IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 41/2003

In the matter between

OUDEKRAAL ESTATES (PTY) LIMITED **Appellant**

and

THE CITY OF CAPE TOWN **First Respondent**

THE MINISTER OF LOCAL GOVERNMENT AND DEVELOPMENT PLANNING, WESTERN CAPE **Second Respondent**

THE SOUTH AFRICAN HERITAGE RESOURCES AGENCY **Third Respondent**

SOUTH AFRICAN NATIONAL PARKS **Fourth Respondent**

CORAM: **HOWIE P, CAMERON, BRAND, NUGENT JJA AND SOUTHWOOD AJA**

Date Heard: 17 February 2004

Delivered: 28 May 2004

Summary: Administrative decision – whether validly taken - consequences of invalidity.

J U D G M E N T

HOWIE P and NUGENT JA

[1] This appeal raises important questions for the rule of law. It raises the question whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts.

[2] The appellant company is the owner of undeveloped land (Erf 2802 Camps Bay) on the slopes of the Twelve Apostles on the Atlantic seaboard of the Cape Peninsula, adjacent to the suburb of Camps Bay. Its immediate predecessor in title secured the laying out and approval of the land as a township in terms of the Townships Ordinance 1933 of 1934 (Cape) ('the Ordinance').[1] The township establishment process involved, among other things, the then provincial Administrator's grant of permission to establish the township, an endorsement on the title deed to the land by the Registrar of Deeds to the effect that it had been laid out as a township, and the opening in the deeds office of a township register. The Administrator granted permission, subject to certain conditions, in 1957, the other formalities were carried out, and the official notification in the Provincial Gazette of the township as approved occurred in 1962. It has since been referred to as Oudekraal Township.

[3] The appellant bought the land in 1965. The only material step it has taken to develop a township on the land consisted in the submission in 1996 to the relevant local authority (the Cape Metropolitan Council)[2] of an application for approval of an engineering services plan. The response from the local authority was that the plan could not be approved because the development rights had lapsed.

[4] In correspondence between the respective attorneys for the appellant and the local authority it emerged that the latter's stance was based on the alleged failure by the township applicant to comply timeously with two requirements of the Ordinance. One was to lodge a general plan of the proposed township with the Surveyor-General for approval. The other was to lodge the general plan as approved by the Surveyor-General with the Registrar of Deeds. For each lodgement a time limit was prescribed and in each case the Administrator was empowered to determine a further period for compliance.[3] Also in each case, if an applicant failed to comply within the prescribed or extended period, the Ordinance provided that the

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[1] The Ordinance came into force on 1 January 1935 and was repealed in 1985 by the Land Use Planning Ordinance 15 of 1985 (Cape). There were various amendments over the years. Its provisions pertinent to this case are cited below as they read at the various times that are relevant.

[2] At the time of the Administrator's grant of permission the local authority within whose area the land was situate was the Cape Divisional Council, established under the Divisional Councils Ordinance 15 of 1952. In 1996 it fell under the jurisdiction of the Cape Metropolitan Council, the successor to the Divisional Council.

[3] Section 19(1) provided for twelve months for the lodgement of the general plan with the Surveyor-General and section 20(1) allowed three months for lodgment with the Registrar of Deeds.

Administrator's permission to establish the township would 'be deemed to have lapsed'.[4] In respect of each lodgement an extension of time for compliance was granted by the Administrator. (In the case of lodgement with the Surveyor-General there were three extensions.) Each such extension was granted only after expiry of the prescribed period. The Cape Metropolitan Council's contention that lapsing had occurred was based on the proposition that the Administrator's extensions after the respective prescribed periods were *ultra vires*. (It was also asserted in any event that the lodgements were not effected within the respective extended periods but we have assumed in the appellant's favour that the lodgements were within the extended periods.)

[5] Timeously lodged or not, a general plan as required by the Ordinance was approved by the Surveyor-General and, with other documentation specified in the Ordinance,[5] duly acted upon by the Registrar of Deeds. It was designated General Plan T.P. 1781 L.D.

