there is a dispute regarding the precise area on Portion 7 that might be regarded as sacred as well as competing positions in the Muslim community at various times, as regards certain religious issues and that this court should be astute not to become enmeshed in debates about the validity, merits or truths of religious beliefs or their importance to believers. I am in agreement with the submission of the first applicant's counsel that the instant is not a matter in which the court is required to be the "arbiter of religious dogma" as it does not involve the

assessment of the correctness, or otherwise, of competing positions regarding the understanding by Muslims of the importance of Muslim graves and kramats in their religious practice; their cultural heritage; or their abhorrence of exhumation, because those matters are to a large extent common cause and the first respondent has not seen fit to challenge the views of the applicants' experts thereanent or to challenge the correctness thereof by placing any opposing views of other experts before this court. The endeavour on the part of the first respondent to question the correctness of the applicants' reliance on the abhorrence of Muslims to the exhumation of graves by having referred to incidents where it had been permitted in the past, floundered because it cannot be disputed that in terms of a Hukem issued in 1973, Muslim burial grounds are considered to sacred and have been prohibited from being sold or the bodies buried there exhumed.

[26]The first respondent and his counsel have not strenuously contested the correctness of the applicants' contentions that the development of the Oudekraal Township, as approved, would on the one

hand infringe upon the Muslim community's right of freedom of religion; their rights of enjoying their culture and the practice of their religion and on the other hand, degrade the environment and undermine conservation and, in addition, infringe the right of everyone to have the environment protected for the benefit of present en future generations, through reasonable measures that would, inter alia, prevent ecological degradation and promote conservation. They, instead, have chosen to rely on the comprehensive legislative and regulatory framework that has come into being during the past decade to ensure that religious and cultural sensitivities are respected and accommodated; that places or structures of regional and national significance are preserved and properly managed; and that the environment is conserved and protected, in contending that as such measures provide effective protection against the desecration of sites of religious significance or potential damage to the environment in the context of the development of the Oudekraal Township. It was argued on the first respondents behalf that as the graves and kramats on Portion 7 are precisely what is envisaged to be protected and managed under the National Heritage

Resources Act, 25 of 1999 (NHRA) and that any environmental and conservation concerns are adequately addressed by the measures contained in the National Environmental Management Act 107 of 1998 (NEMA) and the proclamations enacted as well as the Environmental Impact Assessment Regulations made in terms thereof, no need exists for this Court to take the "extreme measure" of granting this application as a means of ensuring that development in accordance with the administrator's decision made as far back as 1957 does not take place thereon.

[27]The applicants' counsel, whilst fairly conceding that the legislative- and regulatory procedures on which the first respondent relies are capable of being applied to ameliorate any religious and cultural concerns of the Muslim community as well as the environmental and conservation concerns of the general public if a township (not necessarily the approved one) is developed on Portion 7, have advanced cogent reasons why such steps as may be necessary to counter any adverse environmental or other consequences that may result therefrom should not be left to largely unidentified subsequent administrative processes and thereby deprive

interested parties of their entitlement to protection under the law which this court is capable of providing immediately as all the relevant issues have been fully ventilated by them. If the approval of the Administrator is validated as a result of a refusal of this application, the first respondent would be legally entitled to implement the development of the township as approved save as may be curtailed by the aforementioned legislative and regulatory procedures. In such an event any administrative measures envisaged would have to proceed from the premise that the Administrator's approval is unassailable and fashion the required intervention around it as an immutable fact. As a consequence it is not possible to predict, with any degree of certainty, what the nature and/or the extent of such interventions, if any, are likely to be. Whilst it appears from counsels' submissions that the first respondent appears to have reconciled itself therewith that some curtailment of the intended development is inevitable, there appears to be a resolve to undertake a development in some shape or form on Portion 7. It is noticeable that the first respondent, in the face of an almost overwhelming case on the papers that, from

environmental, heritage, protection and town planning points of view no development should be allowed on Portion 7 at present, has not maintained a consistent position as regards the extent of the development envisaged by it. Another concern is that the legislative and regulatory measures on which the first respondent has placed reliance are of recent origin and have come into being long after the administrator's approval. The essential validity of those measures and the validity of their application, in the context of an invalid township approval at a juncture prior to their coming into existence, have not been tested in a court of law and if it were to happen, the outcome thereof could not be predicted and is likely to result in long drawn-out litigation. I reiterate, that in view of the nature of the discretion this court is required to exercise in deciding whether an undue delay should be condoned or not, it is at the very least questionable whether uncertain and speculative considerations of that nature, should be taken into account.

[28] On the basis of what has been set out in the immediately preceding paragraphs I am not satisfied

that, on the facts of this case, the measures provided for in NHRA and NEMA (and the proclamations and regulations made under the latter) are adequate to ensure and protect the religious and cultural rights of the Muslim community of the Cape or to protect the environmental well-being of the general public.

[29]Kasper Andre Wiehahn (Wiehahn junior), the alter ego of the first respondent, in response to views of that tenour expressed by the Supreme Court of Appeal in paragraph 42 of the judgment in the appeal, concedes that it is not entitled to proceed with development on Portion 7 in accordance with the layout on the approved general plan. He, in order to accentuate the ease with which the general plan could be modified in order to purge it of its (one must assume impliedly conceded) shortcomings, proposed certain ameliorating measures that could be considered to be implemented namely, the exhumation and re-interment elsewhere of human remains found thereon; the rerouting of roads and amending the layout of erven in order to ensure that burial sites remain undisturbed. The first respondent, despite having proposed such self-evident measures - other

than a rebuffed attempt during October 2004 to treat with the Muslim community through its attorney about their concerns regarding the impact of the intended development on the burial sites and their access thereto - has not done anything with a view to implementing them despite having known of the presence thereof as well as the Muslim community's attitude thereto since 1996. The debate whether the suggested modifications to the general plan would amount to a revision or a complete redesign, the statutory provisions that find application and who is obliged to give effect thereto appear to have been an exercise in futility. I say so because the uncontroverted evidence before this court is that in terms of Muslim religious precepts the burial sites on Portion 7 are sacred and exhumation and reinternment anathema thereto especially, because of the undisputed opinion of Malan, that the bones of those buried there will still be in a state of preservation. According to her, Portion 7 may well have been an informal burial site because of the number of graves on it; their relative proximity to one another and the absence of formal cemeteries for Muslim slaves at the time. That view is supported by Karaan, a member of the Supreme Council of the

MJC. According to Karaan the entire Belsfontein area, which includes Portion 7 and the land adjacent to the kramat of Tuan Mobeen, has always been regarded as sacred. Jassiem Harris, the Imam of Woodstock; Makmood Limbada the Chairman of the Cape Mazaar Society, an organization founded in 1982 to protect kramats; and Mahmood Akleker the Vice-Chairman of the Cape Mazaar Society support that view. In view of the fact that when the original proceedings were launched there were only slightly more that twenty identified graves on Portion 7; that another thirty graves have since come to light and approximately a third of the area thereof is inaccessible because of the presence of impenetrable alien vegetation, there is a strong likelihood of there being more, as yet undiscovered, marked as well as unmarked burial sites. I have little difficulty in taking judicial notice thereof that the installation of services, the construction of roads and the erection of buildings in the intended township must inevitably entail a disturbance of the soil as a result of necessary earthworks and that it has the potential of desecrating unidentified burial sites which, according to Muslim religious beliefs, will constitute sacrilege. Even if it were possible

to somehow isolate the burial sites on Portion 7 from any township on it, according to Karaan, a spokesperson for the MJC, it would detract from the sanctity of the area and its historic use and that to have secular activities of a probably largely non-Muslim community in close proximity to religious sites which are constantly used and at times frequented by large numbers of adherents of the Muslim faith, would be a sacrilege. As would appear from what has been set out in some detail above, the alleviating measures alluded to by Wiehahn junior fall far short of adequately addressing the religious and cultural concerns of the Muslim community of the Cape. In any event, any reconfiguration of the approved township, which at present has no physical manifestation other than demarcations on the general plan, is an aspect best dealt with by those officials and institutions who, by virtue of their qualifications and expertise have been deputed to do so in terms of LUPO and not the courts. That conclusion was arrived at with full knowledge of the fact that review is fundamentally a discretionary remedy and for that reason, permits of some elasticity as regards an appropriate remedy.

