IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DISIVION, CAPE TOWN

REPORTABLE

CASE NO: 4348/2013

In the matter between:

GREAT FORCE INVESTMENTS 124 (PTY) LIMITED	Applicant
And	
THE SURVEYOR-GENERAL, CAPE TOWN	First Respondent
SUREGO INVESTMENTS 37 (PTY) LIMITED	Second Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Third Respondent
LOOKOUT INVESTMENT CORPORATION CC	Fourth Respondent
DEON WILLEM VAN ZYL	Fifth Respondent

JUDGMENT DELIVERED ON 25 AUGUST 2015

GAMBLE, J:

INTRODUCTION

[1] The Second Respondent, Surego Investments 37 (Pty) Limited ("Surego"), is the owner of Westford Farm which is situated in the picturesque

Rheenendal Valley to the west of the Garden Route town of Knysna. On its north western boundary Westford abuts a small holding of some 2,8ha belonging to the Applicant, Great Force Investments 124 (Pty) Limited, a company wholly owned and controlled by Dr Andre Saaiman, a cardiologist from Cape Town. I shall refer to the property, where convenient, as “Dr Saaiman’s property” , or with reference to its official description in the Deeds Office , as “ Portion 10”.

[2] Dr Saaiman’s property is utilised for lifestyle and recreational purposes while Westford is largely uninhabited and undeveloped farm land. That part of Westford which abuts Dr Saaiman’s property, save for a small part which is free of vegetation, is densely covered with bush and trees. This afforestation , together with the steep topography of the terrain in that area , renders that part of Westford inaccessible from the southern side of the property. For the sake of convenience I shall refer to this part of Westford as “the open area”.

[3] For at least 70 years the successive owners of Westford have had access to the open area by way of a registered right of way granted in their favour. That right of way has traversed a succession of properties as various acts of subdivision have taken place over the years.

[4] Dr Saaiman purchased the property in October 2007 and transfer thereof was given to Great Force in December of that year. It is not in dispute that Dr Saaiman viewed his property somewhat fleetingly prior to submitting an offer to purchase it from Leather Lane CC. The evidence shows that such was the haste with which the offer was concluded, that it was signed on the bonnet of a motor car before the doctor drove off back to Cape Town.

[5] The estate agent charged with the sale of the property informed Dr Saaiman of the existence of a "*servitude road across the property*" and evidently mentioned to him that it was used only occasionally (about once a month) by the farm manager of Westford to access the open area adjacent to a wattle forest on Westford. Other than that, Dr Saaiman does not appear to have conducted any enquiry as to the locality of the servitude prior to the acquisition thereof

[6] When Great Force took transfer of the land from Leather Lane in December 2007 the title deeds reflected that ownership was:

> *"Subject to the conditions referred to in the two Deeds of Transfer No. T8204/1024 and number 3747/1925;*
>
> *B …*
>
> *C FURTHER SUBJECT to the servitude referred to in the endorsement dated 16th November 1999 on Certificate of Registered Title No. 91994 dated 16 November 1999 reading as follows:*
>
> *'By Notarial Deed of Servitude No. K1191/1999 dated 6/9/99 the within property is subject to a servitude road, 6m wide, the western boundary of which is represented by the line C D, as shown on Diagram SG No. 1489/1999 in favour of Portion 11 (a portion of Portion 8) of the farm no. 194, Knysna Division,*

measuring 4,0003ha and held by Certificate of Registered Title No. 91994/1999'.

As will more fully appear from the said Notarial deed and diagram".

[7] As a busy medical specialist, Dr Saaiman says that he did not pay any particular attention to the terms and conditions of the title deed upon receipt thereof and simply filed them away for safekeeping. It bears mention that the servitude referred to in the title deed above is not the road affording access to the open area on Westford but is for the benefit of other properties to the north of Dr Saaiman's to which I shall refer later.

[8] After taking occupation of the property Dr Saaiman says he became aware of the fact that a rough jeep track adjacent to the southern boundary of the property was used by equestrians, and occasionally by someone who needed to access the open area on Westford by bakkie.