[6] The appellant did not immediately turn to law to challenge the refusal to approve the engineering services plan. Instead it attempted certain

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[4] Section 19(3) and section 20(3).

[5] In terms of s 20(1) lodgement was required of the general plan and a diagram of the land, a copy of the conditions, if any, on which the Administrator granted the application and the title deed by which the land was held.

political initiatives to summon support for the township's development but to no avail.

[7] Eventually, in September 2001, the appellant applied to the Cape High Court for declaratory relief. In the notice of motion, as amended later, three declarations were sought. The first two, broadly summarised, were to the effect that the extensions of time granted by the Administrator were *intra vires* and that the lodgement and approval of the general plan, its incorporation in the Deeds Registry records and every subsequent act involved in the establishment and approval of the township were all *intra vires* and of full force and effect. The third read as follows:

> 'Declaring, in addition and in any event, that the Applicant's development rights over Oudekraal Township (General Plan T.P. 1781 L.D.), on Erf 2802 Camps Bay in the Municipality of Cape Town, Western Cape Province (previously known as Portion 7 of Cape Farm 902), notification of the approval of which was published in the Provincial Gazette on 19 January 1962, under Public Notice 59 of 1962, are of full force and effect, and that the Applicants have the right to subdivide the aforementioned land in accordance with General Plan T.P. 1781 L.D.'

[8] The respondents in the court below and on appeal are these. The first respondent is City of Cape Town which came into being in 1998 as the single successor in law to both the erstwhile City of Cape Town

Municipality and the Cape Metropolitan Council.[6] (For convenience we shall refer to the first respondent as the City Council.)

[9] The second respondent is the Minister of Local Government and Development Planning, Western Cape, being in law the successor of the erstwhile Administrator and having the power to perform certain duties in relation to conditions imposed, inter alia, in terms of the Ordinance.[7]

[10] The third respondent is the South African Heritage Resources Agency which was established under the National Heritage Resources Act, 25 of 1999.[8] In terms of that Act[9] its function is to co-ordinate the management of what is called 'the national estate' which includes places of cultural significance, historical graves and sites of significance to the history of slavery in South Africa.[10] It was joined because of its 'potential interest' in the matter but no relief was sought against it.

[11] The fourth respondent is South African National Parks (formerly the National Parks Board) established under the National Parks Act 57 of 1976. It is a corporate body and owns land adjoining the appellant's land.[11] It was similarly joined for its potential interest in the matter.

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[6] The relevant enactment was the Local Government: Municipal Structures Act, 117 of 1998.
[7] The power is conferred by s 39 of the Land Use Planning Ordinance (see footnote 1).
[8] Section 11.
[9] Section 13(1)(b).
[10] Section 3(2)(a), (g) and (h).
[11] The adjoining land falls within the Cape Peninsula National Park which was proclaimed in terms of s 2B(1) of the National Parks Act.

[12] The appellant's application, which was opposed by all the respondents save for the second, was dismissed. The court's judgment, given by Davis J, Veldhuizen J concurring, is reported in 2002 (6) SA 573 (C). Essential to its decision was the finding that the Administrator's extensions of time were invalid (at 587E-F). The court went on to say that the grant of the relief sought by the appellant would have the effect of proclaiming that an illegal action had somehow evolved into a legal decision and that would undermine the principle of legality. Taking that into account and, amongst other things, the fact that the existence of various Muslim burial sites on the land had not been properly considered when the establishment of the township was approved (an issue that we deal with more fully below) the court exercised what it took to be its discretion to permit a collateral challenge by the City Council to the validity of the Administrator's actions, and it refused to grant the declaratory relief. Leave to appeal was refused by the learned judges but granted by this court. The appeal is opposed by the first, third and fourth respondents.

[13] In the view that we take of the case it is not necessary to decide whether the extensions of time that were granted by the Administrator were lawful. In our view the matter can properly be decided by focusing on the Administrator's grant of the application to establish Oudekraal Township.