[30]The first respondent adopted the stance that the inability on the part of the applicants to cogently demonstrate why the statutory and regulatory framework, to which reference has been made above, is inadequate to regulate the development of Portion 7 by the relevant administrative authorities in accordance with the public interest but instead, insist on “exceptional intervention” by this court, lends credence to the assertion that the applicants’ interest is directed at choreographing a situation in which it could be expropriated at a consideration much lower than would be payable if township development rights existed. That thát is the applicants’ motive has been denied by Wootton. The applicants have adopted the attitude that the importance of protecting the public against the ramifications of an invalid township approval in respect of Portion 7 stands independently of whether it should be expropriated or not. They, whilst admitting that the third applicant and members of the Land Consolidation Group do not have the funds to acquire it at the market value thereof as determined by the first respondent’s valuator Erwin Rode, do concede that expropriation might be a last-resort method for securing the incorporation of it

into the Table Mountain National Park but contend that it would be neither fair nor reasonable to burden the public purse with compensation based on the notional value it would have had, had it enjoyed valid township approval. Applying the approach enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A) at 634 E – 635 C to the dispute about the value of Portion 7 if valid development rights existed, it must be accepted it was worth approximately R570 million in 2004 and that without such rights, approximately R20 million. It follows that if the Administrator's approval is "validated" it will provide the first respondent with an immediate unrealised windfall of stellar proportions, as a result of what the third applicant's counsel aptly described as "a thoroughly obnoxious township development plan", as a product of the repressive socio-political and regulatory environment in which it was conceived and brought forth. It will also provide the first respondent with a firm basis in negotiations for a higher price or compensation in the event of a sale or an expropriation should the "validated" development rights be curtailed as a result of the implementation of the regulatory

provisions provided for by NHRA or NEMA. The entitlement to expropriate property and the compensation payable pursuant thereto is dealt with in subsections 25(2) and (3) of the Constitution. The deprivation of property is dealt with in subsection 25(1) which does not make provision for payment of compensation. It has been argued on the first respondent's behalf that the doctrine of constructive expropriation is not recognised in our constitutional law so that the mere deprivation of property rights in terms of a statute or regulation would not amount to an expropriation requiring the payment of compensation as a condition to its validity. That question was left undecided in **Steinberg v South Peninsula Municipality** 2001(4) SA 1243(SCA). The third applicant's counsel submitted that the argument put forward on the first respondent's behalf fails to have regard to the fact that the court in the **First National Bank of SA Ltd t/a Wesbank** case (supra) at 796 E – I, held that any expropriation of property as contemplated by section 25 of the Constitution is a species of deprivation of property and that as subsection (1) thereof provides that no law may permit "arbitrary" deprivation of property, the question of the

constitutionality of a statute providing for deprivation without compensation, would not be confined to only whether it amounts to an expropriation but also the constitutionality of a deprivation for which no compensation is payable. Similar sentiments were expressed by second applicant's counsel. I need say no more than that the uncertainty about whether a mere curtailment of development rights over Portion 7 would require the payment of compensation, strips the submission that the Muslim community's religious and cultural interests as well as the general public's environmental concerns could be adequately served by the already-mentioned statutory and regulatory framework rather than by having the Administrators decision set aside, of its only attractive feature. Although the compensation paid in the case of expropriation must in terms of subsections 25(2) and (3) be just and equitable, the market value of the expropriated property remains a relevant factor. I agree with the second respondent's counsels' submission that a materially different value could result depending on whether the market value of Portion 7 is determined with or without development rights. I am also in agreement therewith that it

would be an affront to the norms and values of our Constitution to increase the compensatory burden on the public purse where the impugned rights were granted 47 years ago and without an appreciation of the need to conserve and protect the environment and without any regard to the religious and cultural sensitivities of the Muslim Community; that no significant steps had been taken by the first respondent for over 30 years to implement the development; that the value of Portion 7 even without development rights, is worth many times the original purchase price of R110 000; and that available resources, because of the demands on the public purse by the substantial economic implications of the Government's various constitutionally prescribed commitments, are not unlimited (Cf: **Fose v Minister of Safety and Security** 1997(3) SA 786 (CC) at paragraph 72).

[31]The issue of prejudice if the Administrator's decision were to be set aside, due to its being assailed after such a long period of time has elapsed, featured in counsels' argument on the following bases: The first is the extent to which third parties, acting in reliance of the

Administrator's decision, have been prejudiced and the second is whether, and if so, the extent to which the first respondent has been or will be prejudiced as a result thereof.

[32]It was submitted on behalf of the first respondent that prejudice to third parties manifested itself in a number of ways. The first is that Price, in consequence of the approval of the Township, appointed land-surveyors to draw up a general plan and submitted it to the fourth respondent in 1960; took steps in 1961 to lodge the approved general plan with the third respondent and applied for and obtained Certificates of Registered Title in respect of not only Portion 7 but also portions 4, 5 and 6, the practical effect whereof was that they then became separate entities of land. The second is that Theodorus Wiehahn (Wiehahn senior), who died a number of years ago and was the guiding mind of the first respondent at the time, as is alleged to be apparent from certain contemporaneous documents, purchased Portion 7 with a view to subdividing and developing it when optimal to do so and that he would not have done so had he known that the administrator's decision was invalid or vulnerable

and have tied up so much capital for in excess of 40 years instead of investing it in other land capable of yielding a better return. The third is that Wiehahn senior and his advisors, relied thereon that development rights had been registered against Portion 7 and had remained unchallenged for approximately 4½ years and therefore cannot be blamed for not having done anything more. The fourth is that the first respondent, early in 1980, when it would still have been possible to amend "the conditions of township approval", had discussions with French and German architects about a different layout for the township. The fifth is that the first respondent engaged Wouter Engelbrecht and Associates during 1996 to prepare an Engineering Services Plan based on the general plan. The sixth is that the first respondent on 31 August 2001 launched the original proceedings and would not have done so had the township approval not stood unchallenged for in excess of 40 years.

As is apparent upon even a cursory reading thereof, the last three of the aforementioned grounds involved the first respondent and not third parties. To the extent that the steps taken by Price pursuant to

the approval of the township to have enabled him to exploit it commercially may prove to have been abortive, it is directly attributable to his failure to have divulged the presence of graves and kramats on Portion 7 in the documents prescribed by the regulations formulated under section 60 of Ordinance 33 of 1934 in the applications submitted by him during 1949 and 1954 for the establishment of the township. It would therefore seem that any abortive efforts and wasted expenditure in that regard are attributable to such failure and not to any neglect on the part of any of the applicants to have taken timeous steps to have the administrator's decision set aside. The assertion that Wiehahn senior and/or the first respondent placed reliance on the fact that the township had been registered and had remained unchallenged for 4½ years - as will appear from what follows later - has been strenuously disputed by the applicants. But even if it were to be accepted that he had, it would appear that any enquiries made and steps taken on the strength thereof, were not for his personal benefit but for that of the corporate entities (of which the first respondent is one) which later became the registered owners of Portion 7 and also portions 4, 5 and 6. Not only is it contentious on the papers before this court whether any prejudice in fact resulted therefrom but it is unclear how such prejudice, if any, could be categorised as having been suffered by a third party. The contention that the first respondent, in acquiring Portion 7, placed reliance on the existence of the administrator's approval in procuring the acquisition of Portions 4, 5, 6 and 7 was strenuously disputed by the applicants' counsel. They did so on a number of grounds. The first was that the proposition that he had done so has been considered and rejected by the Supreme Court of Appeal in paragraph 46 of the judgment in the appeal for the reasons enumerated in paragraph 47 thereof. The second is that further significant items of information which support the same conclusion have come to light since the papers in the original application had been finalised. They are, firstly, that the first respondent and Devland Construction (Pty) Ltd on 25 January 1996 (ie. before the institution of the original proceedings), concluded an agreement - subsequently abandoned - relating to the development of Portion 7 in the preamble whereof it was recorded that:

> "The nature of the existing township layout is not suitable for the beneficial exploitation of the development rights in the current and future environment.