[9] About three years after taking occupation of the property and in January 2011, Dr Saaiman received a telephone call from Mr Dean Walker, the legal adviser to the J P Smit Familie Trust, claiming to represent Mr J P Smit, a director of Surego. Mr Walker informed Dr Saaiman that Mr Smit intended establishing an infrastructure on Westford in the vicinity of the open area with a view to producing charcoal on a commercial basis from the abundance of trees on the property. It was said that Mr Smit intended exercising the right of way purportedly granted in favour of Westford over Dr Saaiman's property for purposes of removing such charcoal from Westford in

large trucks. Dr Saaiman was somewhat alarmed by this potential intrusion on his peaceful enjoyment of the property and immediately consulted his attorneys.

[10] After correspondence between Mr Walker and Mr van Niekerk, the attorney for Great Force, in which Westford's entitlement to exercise what was referred to as "*a servitude right of way*" was asserted, Mr Walker issued an ultimatum to Great Force on 26 January 2011 that unless an undertaking was given by 16h00 that very day pursuant whereto Surego was permitted to exercise its servitude as aforesaid, Surego would approach the High Court as a matter of urgency for appropriate relief.

[11] No such undertaking was given by Great Force in January 2011, or in September 2011 when a similar demand was made on behalf of Surego. Eventually, on 3 September 2012 Surego launched an application (in the long form) for determination of the precise locality and extent of its servitude and for certain declaratory relief in relation thereto. That application was launched in this court's Eastern Circuit Local Division sitting at George, and, once opposed, was enrolled for hearing on 1 March 2013. By that stage this application had already been launched by Great Force in the Western Cape High Court, Cape Town.

[12] The matter did not proceed in George as planned on 1 March 2013 in light of the fact that the parties had agreed that the litigation in the Circuit Court should be stayed pending the final determination of the present review application which effectively seeks to have the right of way servitude in favour of Westford expunged from Great Force's title deeds.

[13] Subsequent to the launch of Surego's application, Dr Saaiman's attorneys consulted a local land surveyor, Mr Mark de Bruyn, to verify the correct location of Westford's servitude. On 10 December 2012 Mr de Bruyn furnished the attorneys with a detailed report. I shall return to certain aspects of this report in more detail later but suffice it to say that Mr de Bruyn held the view that the servitude had probably been correctly recorded by the First Respondent ("the SG") in its records as traversing Dr Saaiman's property. It bears mention too, that the reason that Great Force's attorneys approached Mr de Bruyn was because he had intimate knowledge of the servitude having drawn certain diagrams relating to an earlier subdivision of the parent property from which Great Force's property subsequently was excised.

[14] Dr Saaiman was advised that there were certain difficulties with Mr de Bruyn's report and in February 2013 Great Force's legal representatives were instructed to obtain a second opinion. To this end they approached Mr Andrew Beyers, a Cape Town land surveyor, who was regarded as an independent party in the circumstances.

[15] Mr Beyers advised Great Force's attorneys that the recordal by the SG , initially in 1999 and finally in 2000, on the relevant diagram of the location of the servitude in favour of Westford was without a proper factual or legal basis, and was wrongly recorded as such. On the strength of this advice the attorneys advised Great Force that the decision of the SG was reviewable under s6 of the Promotion of Administrative Justice Act, No. 3 of 2000 ("the PAJA").

THE REVIEW APPLICATION

[16] On 22 March 2013 Great Force launched the present application for review under s6 of the PAJA. Given that the application was brought outside of the 180 day period prescribed by the PAJA, an application was simultaneously brought in terms of s5(1) of that Act for the extension of the requisite period.

[17] Notice of the application was given to the SG, Surego, the Registrar of Deeds, Cape Town, as well as the owners of two other properties that abutted that of Great Force to the north, *viz*. Lookout Investment Corporation CC ("Lookout"), the Fourth Respondent, and Deon Willem van Zyl ("Van Zyl"), the Fifth Respondent. Only Surego opposed the application, while the SG undertook to abide the decision of the court.

[18] Surego raised various defences to the application in the answering affidavit deposed to by Mr Smit. These included the following:

18.1 The servitude sought to be set aside had been recorded in a title deed encompassing a 1999 survey diagram, a public document which constituted effective and constructive notice to the world;

18.2 Accordingly, for purposes of the PAJA, the decision had been taken at least 13 years prior to the launching of the application;

18.3 Great Force could have accessed the relevant information from the title deeds at the time of registration of transfer to it – some 6 years before the application was launched;

18.4 There was no evidence to suggest that the servitude was not exercised by Surego's predecessors in title;

18.5 The servitude was regularly exercised after Great Force had taken transfer of the property;

18.6 Accordingly, it was contended that Great Force had adopted a supine attitude for some 4-5 years and failed to explain such a lengthy delay;

18.7 The replying affidavit put up by Great Force in response to Surego's answer had been filed on 17 April 2015 when in fact it should have been filed in February 2014. Surego accordingly opposed the May 2015 application by Great Force to condone the late filing of this affidavit some 14 months after it was due.