That was not an issue that was relied upon by the Cape Metropolitan Council initially when it refused to consider the engineering services plan. It was first pertinently raised by the fourth respondent (South African National Parks) in these proceedings and was adopted by the City Council. Because of its centrality to the establishment of the township it has a crucial bearing on the third declarator, which is the central relief that was sought by the appellant.

[14] The evidence reveals that at various places on the land in question there are in all more than twenty graves. They have special religious and cultural significance to the members of Cape Town's Muslim community. Two of the graves are kramats. A kramat is the grave of somebody who, among adherents of the Islamic faith, is regarded as having attained, through conspicuous piety, 'an enlightened spiritual situation'. Such person having thus been a 'friend of God', the spirit of God is to be found at the site.

[15] The kramats and other graves on the land are also important cultural symbols in the Muslim community of its history in the Western Cape going back to the era of slavery. Many of the graves are those of escaped slaves and some of the kramats are the burial sites of spiritual leaders of the community during those times. It is believed by followers of the faith that by spending time at these sites they can enhance their own spirituality. One

of the kramats on the land encompassed by the approved township is that of Sayed Jaffer. Thousands visit it each year. Moreover, the indications are that the kramats generally have been visited regularly since before the end of the nineteenth century. In the circumstances, access to the kramats is of great importance to the Muslim people of Cape Town.

[16] The engineering services plan put before the Cape Metropolitan Council in 1996 reflects the details of General Plan T.P. 1781 L.D. (hereafter 'the general plan') as well as the location of the graves and the two kramats. As explained by counsel for the third respondent during argument – and these intimations were not contradicted or queried – the position is this. The kramat of Sayed Jaffer was one of a number of graves more or less in the centre of a large erf destined for a school. The other kramat was among another group of graves spread over what were intended to be three adjoining residential erven. Other proposed residential erven had single graves within their boundaries. Finally, one of the graves was directly in the path of a proposed public road.

[17] The general plan shows none of the graves. What has been found of the documentation comprising or accompanying the township application makes no reference to them either. Nor do the conditions which were imposed by the Administrator when granting the application. The township

application papers included a plan (numbered 16/A1/36/A) which accorded in all material respects with the subdivision and configuration of the general plan. If the presence of the graves was known to the officials concerned they would have seen with no difficulty what impact implementation of the plan would have on the existence and physical integrity of the burial sites.

[18] Among the papers relating to the application is a copy of a document reading as follows:

'EXTRACT FROM THE MINUTES OF A MEETING HELD ON THURSDAY THE 22ND DECEMBER, 1955.

(6) Oudekraal Township.

The Board inspected the township on the 22nd December 1955.'

The reference to the Board in the document is a reference to the Townships Board constituted under s 2 of the Ordinance whose task it was under s 11 to make recommendations to the Administrator whether to grant or refuse a township application.[12]

[19] There is an affidavit in the record by the appellant's attorney, Mr Koumbatis, in which he submits that the existence of kramats and graves on the land would have been readily apparent on the occasion of the Board's inspection. The suggested inference, we perceive, is that the existence of the graves must have been present to the minds of the Board and, consequently,

the Administrator. In our view that inference cannot necessarily be drawn. The extract from the minutes does not indicate what was inspected or observed. The reference to 'the township' is meaningless. There was none in existence. But Mr Koumbatis's submission carries an important concession, namely, that the kramats and graves are indeed readily visible features of the relevant landscape. The importance of that consideration is that a land owner applying for permission to establish a township at that time was required to complete a form detailing, among other things, all relevant physical features of the land to be developed. A copy of the form used in this instance is part of the record. It shows that the applicant's response read thus: 'See plans and reports attached'. The attachments are not part of the record, hence the submission on behalf of the appellant that one would not be justified, without having all the documentation submitted in the township application or considered by the Board and the Administrator, in concluding that the graves and kramats were overlooked or ignored. Although press publication advertised the application no objections appear to have been elicited.