> Redesign of the layout and consequent rezoning will therefore be required to make the development viable and financially attractive and will be proceeded with in terms of a master plan to be agreed between the parties."

Secondly, that it appears that Price had acquired the whole of the remainder of the farm Oudekraal 902 on 23 April 1953 from the estate of the previous owner thereof at a purchase price of £60,000 and that the same land, from which portion 3 had by then been excised and transferred, had been acquired on behalf of or by the first respondent and its group of sister companies at a purchased price of £5,000 less than had be paid twelve years earlier, despite the fact that the development of a township had in the interim been approved thereon. That a reduced purchase price had been paid appears to be consistent with the view expressed by Wiehahn senior and is supported by the consultations that had been held with foreign architects in the 1980's as well as the preamble of the aforementioned contract, that the approved "single grid layout" of the approved township had by then already become outdated as well as the evidence that it was acquired for its unique location and the favourable purchase price.

It was disavowed on behalf of the first respondent that the fact that it had over a period of three decades failed to take any steps to develop Portion 7 in

accordance with the administrator's approval and the general plan, was attributable to the fact that it had considered it as having become outdated. As was submitted by first applicant's counsel, such disavowal is belied by the contents of three contemporaneous documents, namely, Annexure RW 56 (a letter dated 18 May 1964 addressed by Wiehahn senior's partner, W Coetzer to Federale Volksbeleggings); Annexure RW58 (a letter addressed by Wiehahn senior to his partner W Coetzer); the agreement with Devland Construction (Pty) Ltd (Annexure RW 59) as well as the following statements made by Wiehahn junior in the original application namely that:

> "My father was … of the view that the single residential grid layout of the township on Portion 7 which he had acquired had already became outdated since approved"

(founding affidavit paragraph 56) and that his father had held the view that:

> "Land that is close to, or on the slopes of Table Mountain is valuable land and should be acquired if and when possible"

(founding affidavit paragraph 53).

[33]The first respondent's counsel, on the basis that certain specific acts and conduct on the part of the first applicant and its predecessors; the second- and third applicants; and other state officials and public bodies, manifested assent and acquiescence submitted that it is not permissible for them, as organs of state, to make an about-face decades later and now challenge the Administrator's decision. That submission is based on the following acts and

conduct: -

33.1] That the first applicant and its predecessors appear to have been content with the Administrator's decision because they, despite the fact that they had been fully apprised of the township application and the granting thereof and that the "Oudekraal development" had been in the news in 1964 (approximately a year before the first respondent purchased Portion 7) chose not to institute proceedings, despite having obtained legal advice during 1996 to the effect that the approved township was invalid, (a statement which is factually incorrect in that the advice was that it had lapsed).

33.2] That also the Administrator did not have any doubts or misgivings about the efficacy of the administrator's decision as he during June 1964 advised the NMC that nothing could be done about it.

33.3] That the Provincial Secretary had informed Wiehahn senior's representatives that the restoring of the lapsed development rights over portions 4, 5 and 6 would be a mere formality.

33.4] That the NMC had no fundamental difficulty with the approval of the township and was prepared to content itself with representations to the Administrator despite the fact that it, for aesthetic reasons, would have preferred alterations to the conditions of approval and further acknowledged the existence of such rights by having issued notices in terms whereof Portions 4, 5 and 6 were provisionally declared national monuments but not Portion 7.

33.5] That when the boundaries of the Cape Peninsula Protected National Environment (CPPNE) were delineated the commonage on Portion 7 was included therein on the basis that it was to be transferred to the local authority pursuant to the development.
33.6] That the Metroplitan Area Guide Plan for the Peninsula (The Guide Plan) indicates Portion 7 for urban development and implied that development thereon would be permitted in that it provided that no urban development will be permitted in the Peninsula Mountain Area except where the establishment of any township had already been approved; and
33.7] That the Sub-Regional Structure Plan for the Coastline of Metropolitan Cape Town (the Sub-Regional Structure Plan) recognised that urban development along the coastline would include Oudekraal Township but noted that because of steep and hazardous slopes and depressions development should proceed only after consideration of an improved layout.

[34]That submission proceeded from the premise that the applicants and/or their predecessors, by not having taken steps to have the Administrator's decision reviewed and set aside, have tacitly acknowledged that it was regularly granted and as a consequence have forfeited the right of challenging it in these proceedings. Is the inference that the applicants, by having failed to challenge the Administrator's approval, in the circumstances alluded to above, a tacit acknowledgement of the regularity of the granting thereof, consistent with all the proven facts before this court? The answer to that question, in my view, is an emphatic "no" as such an inference postulates an awareness on the part of

the applicants of the existence of the facts on which the Supreme Court of Appeal's finding of invalidity from inception was based, which appears to be common cause, came to light only during 1996. The first applicant and its predecessors could not reasonably have become privy to such knowledge before that date and the second and third applicants became privy thereto only as from the early part of 2002 and there further is no evidence on record which shows that anyone else had any knowledge thereof. Apart from the fact that the Guide Plan and the Sub-Regional Structure Plan must be seen for what they truly are, namely, blueprints for intended future orderly, cohesive and co-ordinated town-planning and there is no evidence that those involved in the compilation thereof had any knowledge of the existence of the facts which rendered the administrator's decision invalid either before or after the publication thereof in 1988. The most plausible explanation for the applicants' inaction, in my view, appears to be that they and the other officials and public bodies involved acted on the erroneous but reasonable belief that the Oudekraal Township had been validly granted.

[35]I accordingly incline to the view that it has not been shown, on a balance of probabilities, that the applicants acquiesced in the Administrator's decision and as a consequence have forfeited the right to assail it in these proceedings. On the contrary, on the basis of the Supreme Court of Appeal's judgment, they as public bodies exercising public powers were obliged to do so.

[36]Counsel for the parties when submitting argument as regards the prejudice the first respondent is alleged to have suffered because this application has been instituted after such a long delay and the prejudice it is likely to suffer should the administrator's decision be set aside at this stage, divided their submissions into broad compartments. I intend to do likewise but not necessary in the same sequence.

[37]The first respondent's counsel submitted that this case is a classic example of the forensic prejudice that could result if an application for review is instituted an inordinately long time after the decision the impugnment whereof is sought. He, on the basis of the applicability of certain of the

criteria that have in the past been enumerated by judges namely, the fading of the memory of the decision-maker, the parties themselves or any of their witnesses; the non-availability of necessary witnesses; and the destruction or the unavailability of physical or documentary evidence (See: **Radebe v Government of the Republic of South Africa** (supra) at 799 B – F; **Liberty Life Association of Africa v Kachelhoffer N.O. and Others** (supra) at 1114 B – C; **Camps Bay Ratepayers and Residents Association and Others v Minister of Culture, Planning and Administration, Western Cape, and Others** (supra) at 307 C – D) submitted that it would not be fair for this review to be entertained at this "extreme degree of remoteness" from the date of the Administrator's decision, as the first respondent has been placed in an unfairly disadvantaged position to oppose it. The major grounds of complaint as regards the alleged forensic prejudice are that because of the non-availability, as a result of death or other reasons, of Price, the Administrator, members of the Townships Board and the professionals who had assisted in the township application as well as the inadequacy of the review record because of the absence of material documents,

it is not possible for the first respondent to show why the plan which accompanied the township application, the general plan and the township conditions did not contain any reference to the graves and kramats on Portion 7 and that without such knowledge, it is not possible to exclude the possibility that the Administrator, with full knowledge of their presence thereon took a reasoned and considered decision that the graves and kramats could be preserved, relocated or exhumed and reinterred without contravening any law or offending any religious sensibilities or cultural practices. The allegedly material documents are the minutes of the meetings of the Cape Town Joint Planning Committee and Technical Sub-Committee, minutes of the meetings of the Townships Board and lack of certainty about the identity of the plan on the basis whereof the Oudekraal Township was approved. The possibility that the absence of any reference to graves and kramats in the approval of the township is attributable to a considered and reasoned decision has not only been rejected by me as improbable but is difficult to reconcile with the acceptance by the first respondent's counsel in their heads of argument that the first of the two