[19] In their Heads of Argument filed in May 2015 on behalf of Great Force, Messrs Scholtz SC and Viviers conceded that the SG's decision sought to be reviewed was made before the commencement of the PAJA on 30 November 2000. Mr Rourke SC, on behalf of Surego, agreed with this submission.

[20] Counsel for Great Force argued, firstly, that the source for review of the SG's decision in 1999 was founded in s33(1) of the Constitution of the Republic of South Africa, 1996, and secondly, that the so-called "*delay rule*" of the common law was applicable to the question of whether the review application was brought within a

reasonable time.[1] Although the "*delay rule*" was not pertinently traversed in the founding papers because of the erroneous assumption that the PAJA applied, Mr Rourke SC accepted the common law approach adopted by Mr Scholtz SC in argument given that all facts relevant to that determination were properly before the court in any event. The delay in the initiation of these proceedings will therefore be approached on the basis suggested by Mr Scholtz SC.

[21] The parties were not in dispute in regard to the applicability of s33(1) of the Constitution, nor that the SG's decision constituted administrative action. I shall revert to the application of this approach later.

THE LAYOUT OF THE RELEVANT PROPERTIES AND THE HISTORY OF THEIR SUBDIVISION

[22] Consideration of the dispute can only be property understood by having regard to the current layout of the various properties concerned which is depicted in Annexure "A" hereto.

22.1 Dr Saaiman's property is presently known as Portion 10 of Farm No. 194, Knysna.

22.2 Immediately to the north of Portion 10 there are 2 properties: the Remainder of Portion 8 of the Farm 194, Knysna, ("Portion 8") which is owned by van Zyl. Adjacent to Portion 8 and to its west

[1] Bell Porto School Governing Body & Others v The Premier, Western Cape & Others, 2002 (3) SA 265 (CC) at paras 83-5; 157. Bullock N.O. & Others v Provincial Government, North West Province & Another, 2004 (5) SA 262 (SCA) at para 7.

lies Portion 11 of Farm 194 Knysna ("Portion 11"), which also borders on the northern boundary of Portion 10. It is owned by Lookout.

22.3 The property immediately to the south of Portion 10 is Portion 4 of Farm 194 Knysna ("Portion 4").

22.4 Westford (more properly known as Portion 44 of Farm 191 Knysna) is a much larger piece of land and lies to the east of, *inter alia*, Portions 4 , 8 and 10.

22.5 The property to the west of Portion 4 is the Remainder of Portion 12 of Farm 196 Knysna. It is colloquially known as "*Mount Pleasant*".

22.6 To the north of Portion 12 of Farm 196 Knysna lies the Remainder of Portion 11 of Farm 196 (and is not to be confused with Portion 11 of Farm 194). This property abuts both Portion 10 and Portion 11 of Farm 194.

[23] The original title deeds for farms in this area go back to 1836 when certain tracts of State land were transferred into private ownership and were given the descriptive names "*Mount Pleasant*", *"Westford"* and "*Quarrywood*". At that stage, and prior to a number of subdivisions over the following 150 years, Portion 10 was located on Mount Pleasant.

[24] In 1886 Mount Pleasant was subdivided into 3 parts being Lots A, B and C respectively under SG Diagram 684/1886. After that subdivision, Portion 10 was physically located on Lot B.

[25] In 1929 Lot B was subdivided in terms of SG Diagram 1324/1929 leading to the creation of Lot No. 2 of Lot B. Portion 10 was then physically located on Lot No. 2.

[26] In 1952 Lot No. 2 was itself subdivided leading to the creation of Portion 4 by way of SG Diagram 10545/1952. Portion 10 was then physically located on Portion 4.

[27] Finally, in 1999 (pursuant to Diagram 1489/1999 and Title Deed 91994/1999), Portion 10 was created from the further subdivision of Portion 4. It is this diagram which is the subject of debate in this application

[28] With the first subdivision of Mount Pleasant in 1886 the relevant SG Diagram (684/1886) accompanying the title deeds reflects that "*a right of way between Lot C and Westford is reserved over Lot B*". That right of way is depicted as running between points "**R**" and "**S**" on Lot B.