[20] On the evidence we are unable to reach any conclusions other than the following. The first is that the applicant for the township made no reference to the graves with the result that all the officials concerned, and particularly

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[12] Section 18(1)

the Administrator, were ignorant of their existence. The second, in the alternative, is that if their existence was known it was ignored. There simply is no other realistic inference notwithstanding that not all the relevant documents are available.

[21] The first conclusion reflects a more likely state of affairs than the second. We say so because it has always been an offence at common law to desecrate a grave: Joubert (ed) *The Law of South Africa* 1st reissue vol 20 part 2 at 279 para 324. It is unlikely that that was not known to the officials concerned who constantly dealt with matters of land rights.

[22] At the time of the Administrator's grant of approval there was no provincial exhumation legislation in the then Cape Province. Subsequently the Exhumations Ordinance of 1980[13] came into force but it made provision for exhumation only in a cemetery. Of note, however, is that s 4 validated exhumation effected pursuant to a permit issued by the Administrator before the commencement of the Ordinance. That section does not speak of exhumations specifically from a grave but if it is an indication of a previously existing unlegislated procedure whereby the Administrator would grant *ad hoc* permits for exhumation it is significant that if the officials concerned knew about the graves no condition was attached to the

[13] Ordinance 12 of 1980 (Cape).

Administrator's permission for Oudekraal township requiring application for such permits in this case. Township applications had to be considered by the Provincial Secretary, then by the Townships Board and finally by the Administrator.[14] It would be extraordinary if the need for some provision to cater for the presence of the graves escaped them all if they knew of them. The Surveyor-General (or his surrogate) and the Registrar of Deeds of Cape Town were members of the Townships Board (see s 2 of the Ordinance). Had they and the Administrator been aware of all the relevant facts it is probable that it would have been required that the general plan be drawn excising the graves and kramats or with conditions for their preservation being imposed. The Administrator had the power to amend conditions even after the grant of his permission[15]. There was therefore by inference no realisation of the need for appropriate conditions even belatedly. Of course, it is irrelevant how easily the position could have been rectified then. What the appellant wants now is a declarator that its township rights are in all respects enforceable, without any qualification, reservation or amendment.

[23] The deponent to the founding affidavit said:

> 'I understand that there are no kramats and shrines on [the land].'

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[14] Section 11 read with section 18.
[15] Section 18(3) and (3) bis of the Ordinance.

If this curious, and unexplained, statement was made in ignorance it could arguably have been that the township applicant was himself equally ignorant, thereby leading to the resulting omission of this aspect from the application papers and the failure of the relevant officials to consider it.

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

[25] Whether the Administrator, as the ultimate decision maker, was ignorant of the graves and kramats or not, the inescapable conclusion must be that he either failed to take account of material information because it was not all before him or if, in the unlikely event that it was before him, that he wrongly left it out of the reckoning when he should have taken it into account. In either situation his decision to lend approval on the terms he granted was invalid.[16] It was, in addition, in either event *ultra vires* for the reason that it permitted subdivisions and land use in criminal disregard for

[16] *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another* 1988 (3) 132 (A) at 152A-E. In the former situation the material facts should have been available to him for the decision properly to be made: *Pepcor Retirement Fund and another v Financial Services Board and another* 2003 (6) SA 38 (SCA) para 47.

the graves and kramats. It would be impossible to avoid desecration or violation if one were to make a road over a grave site or to build over it.

[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful

administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter: *Administrative Law* 355:

> 'There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.'

At other times it has been explained on little more than pragmatic grounds. In *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) 'in a sense delay would . . . "validate" the nullity'.

Or as Lord Radcliffe said in *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) 769-70:

> 'An [administrative] order…is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

[28] That has led some writers to suggest that legal validity (or invalidity) in the context of administrative action is never absolute but can only be described in relative terms. In Wade: *Administrative Law* 7 ed by H.W.R. Wade and Christopher Forsyth at pages 342-4 that view is expressed as follows:

> 'The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another… 'Void' is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation.'