scenarios suggested by the Supreme Court of Appeal namely, that the Administrator and all others involved in the consideration and approval of the township application were completely unaware of the presence of graves and kramats on Portion 7. I am in full agreement with the first respondent's counsel that this complaint has a bearing only on whether the Administrator's decision was unlawful. As the Supreme Court of Appeal based its finding of the invalidity of the administrator's approval thereon that the Administrator and all the officials concerned therewith had been ignorant of the presence of the graves and kramats, the complaint of the non-availability of witnesses and an absence of documentation falls away because the fact that none of the persons involved in the approval of the township is alive or available and that the record may not be entirely complete, did not, in my view, in any way handicap the first respondent in the presentation of its case in these proceedings. In any event as appears from paragraphs 75 to 81 of the first applicant's counsels' heads of argument in reply, the record which has been filed by the second respondent in terms of the provisions of Rule 53(1)(b) (the Minister's record) is replete with

documents containing references to the views and recommendations of the Joint Planning Committee as well as documents pertaining to the views and recommendations of the Townships Board in the performance of its functions in relation to the approval of the Oudekraal Township. Significantly, not a single one of such documents contains any reference to the presence of graves and kramats on Portion 7 or even hints at their relocation and/or exhumation and reinternment.

The first respondents counsels' **cri de coeur** that the plan which accompanied the application when it was approved in 1954 has not been made available because plan, PA 16/A/1/36-A (Annexure RW 5) is dated 17 April 1956 (ie. almost two years after Price's application had been submitted) and deals only with Portion 7 whereas the plan which it alleged had been submitted (presumably Annexure RW 4), was in respect of portions 4, 5, 6 and 7 lacks substance. The first applicant's counsel have in their heads of argument shown conclusively that this complaint is unfounded because of a misinterpretation or lack of understanding of the facts. It transpires from Annexure RW 5 that it was not dated 17 April 1956 but that the fourth

respondent, on that date, endorsed that the erf numbers thereon had been amended. Furthermore, the first paragraph of the township conditions which form part of the approval, contains the following statement:

> "This township shall consist of the erven and public places shown on Plan PA 16/A/1/36 – A"

That is the number which appears on the top right-hand corner of Annexure RW 5. It further appears that the Minister's record is replete with references, from as early as 1954 already, to plan PA 16/A/1/36-A when referring to the Oudekraal Township and to plans PA 16/A/1/43-A to PA 16/A/1/46-A when referring to extensions 1, 2 and 3. In the circumstances there can be no doubt that Annexure RW 5 was the plan which had been submitted in connection with the Oudekraal Township application and that it was the plan which was considered when the desirability of establishing a township on Portion 7 was considered and approved. Annexure RW 5 does not disclose or depict any graves and kramats.

In view of the aforegoing I incline to the view that it has not been shown that the first respondent has

been materially prejudiced in the presentment of its case in these proceedings, despite of what I have already found constituted an unreasonably long delay.

[38]The argument advanced on the first respondent's behalf regarding the prejudice it will suffer if the administrator's decision were to be reviewed and set aside in this application proceeded on the bases firstly, that the acquisition and the long-term holding of immovable property for eventual development is a well-recognised investment strategy and that Wiehahn senior, the guiding mind behind the first respondent in 1965, acquired Portion 7 for that purpose in the knowledge that the Oudekraal Township had been proclaimed as such for slightly longer than three years and secondly, in reliance on the "legal certainty" engendered by the fact that its approval, being a planning decision which by its very nature and the fact that it affected also the rights of land use in surrounding areas needed to be challenged promptly, had not been assailed. It is in that context that it was submitted that the first respondent suffered financial prejudice which "has increased exponentially with the passage of time".

> The prejudice the first respondent has allegedly been exposed to is attributed to the applicants' delay in not having instituted these proceedings within a reasonable time and necessitates a comparison of the first respondent's patrimonial position if the administrator's decision is set aside at this juncture with what it would have been if it had been done within a reasonable time.

The present market value of Portion 7, without an approved township, appears to be in the order of R20 million as Erwin Rode the property economist and property valuer consulted by the first respondent and Jaques Francois du Toit (Du Toit) a professional valuer and appraiser, consulted by the applicants, were in agreement that that is what its market value was as on 1 December 2005. What its market value would have been had this application been brought within a reasonable time will have to be determined with reference to the juncture at which it should have been brought. Because, as has already been found, all concerned with the approval of the Ouderkaal Township, including the applicants, were oblivious of the existence of graves and kramats on Portion 7 prior to the latter part of 1996, it cannot be found that there was an unreasonable delay with the institution of this application prior to the latter part of 1996. I have already found that the first applicant delayed unreasonable from 1996 onward and that the second- and third applicants did so from February 2002. For prejudice - other than lost alternative investment opportunities - to have manifested itself there needs to be proof that had Portion 7 been sold at any time after 1996 it would have realised a higher selling price than it would if sold at present. Such a possibility can best be described as illusory. It has been submitted that had the bringing of this application not been delayed unreasonably and had the administrator's decision been set aside earlier, Portion 7 could have been disposed of and the proceeds yielded thereby invested in "equivalent or comparable land investments with significant capital growth in the intervening period". The quantum of such lost opportunity costs, which has

been described as "irremediable" in the first respondent's counsels' heads of argument, will depend on the determination of the approximate date on which it would have become available and which, as I have already concluded, could not have been prior to 1996. Alternative investment opportunities in equivalent or comparable land as from that date, on the basis of the selling price obtained, are relevant and not the investment of the purchase price paid in respect of Portion 7 in 1965 in different kinds of investment products as was done by Du Toit. Save that I shall assume that the reference to "equivalent or comparable land investments" was intended to refer to raw land with potential for - or existing township development rights there is no clear identification or elucidation in the papers of such alternative opportunities and their respective returns except for Rode and Du Toit's average annual increase of the value of residential properties over a number of years of 24.4% and 14.73% respectively. Accepting that the market value of undeveloped rural land with existing or potential township development rights would be more valuable and appreciate at a faster rate than similar land without such rights, I shall assume that the first respondent will suffer prejudice from the delay in the institution of this application by the applicants even if the growth in the value of Portion 7 during that period is brought into account against it. Due to a dearth of relevant information it is not possible to determine the extent thereof even by means of an approximation, other than to say that it could not be anywhere near its market value of R570 million, if this court were to validate the Administrator's decision by refusing this application. That, however, is not the basis on which the submission under consideration was made.

On the basis of what has been set out above I shall, in the exercise of my discretion, accept that the submission that the unreasonable delay on the part of the applicants in the bringing of this application has deprived the first respondent of more favourable investment opportunities in land that could have been exploited by it if the present application had been brought within a reasonable time and had been successful.

[39]The first respondent contends that, as a result of the delay in the launching of these proceedings, it

has been prejudiced in that it has been denied the opportunity of remedying the administrator's invalid decision by means of a "fresh approval" for the establishment of a township on Portion 7 because it would have had a substantially greater chance of succeeding with such an application if it had been brought within the first thirty years of the granting of the approval. The fact that the Provincial Secretary had in 1964 intimated that the obtaining of fresh approval for the already lapsed township approval in respect of Portions 4, 5 and 6, would be a "blote formaliteit" but that the attitude of the provincial authorities at present would be diametrically opposed, was invoked in support of that contention. That the chances of an application for the establishment of a township on Portion 7 in the present legislative and regulatory environment succeeding are unfavourable is consistent with all the information at this court's disposal. As this contention was predicated on the assumption that a fresh approval application would have been brought, it would not serve any purpose to consider the applicability, meaning and ambit of the statutory provisions in terms whereof an application would have been made for the amending of the

township conditions and/or the amending or cancellation of the general plan in respect of the Oudekraal Township. This contention is flawed, however, in that it is predicated on a hypothesis which presupposes that an application for the setting aside of the Administrator's decision would have been brought within thirty years and would have been successful. The flaw stems from the fact that, as has already been found above, none of the interested parties could have had any knowledge of the existence of the facts upon which the validity of the administrator's decision could have been successfully assailed prior to late in 1996. Accordingly an opportunity for the bringing of such an application would not have arisen so that there is no causal connection between the undue delay and any prejudice the first respondent claims to have suffered as a result thereof (Cf: **Spier Properties (Pty) Ltd and Another v Chairman, Wine- and Spirit Board, and Others** 1999(3) SA 832 (C) at 844 H – I; 845 D – C).