[29] The diagram accompanying the subdivision of 1929 (SG No. 1324/1929) contains various annotations including a line from points "**a**" to "**b**". In terms of a contemporaneous note on that diagram "**ab**" represented a right of way granted in favour of Westford. This diagram was registered in 1930 and accompanied a notarial deed in which the existing servitude granted in 1886 (**RS**) was cancelled and a fresh

servitude created in the following terms in favour of the owners and their successors-in-title of Lot C -

> "*2…… a right of way over*
>
> *(a) ...*
>
> *(b) Lot B, adjoining Mount Pleasant aforesaid, along the line marked **RS** on the Diagram thereof* ..."

[30] The 1930 notarial deed went on to record that the right of way had been granted by the owners of Lot B to afford the owners of Lot C –

> "*a means of access to the remaining extent of the farm Westford ... with a common boundary between the said Lot C and the now remaining extent of Westford being impassable by reason of the heavily wooded and hilly nature of the land in its vicinity*".

[31] In the 1952 subdivision pursuant whereto Portion 4 came into existence, the relevant SG Diagram (No. 10545/1952) reflected a "*farm road*" traversing Portion 4. The "*farm road*" has no trigonometric co-ordinates and the diagram does not refer to any servitude as such. Great Force contends that the distinction in description between a registered right of way servitude and a "*farm road*" is significant and that the description of the latter on the diagram as such was only intended to reflect a "*topographical feature*" on the property.

[32] In the founding affidavit Great Force introduces the expert evidence of Mr Beyers. It is said that Mr Beyers applied his professional expertise to the various documents available to him to plot and establish the correct position of the servitude, and came to the conclusion that the "*farm road*" ran over Portion 4 while the registered servitude (**RS**) in fact ran across the current Portion 5 and was located more than 100m to the north of the "*farm road*". The logical consequence of this opinion, says Great Force, is that the subsequent confirmation by the SG of a servitude right of way over Portion 10 in favour of Westford was without proper legal or factual foundation. This is the gravamen of its attack on review.

[33] Surego takes issue with the distinction sought to be drawn by Mr Beyers and contends that the "*farm road*" depicted by the line "**ab**" over Portion 4 was in fact the right of way known as "**RS**" registered in favour of Westford both in 1886 and 1930.

THE ADDITION OF "SERVITUDE NOTE 3"

[34] When Portion 10 was created in 1999 through the subdivision of Portion 4, the SG included the following notes on Survey Diagram 1489/1999 which was annexed to the relevant Deed of Transfer, 91994/1999:

> "*Servitude notes*
>
> *1. The line CD represents the western boundary of a servitude road 6,00 metres wide as shown.*

2. *The line CF represents the western boundary of a servitude road 6,00 metres wide over the Remainder as shown.*

3. *The line ab represents a ROW servitude vide D/T 1924-182-8202*".

Survey Diagram 1489/1999 is reproduced below as Annexure "B".

[35] The survey diagram in question was prepared by Mr Mark de Bruyn to whom reference has already been made. He initially only recorded that Portion 10 was made up by the figures A B C D on the diagram. As will be seen hereunder, and on the instructions of the S.G, he subsequently plotted the line "**ab**" as running across the property from west to east, parallel to the southern boundary (C-B) but slightly to the north thereof.

[36] On Annexure "B" it will be observed that "Servitude Note 3" appears to have been appended to the diagram subsequent to its original compilation: it is in a different type-face to the rest of the document and can be seen to have been inserted into an existing space between the figures representing the various properties and "Servitude Note 2". For the sake of convenience I have enclosed the note in a black rectangle.

[37] In a letter dated 10 December 2012 written to Great Force's attorneys, Mr de Bruyn explained how, *inter alia*, Servitude Note 3 found its way on to Diagram No. 1489/1999.

"*I did the survey for Portion 10, which is shown on SG diagram no. 1489/1999 and no servitude was initially added to the diagram by me as the parent diagram did not show any servitude. The parent diagram is Portion 4 and is shown on SG diagram no. 10545/1952. The diagram of Portion 10 initially showed two servitude notes and these were new servitudes created to allow access to Portion 11 and Portion 9.*

The diagram was approved with only the two servitude notes and the first registration was indicated as deed No. 91994/1999. The copy of title deed No. 91994/1999 does not have any reference to a servitude indicated by note 3 on diagram 1489/1999.