[29] In our view the apparent anomaly – which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity'[17] – is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth.[18] Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points

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[17] De Smith, Woolf & Jowell: *Judicial Review of Administrative Action* 5 ed para 5-044

[18] Christopher Forsyth: "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law" in *Essays on Public Law in Honour of Sir William Wade QC* ed Christopher Forsyth and Ivan Hare (Clarendon Press) 141. Cited with approval by Lord Steyn in *Boddington v British Transport Police* [1999] 2 AC 143 (HL) 172B-D.

out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words '… an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'[19]

It follows that

'[t]here is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough.'[20]

The author concludes as follows:

'[I]t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act.* And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void'[21] (our emphasis).

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19 Forsyth, above, 147.
20 Forsyth, above, 148.
21 Forsyth, above, at 159.

[30] Lord Hoffmann drew the same distinction in *Regina v Wicks* 1998 AC 92 (HL) when he said the following at 117A-C:

> '[T]he statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices.

[31] Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.

[32] But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify

his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.[22] Such a challenge was allowed, for example, in *Boddington v British Transport Police,*[23] in which the defendant was charged with smoking a cigarette in a railway carriage in contravention of a prohibitory notice posted in the carriage pursuant to a byelaw. The House of Lords held that the defendant was entitled to seek to raise the defence that the decision to post the notice (which activated the prohibition in the byelaw) was invalid because the validity of the decision was essential to the existence of the offence. (It happened that the decision to post the notice was held to be valid but that is not material for present purposes). At 153H-154A Lord Irvine LC said the following:

'It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. Suppose an individual is charged before one court with breach of a byelaw and the next day another court quashes that byelaw – for example, because it was promulgated by a public body which did not take account of a relevant consideration. Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.'

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[22] A challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act.

And at 160 and 161 he went on to say the following:

'[160C-G] However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely … [161C-D] However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.'

As Lord Steyn pointed out at 173A-B:

'Provided that the invalidity of the byelaw is or may be a defence to the charge a criminal case must be the paradigm of collateral or defensive challenge.'

Dealing with an earlier decision of the Divisional Court that precluded a collateral challenge to the procedural validity of subordinate legislation in criminal proceedings[24] he went on to say the following at 173E-G:

'My Lords, with the utmost deference to eminent judges sitting in the Divisional Court I have to say the consequences of *Bugg's* case are too austere and indeed too

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[23] Citation in footnote 18.

[24] *Bugg v Director of Public Prosecutions* [1993] QB 473.

authoritarian to be compatible with the traditions of the common law. In *Eshugbayi Eleko v Government of Nigeria* [1931] A.C. 662, a habeas corpus case, Lord Atkin observed, at p 670, that "no member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a court of justice." There is no reason why a defendant in a criminal trial should be in a worse position. And that seems to me to reflect the spirit of the common law.'

[33] So, too, is it implicit in the decision in *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others*[25] that the coercive powers that the industrial council purported to assert were dependent for their validity upon the lawful establishment of the council and hence were subject to collateral challenge when they were sought to be enforced.[26]

[34] Forsyth explains it as follows:[27]

'… only where an individual is *required* by an administrative authority to do or not to do a particular thing, may that individual, if he doubts the lawfulness of the administrative act in question, choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved; and the individual will be able to raise the voidness of the underlying administrative act as a defence.'

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[25] 1993 (2) SA 245 (C).
[26] See, too, the case of *Wandsworth London Borough Council v Winder* [1984] 3 All ER 976 (HL) relied upon by the court *a quo* (see 592F-J) and other examples cited in Wade: *Administrative Law* 7ed 321-324.
[27] Forsyth, above, 156.

[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings'.[28] Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.

[36] It is important to bear in mind (and in this regard we respectfully differ from the court *a quo*) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: the right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be

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[28] Per Conradie J in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C) 530C-D and Scott J in *Photocircuit,* above, at 253E-F, citing Wade: *Administrative Law* 6th ed at 331 (repeated in 7 ed, see para 28 above).

precluded from challenging its validity.[29] On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.[30] It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.