It was also submitted on the strength of the approval in 1999 of a housing development on the slopes of the Dassenberg Mountains in Noordhoek that had the Administrator's decision been set aside during the latter part of the 1990's it is "hardly fanciful" that a fresh application for development rights on Portion 7 on condition of the donation of the "top portion of the

property" to the Table Mountain National Park might have been favourably received. In my opinion that submission is purely speculative as by then the changed statutory and regulatory environment to which reference has been made earlier herein had already established itself firmly and, as has already been pointed out above, the problem of reconciling any form of urban development on Portion 7 with the Muslim community's religious and cultural sensitivities and its uniqueness, from conservation and environmental points of view. What must, in the context, not be lost sight of is that the second respondent - the successor to the Administrator - has signified an acute awareness of the need to protect the rights of the Muslim community to practice their religion and enjoy their culture.

[40]It was also contended on behalf of the first respondent that it suffered prejudice resulting from the applicants' undue delay because it "caused" the area of land referred to as the commonage to be included in the CPPNE without any challenge, unlike what it would otherwise have done, as happened in the case of other land owned by it. It was submitted that had the present application been brought "even after a couple of decades after the Administrator's … approval" it could have objected to the incorporation of the commonage into the CPPNE. The commonage (± 308,59 hectares in extent) originally formed part of farm Oudekraal 902. It became known as the remainder of the farm Oudekraal 902 when Price, pursuant to the granting of township rights over the whole of the property by means of

defined and numbered extensions, took out Certificates of Registered Title on 1 November 1961 in respect of Portions 4 (Extension 3), 5 (Extension 2), 6 (Extension 1) and 7 of the remainder of the farm Oudekraal 902 and in that manner, excised them from it. Clause 14(c) of the Conditions of the Oudekraal Township provided that the commonage should be given in trust to trustees appointed by the Administrator "after deduction of the small scale diagrams of this township and its three extensions". It has not as yet been so "given" in trust and the whole of the commonage is at present registered in the name of, not the first respondent, but in that of a sister company, namely, Oudekraal Properties (Pty) Ltd (Oudekraal Properties) pursuant to its sale to it by Price. The commonage was on 10 February 1984 proclaimed as a "nature area" in terms of the provisions of the Physical Planning Act, 88 of 1967 and by virtue of the provisions of section 44(2) of the ECA, became known as the CPPNE as from 9 June 1989. The effect of the inclusion of land in the CPPNE is that the development thereof is prohibited without ministerial permission. That the first respondent suffered any prejudice from the inclusion of the

commonage in the CPPNE, in my view, is illusory as no part thereof ever formed part of Portion 7 so that any prejudice that flows therefrom accrued to Oudekraal Properties which appears to be the only party with the required standing in law to have objected to its inclusion. That effectively destroys the basis upon with the first respondent's alleged prejudice under this head was predicated in argument.

In any event, it on the facts before this court appears exceedingly unlikely that any prejudice has been suffered as a result of such incorporation. There is not even a hint that Oudekraal Properties ever intended developing any part of the commonage below the 152 meter contour line or sought permission to do so in terms of Act 88 of 1987; section 16(1A) of the ECA; and section 29 of the Protected Areas Act, 57 of 2003. Because of the considerable expense of installing engineering services at such a distance from the central business district of Cape Town and, unlike in the case of Portion 7, bulk services would have to be paid for, the feasibility of developing that part of the commonage lying below the 152 meter contour line appears to be highly unlikely. As was conceded by the first respondent's consulting engineers, Nkuthalo Wouter Engelbrecht (Pty) Ltd, the commonage above the said contour line is not suitable for urban development. What's more: the Guide Plan discourages urban development on gradients steeper than 1 : 6 and the gradients of most slopes on the theoretically developable section of the commonage exceed this.

[41]A further manifestation of prejudice to the first respondent was postulated on the basis that had the Administrator's decision been set aside prior to 1965, the continued need for the division of the

Oudekraal farm into four separate units would have fallen away and Price would thereafter have divided the land up in a different and "more favourable manner", alternatively, Castle Estate Agency (Pty) Ltd would have "purchased" the said property in an undivided state and could then have subdivided it in the most optimal way. If that had occurred, so runs the argument, it would have been less prejudicial in the event of township rights on any of the portions thereof being set aside because "a company like Oudekraal Estates might not be left with two or more properties covering what is now Portion 7 on which (at the very least) a single dwelling could be built". On my understanding thereof this complaint limits the period of the failure to have instituted proceedings reviewing the Administrator's decision, to the period preceding the date on which the first respondent became the owner of Portion 7, namely, 28 May 1965. In view thereof that the subdivision of the remainder of the farm Oudekraal 902 came into effect only on 1 November 1961 when Price took out certificates of Registered Title in respect of Portions 4, 5, 6 and 7, the delay to which the alleged prejudice is attributed is limited to a period of approximately 3½ years. I am in agreement

with the argument of the applicants' counsel that a finding that any of the applicants had during thát period delayed unreasonably, any failure to have done so prior thereto is of no relevance, as would be any undue delay subsequent thereto. As the facts on the basis whereof the Supreme Court of Appeal found that the Administrator's decision could be assailed had not and could not reasonably have been expected to have been known by the applicants during that period there, in my view, is no factual basis for a finding that they delayed unreasonably during that period. The first applicant's counsel were correct, in my view, in having submitted that the alleged prejudice is entirely hypothetical and based on a notional hypothesis not justified by the facts or supported by any probabilities. Nothing precluded Wiehahn senior, as the controlling mind behind the different entities involved in the acquisition of farm Oudekraal 902 from the estate of Price, to have undone such subdivisions and to have reconfigured it into such entities as would have suited his and their individual or combined interests.

[42]A further issue raised by the first respondent was

that the Administrator's decision to allow the establishment of a township on farm Oudekraal 902 was a composite one of which the approval of the Oudekraal Township on Portion 7 was an integral part and that one cannot set aside the Administrator's approval in respect thereof and leave the subdivision of the remainder intact especially as only the first respondent as the owner of Portion 7, has been cited as a party in these proceedings and the owners of what are presently known as Portions 4, 5 and 6 have not. That submission was predicated thereon that the Administrator, as was alleged to have been his practice, granted four separate approvals, three whereof were in respect of Extensions 1, 2 and 3 (Portions 6, 5 and 4) - because the fourth respondent preferred to restrict the erven reflected on individual general plans to no more than 200; that Certificates of Registered title in respect of portions 4, 5, 6 and 7 were issued by the third respondent as a consequence of the decision to grant such approvals and that the units of land referred to in the Certificates of Registered Title in respect of portions 4, 5, 6 and 7 owe their existence to the Administrator's approval. The first applicants' counsel challenged

the factual correctness of all the assumptions of fact on which that submission was based. John Godfrey Obree, the Surveyor-General, disavows knowledge of a preference to limit the number of erven on general plans as alleged, and succeeded in locating 27 general plans for the period 1954 to 1957 that comprise more than 200 so that the existence of a policy of the nature alleged is unlikely. A more likely explanation for the breaking up of large townships into extensions appears to be a preparedness on the part of the authorities to accommodate developers who would then not have to bear the up-front costs of installing the entire infrastructure of a township before being able to sell erven. As the township approvals of Portions 4, 5 and 6 had lapsed on 31 December 1959, only Portion 7 retained its development rights and Portions 4, 5 and 6 reverted to their original rural zoning and retained that status until 1 November 1961 when the Certificates of Registered Title were granted in respect thereof. The effect thereof was that each of Portions 4, 5, 6 and 7 from then on became independent land units which are presently owned by different but related legal entities. Also the commonage became a separate entity held under

separate title by Oudekraal Properties. The fact that Certificates of Registered Titles were applied for and granted in respect of also those units of land of which the previously granted development rights had lapsed and had reverted to their original agricultural zoning, militates against their having been granted as a consequence of the granting of the original township approvals. Also the assumption that Portions 4, 5, 6 and 7 owe their existence to the Administrator's approval is contentious. Prior to the Certificates of Registered Title having been applied for and granted, the units of land comprising portions 4, 5, 6 and 7 existed as extensions in a single composite township. When the township approvals in respect of those portions lapsed the planned extensions discontinued to exist. The taking out of Certificates of Registered Title was not a condition of township approval nor a requirement imposed by the Administrator. It was the result of a decision by the previous owner, for reasons best known to himself, from then on to hold the remainder of farm Ouderaal 902 in subdivided units that corresponded with the areas on which the different extensions would have been located. Whilst Portions 4, 5, 6 and 7 certainly originated

from the Administrator's approval of township development rights on farm Oudekraal 902 they, in my view, do not owe their existence thereto.