In about April 2000 a further servitude, servitude note 3, was added to the diagram by the Surveyor-General's (S.G.) Office. This was done after the owner of the adjoining farm to the east, Portion 44 of the farm Westford No. 191, requested that the servitude shown in his title deed be brought forward on to the diagram of Portion 10 of farm no. 194. He stated in a letter dated 2000-03-17 to the S.G. that his title deed was No. T21509/1984 and that the details of the servitude were contained in title deed No. T7542/1998 in the name of Leather Lane CC.

The owner of Portion 44, Mr D B Hallick, also referred to the SG diagrams of Portion 4 (No. 10545/1952) and Portion 10 (No. 1489/1999).

> *The S.G. subsequently made the addition and informed Mr Hallick in a letter dated 14 April 2000, that this had been done.*
>
> *There is no indication in the S.G.'s file that the owner of Portion 10 or anyone else were (sic) informed of the addition.*"

[38] Mr de Bruyn went on to explain how "Servitude Note 3" came to be added to the diagram. The following narrative is based both on his own personal enquiries at the S.G.'s office, as well as his conclusions based on his professional expertise.

> "*The addition of note number 3 to the diagram was done by the Surveyor-General in order to bring forward the line which was referred to in Notarial Deed dated October 1930 and attached to Title Deed 8202/1924.*
>
> *There are no letters "**RS**" on the Deeds Office copy of the diagram, referred to in this Notarial Deed, but the S.G. copy of the diagram does show these letters. It would <u>appear</u> that a brown line, which was shown on the diagram as a topographical feature, was used as the basis for the graphical representation of the servitude and was lettered by the S.G.'s office so that the servitude could be described. However I could not find any notes on the S.G. (sic) to that effect.*

*The line "ab" drawn on to SG Diagram No. 1489/1999 follows a line shown on the parent diagram (S.G. diagram no. 10545/1952) that was indicated as 'farm road'. This was confirmed to me by the official who dealt with this addition. It appears that the S.G. felt that there was sufficient evidence to show that the line "**RS**" to which the notarial deed of servitude refers, co-incides with the 'farm road' as shown on SG diagram no. 10545/1952. The S.G. furthermore took notice of the fact that a further servitude, that extends from Portion 10 to the Divisional Road, lines up with the farm road and thus also the line "ab" and that this road exists today and concluded that the line "**RS**" could fall in no other place.*

No numerical data regarding servitude note no. 3 is given on the S.G. diagram no. 1489/1999 and no reference to a previous diagram is given either. In other words there is no numerical indication on the diagram such as angles, distances to boundaries or any width.

*A plot of the line "**RS**" as shown on S.G. diagram no. 684/1886 shows that this line falls off Portion 4 and hence off Portion 10. Nevertheless the line "**RS**" was assumed by the S.G. to have <u>not</u> been accurately plotted originally and that the physical evidence of the farm road (as shown on diagram 10545/1952) indicated where the servitude should lie.*

When SG diagram no. 10545/1952 was framed a servitude note was not added. It appears that the reason for this is that the parent diagram of Portion 4 (Portion 1 on SG diagram no. A1324/1929) indicates a line but this line does not fall onto the duly deducted Portion 4. This line (also co-incidently also (sic) lettered "ab") falls on to a duly deducted Portion 5. A note on the diagram regarding a right of way 'from a to b' was at some time deleted, apparently by the S.G. The deletion may have occurred because it was discovered when Portion 4 and 5 were surveyed off , that the road did not in fact fall on to Portion 5 but on to Portion 4.

It is however possible that there was another road in 1930 when the servitude was created and the servitude line was originally correctly plotted. [Emphasis added]

I would therefore say that the description of the servitude is as defined in the notarial deed but because its route is not clearly defined by a survey it must be regarded as being a 'general servitude'. My understanding of such a general servitude is that its route is not necessarily fixed, depending on the intention of the parties involved. It is granted in general terms.

The land over which the original servitude ran has been subdivided. While it is possible that the road has moved over from its original position, either gradually or in one step, the land

over which the actual physical access fell as the land was being subdivided became the servient tenement. As the existing road is used to access Portion 44 of the farm Westford No. 191, it would therefore be the position of the servitude and the S.G. was correct in bringing the line onto diagram No. 1489/1999. No additional rights have been created by the note and reference must be made to the original notarial deed. Unless there is evidence to the contrary the position of the road on the ground defines the line of the servitude".