[37] In our view that analysis of the problems that arise in relation to unlawful administrative action recognizes the value of certainty in a modern bureaucratic state, a value that the legislature should be taken to have in mind as a desirable objective when it enacts enabling legislation, and it also gives proper effect to the principle of legality, which is fundamental to our legal order. (*Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) paras 56, 58 and 59; *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2)

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[29] See the comments in Wade: *Administrative Law* 6 ed 354. (The passage appears to have been inadvertently omitted from 7 ed: see Forsyth, above, fn. 68.)

[30] *Wandsworth London Borough Council v Winder*, footnote 26. Generally , as to discretion, see De Smith, Woolf and Jowell, para 20-007.

SA 674 (CC) para 50). While the legislature might often, in the interests of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid. And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it.

[38] It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.

[39] The City Council's reliance upon a collateral challenge to the validity of the Administrator's decisions in the present case was, in our view, misplaced. The approval of the township was, in truth, no more than a

permission to the land owner to develop the land in a particular way (which would otherwise be prohibited by the Ordinance) that took effect once the various steps prescribed by the Ordinance had been complied with (i.e. once the approval had been granted, the various officials had performed their respective functions, and the approval had been notified in the Provincial Gazette.) On a proper construction of the Ordinance the validity of each of those steps was not dependent on the legal validity of the Administrator's approval but merely upon the fact that it was given. The legislature could not have expected the Surveyor-General first to satisfy himself that the Administrator's approval was valid before he approved the general plan. It also could not have intended the Registrar of Deeds first to satisfy himself that the approval was valid before he opened a township register. And it could not have expected the township owner and the public at large to enquire into the validity of the Administrator's approval before they relied upon the notification in the Provincial Gazette that the township had been approved. In our view the functionaries were authorized to act as they did merely upon the fact of the Administrator's approval and their acts were accordingly lawful. The effect of the notification of the approval in the Gazette, which was the final step in the process, was that the owner of the land was permitted to exercise the ordinary rights of an owner to develop the

land, provided, of course, that the development was in accordance with the approval and did not conflict with other restrictions. (We might add that in our view the Surveyor-General and the Registrar of Deeds were similarly authorised by the Ordinance to act upon the extensions that were granted by the Administrator for the lodgement of the general plan even if those extensions were invalid and their conduct in doing so was thus authorised.) In the form in which the matter comes before us the invalid administrative act that is in issue is not sought to be applied coercively by a public authority or to provide the foundation for coercive action against the subject and hence no rule of law considerations militate against the construction that we have given to the legislation.

[40] It follows that for so long as the Administrator's approval (and the extensions) continues to exist in fact the township owner has been permitted to develop the township and the Cape Metropolitan Council was not entitled simply to ignore that when deciding whether or not to carry out its public functions. The statutory duties that are imposed upon a local authority to consider plans of that nature were not canvassed before us, but there was no suggestion that the relevant legislation that imposes any such duties falls to be construed as doing so only if the approval of the township was substantively valid.

[41] But it does not follow that the appellant was entitled to the declaratory relief that it sought. On the contrary, in our view it was correctly refused, for two reasons in particular.

[42] The first relates to only a portion of the third declaratory order and it arises independently of the issues that have been dealt with thus far in this judgment. Amongst other things the appellant sought a declaration that it 'has the right to subdivide the … land in accordance with [the general plan that has been registered].' Clearly it is not entitled to proceed with the development of the land in accordance with that general plan. The exploitation of property rights is always constrained by such laws as exist at the time that they are sought to be implemented. We have already drawn attention to the fact that the layout of the township as depicted on the general plan contemplates the development of residences and roads on various burial sites. 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 cultural and religious practices by s 31 of the Bill of Rights. In any event the burial sites are protected against disturbance by s 36(3) of the National Heritage Resources Act 25 of 1999, quite apart from the common law constraint. On

those grounds alone the appellant was not entitled to that portion of the relief that it sought and persisted in before us.