The submission that the approval of the township in respect of Portion 7 was also in respect of Portions 4, 5 and 6 was based thereon that Condition 14 of the Oudekraal Township refers to Extensions 1, 2 and 3 (Portions 6, 5 and 4) and reserved the commonage for the benefit of Oudekraal Township (ie Portion 7 as well as Extensions 1, 2 and 3). The first applicant's counsel did not question that that condition was imposed, but submitted that it did not stand in the way of the granting of the relief the applicants are seeking herein. I am in agreement with the submission that as the approval of township rights in respect of the extensions referred in that condition have lapsed, the reference thereto in the approval in respect of Portion 7 and "the benefit" of the commonage in relation to "Extensions 1, 2 and 3" have become redundant and that, if the Administrator's approval in respect of Portion 7 is set aside, the obligations imposed by, inter alia, that condition would similarly fall away. I also agree that the effect of the aforegoing will be that the commonage would no longer be regarded as a commonage for "this township" and its extensions, and that neither the owner of Portion 7 nor the owner of the commonage would be under any obligation to transfer it to trustees in terms of the provisions of Oudekraal township Condition 14 (c).

I accordingly find that the approval of the Oudekraal Township and the taking out of Certificates of Registered Title and of sub-divisional diagrams in respect of Portions 4, 5, 6 and 7 are unrelated and that the setting aside of the former will not adversely or otherwise affect the registration thereof as separate entities of land.

[43]The first respondent's counsel advanced a number of factors as militating against the setting aside of the Administrator's approval of the Oudekraal Township.

The first is that if the application should succeed, ownership of the roads and public places on which the kramat of Sayed Jaffer and most of the graves are situated would revert to private ownership and enable the first respondent, in the exercise of its rights of ownership, to "fence its entire property" and leave members of the Muslim community worse off than they are at present. However, not all the graves and kramats, such as the kramat of Sayed Ahmed Madhi Ra, are located in public places depicted on the general plan. Portion 7 does not appear to have been fenced at any time and the Muslim community has exercised unfettered access to the burial sites thereon for religious and cultural purposes since time immemorial, not because the roads and public places vested in the local authority in terms of the provisions of section 24(1) of Ordinance 33 of 1934, but because the owners thereof failed to object thereto. Should the exercise of any rights in favour of the public

> established thereby be frustrated by the erecting of a fence or by any other means, it could be undone by means of appropriate interdictory relief. That the Muslim Community will be worse off if the application should succeed is therefore not a given.

The second is that Portion 7 is relatively small in size and constitutes only a small portion of the present undeveloped land extending from Camps Bay towards Llandudno and that as its southern boundary abuts Rontree Estate, Camps Bay, any development thereon would involve a relatively small southward extension of Camps Bay and accordingly have only a limited impact. The superficial attractiveness of that submission is, however, emasculated by the fact that, on the facts before this court, the importance of Portion 7 from a religious, cultural, conservation and an environmental point of view, is in inverse proportion to its actual extent.
The third is the inappropriateness of allowing the applicants to derive a benefit from having delayed for "almost 50 years" before launching these proceedings because it would be "contrary to all principles of administrative fairness" if any advantage flowing therefrom should enure to the applicants. The following were categorised as constituting such benefits. Firstly, that it has since the handing down of the judgment of the Supreme Court of Appeal in **Pepkor Retirement Fund and Another v Financial Services Board and Another** 2003(6) SA 38 (SCA) been precluded from asserting as a defence that an unwitting mistake of fact does not constitute a ground of review. The second is that had the present proceedings been launched ten years sooner the applicants would not have enjoyed the advantage of the present more beneficial township considerations and spatial frameworks that have come into being during that period of time.
The first-mentioned basis was not persisted with by the first respondent's counsel during argument, correctly in my view, as the **Pepkor** judgment did no more than expound and apply the law as it is. The second of the said bases, at best, is of doubtful validity as due to an absence of knowledge of the relevant facts on the part of the applicants they could not reasonably have been expected to have instituted the proceedings prior to 1996 by which date such townplanning considerations had already been put in place.

[44]The applicants' counsel in turn submitted that this case has certain features that are unusual and unprecedented, if not unique, which ought to be considered by this court in exercising its discretion whether to condone the unreasonable delay. They are –

44.1] that the applicants are public bodies, acting in the public interest in seeking to set aside an invalid administrative decision taken during the height of the apartheid era on the basis of its momentous and deleterious implications for present and future generations when viewed from religious, cultural, heritage and environmental perspectives.

44.2] that the second respondent, the successor to the decision-maker, the Administrator, accepts that the decision was invalid and not only chose not to oppose the application but adopted the stance that any attempt to remove the graves and kramats from Portion 7 would be contemptuous of the religious feelings, social traditions and cultural beliefs of the Muslim community, and that the developing of a township as approved would virtually be impossible without desecrating or violating at least some of such graves and kramats.

44.3] that the provisions of section 81 of the Constitution of the Western Cape, which requires the Provincial Government to adopt and implement policies that actively promote and maintain the welfare of the people of that Province, including policies aimed at achieving the promotion of respect for the rights of cultural, religious and linguistic communities.

44.4] the stand adopted by the second respondent that to allow the Administrator's decision to stand and allow such development on Portion 7 to be implemented will have a significant effect on the rights of the Muslim community of the Cape to enjoy their culture and practice their religion and

> "… that it is in the public interest that such rights be protected and that both the Constitution and the Constitution of the Western Cape … be given effect to."

And, furthermore, constitutes a significant distinguishing feature from the typical case where the administrative authority which took the decision raises the defence of delay because of the need for finality or efficient administration;

44.5] that the approval of a township on Portion 7 has not been acted on and no development has taken place thereon, or anything else done therewith, despite the fact that approval had been granted nearly 50 years ago;

44.6] that since long before the land of which Portion 7 formed part had passed into private hands it has played a central role in the religious and cultural life and the heritage of the Muslim community of the Cape who have continued to visit the graves and kramats thereon and to treat the area as a spiritual haven;

44.7] that Portion 7 has remained unspoilt and preserved as a richly diverse and ecologically important environmental resource in its original natural state;

44.8] that the Administrator's approval was not only invalid due to his having failed to take the presence of the graves and kramats into account, but also because it permitted subdivisions of land use in criminal disregard

thereof since the graves and kramats would be desecrated or violated if development occurred in terms of the approved township plan and that if the invalid approval were allowed to stand, this Court would not only be breathing judicial life into an invalid administrative decision, but in doing so would be placing its imprimatur on development the implementation whereof would involve criminal conduct; and

44.9] that, as has been conceded by the first respondent's own expert, Timothy Afred Strain Turner, there is "no prospect whatsoever" that the township approval which the first respondent is desirous of having validated by the invocation of the delay rule (or any other township) would be permitted on Portion 7 at the present time by reason of currently accepted planning and environmental norms.

