



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 3 September 2009

Status: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

On 3 September 2009 the Supreme Court of Appeal handed down judgment in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and others*. This court dismissed an appeal against a decision of the Cape High Court in terms of which the approval of a township on portion 7 of the farm Oudekraal, situated between Rontree Estate in Llandudno, below the Twelve Apostles peaks and alongside the Cape Atlantic coast, was set aside.

The township had been approved in 1957 by the then Administrator of the Cape Province. The appellant, Oudekraal Estates (Pty) Ltd, did nothing to develop the township until 1996 when it submitted engineering services plans to the City of Cape Town and at the same time announced to the media that it intended developing a township. This led to a public outcry and the formation of a coalition of environmental activists and Muslim organisations who were opposed to the development.

From the turn of the 18th century, the area in which portion 7 is situated was used as a refuge by slaves who had escaped from their masters and the colonial authorities. Among them were Muslim spiritual leaders who had led uprisings against slavery in the Dutch East Indies and who had been captured and brought to the Cape. These

leaders taught their disciples in the seclusion and safety of these ravines and in this way fostered and kept Islam alive at the Cape. Prominent leaders who attained spiritual levels equivalent to Christian saints were buried there, these burial places being known as kramats. The kramats are visited regularly by members of the Muslim community who regard that area as sacred. A large number of Muslim graves are also to be found in these parts. There are three kramats on portion 7 and a number of Muslim graves.

A part of portion 7 falls within the cadastral boundaries of the Cape Peninsula Protected Natural Environment (CPPNE). The area is regarded as one of the world's 'hottest hot spots' for plant diversity and endemism. The floral vegetation of portion 7 consists of (amongst other species) Coastal Renosterveld, which has been identified as the most critically endangered ecosystem in South Africa.

In response to the public outcry the City and the Cape Metropolitan Council adopted the attitude that the development rights had lapsed and consequently informed the appellant that the provision of services could not be approved. The appellant unsuccessfully sought a political solution. Thereafter in August 2001 it approached the Cape High Court for an order declaring the development rights for portion 7 to be of full force and effect. The Cape High Court dismissed the application holding that the Administrator had acted beyond his powers in extending the time limit within which a general plan had to be lodged. The appellant appealed to this court against that decision. On 28 May 2004 this court dismissed the appeal on the basis of the non-disclosure by the appellants of the kramats and graves on portion 7. However, this court held that the decision by the Administrator still existed in fact and had legal consequences that could not be overlooked. The decision could only be set aside by a proper application for judicial review.

This led to an application in the Cape High Court by the three respondents, the City, the South African Heritage Resources Agency and South African National Parks for an order setting aside the Administrator's approval and actions consequent thereon. The sole reason advanced on behalf of the appellant in contesting the application was the 'delay rule' in relation to administrative review. In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion,

in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds being present for the setting aside of the decision. The application of the delay rule would in a sense 'validate' a nullity. The rationale was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts.

The Cape High Court accepted that there had been an unreasonable delay by the three respondents in bringing the application. However, the court, in considering whether it should condone the delay, took into account the right to freedom of religion and culture of members of the Muslim community as well as the right of the broader community to have a heritage and environmental area of high significance preserved.

This court agreed that there had been an unreasonable delay. However, like the high court, it took into account that the area has great religious and cultural significance for the Muslim community and that the area is conservation-worthy. Portion 7 fronts on Victoria Drive, a scenic drive comparable to the most exquisite drives anywhere in the world. It offers integrity of scenery from mountain crest to sea, not easily found in such close proximity to major metropolitan areas elsewhere in the world. Its aesthetic value heightens its value for tourism.

This court was mindful of the public interest in the finality of administrative decisions but held that justice was best served by confirming the high court's conclusions. In this case it was possible to correct the monstrous wrongs and injustices of the past and this court held that in the totality of the circumstances the Cape High Court was correct in exercising its discretion in favour of the respondents. The appeal was accordingly dismissed with costs.