[43] But the second reason is more fundamental and goes to the heart of what the appellant sought to achieve in this application. In prayers 1 and 2 the appellant sought declarations that the extensions by the Administrator of the periods for the lodgement of the general plan with the Surveyor-General and with the Registrar of Deeds respectively were lawful. Those prayers sought to meet and overrule the resistance of the Cape Metropolitan Council on the basis that it gave for refusing to consider the appellant's engineering services plan. The question whether the Administrator's approval was invalid for disregard of the existence of the burial sites had not arisen when the Notice of Motion was first drafted and none of the prayers was directed specifically to that issue. That issue – and, indeed, any other ground upon which the lawful establishment of the township might be challenged – was sought to be catered for by prayer 3 in the omnibus form into which it was amended. In that prayer (quoted in paragraph 7 above) the appellant sought an undifferentiated declaration that its 'development rights … are of full force and effect.'

[44] The rather vague term 'development rights' was used to encompass all the consequences that generally follow from the lawful establishment of a

township. In the form in which the relief directed at them is sought the term takes no account of whether those consequences are dependent for their legal effect upon the factual existence of the approval of the township, or whether they are dependent upon the substantive validity of the approval. What was sought by the appellant, in effect, was an order declaring that all the ordinary consequences that follow upon the lawful establishment of a township are not open to any challenge. The attempt to obtain relief in this all-embracing and undifferentiated form was, we think, wholly misdirected.

[45] We have already observed that it will generally be inappropriate to make such a declaration in a vacuum. Perhaps the appellant might have been entitled to a declaration in general terms that the Administrator's approval and the subsequent acts of the Surveyor-General and the Registrar of Deeds existed in fact and that any consequences that were dependent merely upon the existence of those facts were of full force and effect. And perhaps the City Council in those circumstances would be obliged to consider the engineering services plan that was submitted for approval and the appellant was entitled to a declaratory order to that effect. (We have already observed that the City Council's statutory powers and obligations in that regard were not canvassed in these proceedings and we are not in a position to decide whether that is so.) But the appellant did not confine the

relief that it sought in that way, either in the court *a quo* or before us. It persists in seeking a declaration that has the effect of declaring unassailable all the consequences that generally follow from the lawful establishment of a township. Clearly it is not entitled to that relief. Bearing in mind that the approval of the township was invalid at the outset all the consequences of the approval clearly cannot be said to be unassailable.

[46] One of those consequences is that the invalid approval is liable to be set aside in proceedings properly brought for judicial review. It is not open to us to stifle the right that any person might have to bring such proceedings, or to pre-empt the decision that a court might make if it is called upon to exercise its discretion in that regard. That is not a remote and academic prospect, bearing in mind that the approval was invalid. No doubt a court that might be called upon to exercise its discretion will take account of the long period that has elapsed since the approval was granted,[31] but the lapse of time in itself will not necessarily be decisive: much will depend upon a balancing of all the relevant circumstances,[32] including the need for finality,[33] but also the consequences for the public at large, and, indeed for future generations, of allowing the invalid decision to stand. In weighing the

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[31] Lawrence Baxter: Administrative Law 715

[32] Per Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) 42C-D.

[33] *Wolgroeiers Afslaers,* above, 41D-F.

question whether the lapse of time should preclude a court from setting aside the invalid administrative act in question an important – perhaps even decisive[34] – consideration is the extent to which the appellant or third parties might have acted in reliance upon it. On the material that is before us it is by no means clear that the appellant – or any third party for that matter – has in fact acted in reliance on the approval notwithstanding the elapsing of some forty years.