[45]The public interest element in the finality of administrative decisions and acts is a further factor that needs to be considered by a court in the exercise of its discretion as regards whether an unreasonable delay in the instituting of review proceedings should be condoned or not: it after all is recognised as one of the raisons d'etre of the delay rule. It, however, is clear from paragraph 46 (at 249 G - 250 A) of the judgment of the Supreme Court of Appeal that the need for finality is but one of the relevant circumstances that should be considered. Accordingly, there is no warrant for assigning any elevated ranking or weight to it. In my view, the prominence to be assigned to it must surely be determined with reference to the facts of each particular case because the ramifications of

administrative decisions and acts are self-evidently not homogeneous. The extent to which an administrative decision or act impacts upon the interests and/or conduct of persons other than the litigants is recognised as a consideration in the assessment of the weight that should be assigned to it (See: **Ntame's** case (supra) at 261 G – H). As amply appears from the judgment of the Supreme Court of Appeal (at paragraph 46) as well as the findings made earlier in this judgment, there is little, if any, evidence of third parties having altered or rearranged their affairs on the strength of the Administrator's decision and the first respondent has not materially done so either. In the circumstances the need for the finality of administrative decisions and acts does not in the instant case outweigh the other factors which have already been enumerated at length in this judgment.

[46]I am in full agreement with the submission of the second applicant's counsel that when a court in our present constitutional order is required to exercise its discretion whether to allow a review, despite the passing of an unreasonable time, cannot disregard the Constitution and is obliged to give

consideration to its values, particularly the spirit, purport and objects of the Bill of Rights as well as the interests of justice. I, on the basis that the delay rule as it has evolved over the years, is sufficiently flexible in its application for such values and interests to be accommodated and given effect to, came to the conclusion earlier in this judgment that no need exists for the development of the common law in that regard. As was done by Plaskett J in **Ntame's** case (supra) at paragraph 25, I, in exercising my discretion, shall be mindful thereof that the fundamental right of access to the courts ensconsed by Section 34 of the Constitution forms part of the Bill of Rights, the spirit, purport and object whereof this court is obliged to promote in terms of the provisions of section 39(2) of the Constitution; that section 1(c) of the Constitution entrenches the rule of law and its over-arching principle of legality, as a founding value and that, for that reason, as few invalid exercises of administrative power as possible, should be allowed "to slip through the net"; and that the applicants, acting in the public interest, are in these proceedings seeking to enforce the fundamental rights of members of the

Muslim community of freedom of religion, their rights of practicing their religion and to enjoy their culture, in terms of sections 15(1) and 31(1) of the Constitution, as well as the rights of everyone to an environment that is not harmful to their well-being and to have it protected for the benefit of present as well as future generations as guaranteed by Section 24 of the Constitution. I shall also have regard thereto that a large proportion of the members of the Muslim community were previously socially, politically and economically disadvantaged because of the repressive and disempowering political policies of the past and, for that reason, have not been in a position to effectively assert and protect their interests. As the Constitution is the supreme law of the country and the Bill of Rights binds also the judiciary, deference to the principle of legality which in its wider sense applies to all state authority including judicial authority (See: **S v Mabena** [2007] 2 All SA 137 (SCA)) played an important, if not decisive role, in the exercise of my discretion because, in my view, the granting of an order, the practical effect whereof would be that it will place this court’s imprimatur on an administrative decision,

the implementation whereof would not only offend against the fundamental rights in the Bill of Rights but constitute criminal conduct, will be disharmonious therewith. I have also taken account of the importance of Portion 7 from a historical, cultural, religious and heritage point of view as well as its uniqueness from a conservation and environmental point of view and have further not lost sight of its inestimable scenic beauty in the context of the constitutional imperative contained in Section 24(b) of the Constitution that the environment should be protected for future generations. I have, in addition, been mindful of the factors which have been enumerated in paragraph 45 above and have lent this application its unique and unprecedented character as well as that there is no evidence that the interests of third parties have been materially influenced by their having acted in reliance on the Administrator's decision and as a consequence the need for finality furthermore does not feature prominently. I have also given consideration to the fact that, other than to the first respondent, no material prejudice would result should the administrator's decision be set aside. Against that backdrop I have given some weight to

the fact that if the application should succeed the first respondent, in the context of a capitalist society in which the financial rewarding of entrepreneurial foresight and skill is the foundation of commercial activity, the first respondent stands to forfeit an extremely substantial enhancement of its patrimony should the administrator's decision be set aside especially if regard is had of the fact that the area that will be affected by this court's order is of limited extent and will preclude the continuation of further urban development adjacent to Camps Bay of only a relatively small area of the original Oudekraal farm. I have also not lost sight of the fact that if the administrator's decision should be set aside by this court, the first respondent will be exposed to losses occasioned by its having been precluded from pursuing alternative investment opportunities the quantum whereof is difficult to determine at this juncture.

After a holistic weighing of not only the aforementioned factors, but also the other submissions in favour of and against condoning the delay in the institution of these proceedings, I have come to the conclusion that I should exercise

the discretion with which I have been imbued in favour of condoning the applicants' unreasonable delay. I am not unmindful thereof that the condoning of the instituting of review proceedings 47 years after the taking of a decision which is being impugned, is unprecedented in South African law in a context other than the exercise of coercive powers. But, as was stated by the Supreme Court of Appeal in paragraph 46 of its judgment in the appeal "… the lapse of time in itself will not necessarily be decisive …" and that much will depend on a balancing of all relevant circumstances. A pertinently relevant circumstance in the instant case is that one of the consequences that flows from a validation of the administrator's decision would be irreconcilable with the principle of legality, an aspect of the rule of law binding also on courts of law,in that it would allow criminal conduct in the form of the desecration of graves. In view of thát conclusion and the fact that it was accepted that the administrator's decision was invalid from its inception, it follows that the applicants are entitled to an order in terms of prayer 1.2 of the notice of motion.

[47]The fourth respondent, in response to prayer 2.1 of the notice of motion, has provided the first applicant's attorneys with a report in which he pointed out that the provisions of section 37(2) of the Land Survey Act, 8 of 1997 (Land Survey Act) would have to be complied with as a prerequisite to the general plan for Portion 7, Plan TP 1781 LD, being cancelled. That subsection contains a proviso which provides that where an amendment or cancellation of a general plan affects "any street, road, thoroughfare, … square or open space shown on a general plan of a township" the Premier must prior to the amendment or cancellation thereof, advise the fourth respondent that "the provisions of the laws relating to the permanent closing of any public place or part thereof have been complied with."

As pointed out by the fourth respondent the roads and public places shown on general Plan TP 1781 LD are by virtue of the provisions of section 24(1) of Ordinance 33 of 1934 deemed to exist and vest in the local authority upon notification of the registration of the township by publication in the Provincial Gazette. As the notification of the registration of the Oudekraal Township took place in the Provincial Gazette of 19 January 1962 the roads and public places therein are deemed to have vested in the local authority since that date.

The closure of roads and public places in this court's area of jurisdiction is regulated by at least two enactments. The first is the by-law relating to the Management and Administration of the City of Cape Town's Immovable Property with effect from 28 February 2003, section 6(1) whereof provides that the municipality may

close public places and public streets or any portions thereof, only after it has advertised its intention of doing so and has considered and rejected any objections lodged, and recorded its reasons for doing so in writing. The second is The Roads Ordinance, 19 of 1976 section 3(1) whereof provides for the closure, of his own accord, of an existing public road by proclamation in the Provincial Gazette by the Administrator (now the Premier or the Minister to whom the Ordinance has been assigned) subject to compliance with subsection 3(3), unless it is one contemplated in subsection 3(1)(b) or (c), in which event it can be done only on the application of the relevant local authority and then only if such local authority has advertised its intention of closing or applying for the closure thereof and has served the advertisement allowing for 21 days' notice on the owners of all land abutting the proposed or existing public road and, in certain cases, on any other road authority.

It was submitted on the first respondent's behalf that as the outcome of the notification process envisaged by the said enactments cannot be predicted it "demonstrates the dangers of overturning administrative decisions many years down the line". The submission that the outcome of any process in terms whereof notice is given and objections invited as a precursor to the closing of roads and public places on Portion 7 is predicated on its impact on various interested parties such as the first respondent and Oudekraal Properties; members of the Muslim community whose access to the areas demarcated as roads and public places on the general plan will be affected and the motoring public who will be deprived the reasonable expectation of in the future using the roads traversing it as a shortcut from Camps Bay to Victoria Road.

That submission self-evidently does not apply to the relief claimed in prayer 1.1 of the notice of motion.

Section 37(2) of the Land Survey Act finds application only if it is required of the fourth respondent, to, inter alia, cancel a general plan either partially or totally with the consent of the Premier or by an order of Court. Whilst on the face

thereof it appears that thát is what prayer 2.1 requires the fourth respondent to do, the question arises whether, on the facts of this matter, that is the true nature of the function he is required to perform.

In considering that question it must be borne in mind that the granting of the relief sought in prayer 2.1 only follows upon the granting of the relief sought in prayer 1.2 of the notice of motion. Whilst, prior to that order having been made, the approval of the Oudekraal Township existed in fact only, the effect of the granting thereof has been to transform it from being relatively or functionally voidable to being void in an absolute sense and accordingly, devoid of any existence either in law or in fact, ie. a nullity, and as such incapable of supporting any legal consequences. Condition No 1 of the Oudekraal Township approval was that

> "This township shall consist of the erven and public places shown on Plan No P.A. 16/A/1/36 - A"

a copy whereof appears to have been annexed thereto.

General plan TP 1781 LD, which forms the subject-matter of prayer 2.1, was submitted to the fourth respondent in terms of the provisions of section 19(1)(a)(i) of Ordinance 33 of 1934 which provides for the framing of a general plan "… in accordance with the conditions approved by the Administrator and showing the numbers assigned to the erven." As is to be expected, a comparison of the general plan TP 1781 LD with plan PA 16/A/1/36-A, shows that the configuration of the township on the former is identical to the latter and warrants the inference

that the latter served as the basis for the framing of the former. It appears to follow logically that if the township configured as depicted on plan PA 16/A/1/36-A falls away as a result of the Administrator's approval having been set aside, general plan TP 1781 LD which owes its whole existence thereto, must suffer a similar fate and discontinue to be of any further practical or legal effect. Although that general plan may continue to have a physical existence in the offices of the third- and fourth respondents as a sheet of paper, it is a general plan in name only. An inevitable consequence of the township as configured on the said general plan discontinuing to exist, is that the roads and public places demarcated thereon also cease to have any existence and accordingly, are no longer capable of vesting in anyone. To the extent that it may notionally be possible to cancel the general plan of a township, the approval whereof has discontinued to exist, I am of the view that the proviso to section 37(2) of the Land Survey Act does not find application in the instant case and that there is no need to comply with the requirements prescribed by the aforementioned two enactments. I say so because the terms of the proviso only apply

if a partial or total cancellation, which "affects a public place", is envisaged and the only possible manner in which the public places as demarcated on general plan TP 1781 LD could be affected by the granting of prayer 1.2 is that they will simply discontinue to exist. Such a state of affairs is a consequence of this court's order and not any purported cancellation of the general plan on which they have been demarcated. In view thereof, I incline to the view that there is no need to comply with the provisions of the proviso to section 37(2) of the Land Survey Act as a precondition to the making of any order in terms of prayer 2.1 of the notice of motion.

I have already articulated my views regarding the status of general plan TP 1781 LD from the moment an order is granted in terms of prayer 1.2 of the notice of motion and whether any purpose will be served by a purely formalistic "cancellation" thereof. If, as I have already found, the said general plan has lost its raison d'etre and serves no purpose other than as encapsulating, in a two-dimensional form, the configuration of a now defunct approved township as a historical fact, the only purpose the intended cancellation thereof could

possibly serve is to ensure the integrity and reliability of the records in the offices of the third- and fourth respondents. That purpose, in my view, can be equally achieved if the terms of this order are endorsed thereon as well as all the other records and documents referred to in prayer 2.2. Accordingly the follow orders are made in substitution of the orders sought in prayers 2.1 and 2.2 of the notice of motion.

"2.1 The fourth respondent is authorised to endorse the terms of this order on the General Plan approved by the fourth respondent on 10 April 1961 under reference number TP 1781 LD in respect of Portion 7 of the Farm Oudekraal, now known as erf 2802 Camps Bay and currently registered under Deed of Transfer No. T13636/1965 and annex a copy thereof or file it with the said General Plan.

2.2 The Third Respondent is authorised and directed

2.2.1 to endorse the title deed of erf 2802 Camps Bay to record that this order has been made as well as the terms thereof and that no transfer may be effected of the erven formerly known as erven 1 - 240 Oudekraal Township and Public Places 241 - 252 and now described as erven 2803 -3042 and Public Places 3043 - 3054, Camps Bay as depicted on General Plan TP 1781 LD;

2.2.2 to record a caveat in its records reflecting

> that this order has been made as well as its terms and to similarly endorse the owner's title deed in respect of Erf 2802 Camps Bay if and when it is lodged in the Deeds Registry."

[48]What remains to be considered is the question of costs. The first respondent's counsel submitted that in the event of the application succeeding it should not be penalised in costs because, in relation to the invalid approval, it was an innocent third party and that it did not oppose the application unnecessarily. Second applicant's counsel submitted that whilst the first respondent's invocation of the delay rule was not unreasonable, the same could not be said of its defence of an egregious decision of the Administrator due to its total disregard of the disenfranchised and otherwise oppressed members of the Muslim community during the apartheid era. In my view the reasonableness of the invocation of the delay rule is not in itself a sufficiently cogent reason for depriving the applicants of their costs.

The first respondent's counsel submitted in the alternative that the applicants individually are not

entitled to the costs of all the counsel employed by them as they could have advanced their causes equally efficiently by having employed a single team of advocates to represent them and should be allowed the costs of only one counsel each or that the costs of the employment of a team consisting of three counsel should be divided equally between them.

Counsel for each of the applicants have contended that their respective clients are entitled to the costs of all the counsel employed by them.

This case is undoubtedly one of exceptional difficulty and complexity with voluminous documentation and papers and a multitude of factual and legal issues. By agreement between the parties and in order to avoid duplication, the first applicant's counsel bore the brunt of the preparation of the papers. It furthermore is a matter of importance for the first applicant and its constituents. In the circumstances the employment of three counsel by the first applicant, in my view, was not an unwarranted luxury but necessary. That conclusion is consonant with the first respondent's own perception of what was prudent as regards the employment of counsel in that it was in these proceedings represented by an experienced silk and two juniors one whereof is of senior-junior status.

The third applicants' counsel submitted that each of the applicants were entitled to have used their own counsel because they are not from the same sphere of government; that each of them derive their existence and capacity to sue from different legal sources; that each has been established to perform distinct functions in pursuit of distinct statutory or constitutional objectives; and that despite their common purpose in opposing the relief claimed, the interests served by them are not identical and that they would not have been entitled to delegate their respective functions and powers to each of the other. He furthermore submitted that employment by the second- and third applicants of their own counsel was justified in the interests of maintaining continuity; that the public functions and the particular aspects of the public interests promoted by each are not identical; and that the historical and

other issues pertaining to the reasonableness or otherwise of the delay in launching the application and the possible need for the condonation thereof differed in important respects from applicant to applicant. These factors as well as the factors that have been mentioned in the context of the reasonableness of the employment of three counsel by the first applicant, in my view, show convincingly that the employment by each of the applicants of their own counsel as well as having employed more than one counsel was warranted in the particular circumstances of this case.

[49]I accordingly order the first respondent to pay each of the applicants' costs of suit on a party and party basis and further direct that in the case of the first applicant such costs shall include the costs of employing three counsel and in the case of the second- and third applicants the costs of the employment of two counsel.

[50]As I am satisfied that the qualifying expenses in respect of the following experts were reasonable incurred, it is ordered that the costs recoverable from the first respondent shall include the qualifying expenses of: -

L R Le Roux

N D Smith
J F du Toit
J E Avis
P N Tomalin
J P Rossouw
A Malan
S C Nicks
B K Tait
E Abrahams
and in the case of the second applicant of: -

Y. Da Costa
B J Mellon
A. Ballantyne

_____
D. VAN RENEEN

YEKISO, J:
I agree.

_____
N.J. YEKISO