[47] We have drawn attention to the fact that the land remains undeveloped. The only transaction that has occurred since the township was approved is the purchase of the land by the appellant. The appellant does not allege that it purchased the land in reliance on the fact that the township had been established. On the contrary, the deponent to the founding affidavit suggests that it was the location of the land, rather than the approval of the township, that caused the land to be purchased. At the time of the purchase the appellant was controlled by the deponent's father who, according to the deponent, 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.' There is a suggestion in the papers that a premium was paid on the purchase price of the property because a township had been approved,

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[34] *Wolgroeiers Afslaers,* above, 42C.

in comparison with the prices that were paid by related companies, also controlled by the dependent's father, for adjoining properties. This suggestion is discounted by the contents of a contemporaneous letter written by the deponent's father to a fellow prospective township developer, in which he said that his practice was, for tax reasons, to assign a larger portion of the overall price paid for a parcel of land to that piece of land in the parcel that he intended to develop first. In the present case that would have been the land that is now in issue. Nor does the deponent's father appear to have had any intention of developing the land in accordance with the approval that was granted because he was 'also of the view that the single residential grid layout of the township on Portion 7 which he had acquired had already become outdated since being approved.' (Portion 7 was the land now under consideration.) It is difficult to see in those circumstances in what way the appellant, or any other person for that matter (other than the functionaries who played a role in the establishment process), can be said to have placed reliance on the Administrator's approval in the time since it was granted.

[48] Of course, s 7 of the Promotion of Administrative Justice Act 3 of 2000 prescribes a period of 180 days for the institution of proceedings for judicial review in terms of that Act, but it is by no means certain that that

legislation applies to the administrative act that is now in issue, or that it is exhaustive of the remedy of judicial review.

[49] But these are all matters upon which we are not called upon to express any final view (and we do not do so). We mention them merely to highlight that there is a real prospect that a court might yet be called upon to set aside the Administrator's approval in proper proceedings for judicial review. Whether it would be appropriate to set aside the approval was not canvassed in the present case, but the appellant is not entitled to a declaratory order that pre-empts such proceedings, or that pre-empts an attack upon any other consequences of the approval that might depend upon its substantive validity, if there are any. Indeed, once it is clear, as we have found, that the Administrator's approval was invalid, it follows inexorably that the appellant was not entitled to a declaratory order in terms as wide as prayer 3. In the absence of a request by the appellant, both in the court *a quo* and in this court, for relief in more limited terms, that prayer was properly refused. Prayers 1 and 2 were little more than precursors to the relief that was sought in prayer 3. Because of the view that we have taken of the matter the issues that are dealt with by those prayers have become irrelevant and they should also not be granted.

[50] There is one more matter that needs to be dealt with. The fourth respondent (South African National Parks) submitted that in any event the Administrator's approval came to an end after it was granted. That submission has no merit and we will deal with it briefly. One of the conditions of establishment required the owner to reserve a specified portion of land as a commonage for the benefit of any future local authority. The condition went on to provide that

> '. . . [the commonage] will be transferred to the trustees appointed by the Administrator for the future urban local authority; the said land to be regarded as reserved land as referred to in section 21 of Ordinance No. 33 of 1934 and to be transferred prior to the transfer of any land in the said . . . Township'

Section 21(1) of the Ordinance provided that before the transfer of any erf in an approved township was registered in the deeds registry the owner had to transfer any land reserved as commonage to trustees appointed by the Administrator in trust for any local authority that might thereafter be constituted for the township, or to the local authority itself if one already existed. When the land that is now in issue was sold and transferred to the appellant the commonage was simultaneously sold and transferred to an associated company of the appellant. It was submitted on behalf of the fourth respondent that the effect of the transfer of the commonage to a private owner instead of to the Administrator in trust, as required by the

conditions of establishment, was that 'any approval for the establishment of [the township] which may have existed prior to [that date] would, as a matter of law, have come to an end at that time.' (The quotation is from the heads of argument.) There is no suggestion that the appellant, as successor to the initial owner, would not be able to fulfil the obligation to transfer the commonage were it to be called upon to do so. On the contrary the commonage is held by an associated company and there is every reason to believe that the appellant will be capable of fulfilling that obligation. In the circumstances we see no grounds upon which the act of transferring the commonage somehow brought the approval to an end.

[51] The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

CT HOWIE
PRESIDENT: SUPREME COURT OF APPEAL

RW NUGENT
JUDGE: SUPREME COURT OF APPEAL

CAMERON JA:)
BRAND JA:) CONCUR
SOUTHWOOD AJA:)