[39] After discussing various other aspects Mr de Bruyn offered the following general concluding remarks:

"*In summary I feel that the original servitude was created to allow a right of way to the farm Westford with reference to a line "RS" as shown on the S.G. diagram. There is no evidence that this line was accurately surveyed and the lettering appears to have been added, after the initial diagram was framed, to the S.G. copy of the diagram only, at the ends of a brown line that appeared on the diagram. Such lines (together with streams and vegetation etc.) were added to older diagrams as topographical features and were only approximately depicted. This should have been known to the parties concerned. As such I feel that this servitude is what is termed a 'general servitude' in that the position is not fixed but can move as required.*

With subsequent surveys this land could not be brought forward as its graphical position either did not correspond to its actual position or it moved after 1886, when the Farm No. 194 was surveyed. The S.G. however decided from evidence available to him that the 'farm road' as shown on the diagram of Portion 4 was the line of the servitude and that the physical position of the road determined the position of the servitude.

Even although the position of the 'farm road' as shown on the diagram of Portion 4 was most likely reasonably accurately plotted there is no reference to any dimensions so its position is still only approximately depicted".

REASONS FURNISHED BY THE S.G.

[40] As already stated, the S.G. has indicated that he will abide the decision of the court in this application. During May 2013 he lodged the Rule 53 record relevant to the decision being attacked in this matter and filed a short explanatory memorandum dated 15 May 2013 to the following effect:

40.1 The S.G. acted in terms of Section 6(c)(iii) of the Land Survey Act, No. 8 of 1997 read with Regulation 73(2) of the Deeds Registries Act 47 of 1937 in adding "Servitude Note 3" on the diagram in question.

40.2 The note was added at the request of the erstwhile owners of Westford (Messrs DB & ME Hallick) who said that the right of way servitude registered under the 1930 Notarial Deed was not shown on the diagram of Portion 10.

40.3 The S.G. researched the request and found that the original depiction of the servitude marked "**RS**" on the 1886 diagram "*was not accurate owing to the early date of the survey*".

40.4 A more recent and accurate survey conducted in 1952 (for purposes of the 1953 diagram) showed a "*farm road*" and this was presumed by the S.G. to be the same road as reflected as "**RS**" on the 1886 diagram.

40.5 The S.G. adopted this "*more accurate determination of the position of the 'farm road'*" to fix the location of the servitude claimed by the owner of Westford over Portion 10.

THE BASIS FOR THE ATTACK ON THE S.G.'S DECISION TO ADD SERVITUDE NOTE 3

[41] As I have indicated, the parties were ultimately *ad idem* that the proper approach in this matter was the application of s33(1) read with item 23(2)(b) of Schedule 6 to the Constitution of 1996. In Bel Porto, Chaskalson CJ, for the majority, summarised the position thus:

"[83] At the time of the relevant event the right to just administrative action was regulated by item 23(2)(b) of Schedule 6 to the Constitution ...

[84] ... item 23(2)(b) seems to me to encapsulate and in some respects extend the well-known common law grounds of judicial review as they have developed over the years in England and South Africa – legality, procedural fairness and rationality. These provisions can be interpreted and applied without 'sterile, symptomatic and artificial classifications', and without importing into the constitution a requirement that decisions must not only be procedurally fair, but also substantially fair. If that had been the purpose of item 23(2)(b), sub-para (b) would not have confined itself to procedurally fair administrative action, but would have referred generally 'to fair administrative action'.

[85] For good reasons, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. Whilst procedural fairness and the audi principle is strictly upheld, substantive fairness is treated differently. ...

[86] The unfairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be of such a degree that an inference

can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.

[87] The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.

[88] I do not consider that item 23(2)(b) of Schedule 6 has changed this and introduced substantive fairness into our law as a criterion for judging whether administrative action is valid or not. The setting of such a standard would drag a Court into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not a judicial level. This is of particular importance in cases such as the present, in which the issues relating to difficult and complex policies adopted in order to promote an equitable transformation of apartheid structures and a reversal of policies that were grossly unequal.

> *[89] I do not understand the Carephone case [1999 (3) SA 304 (LAC)] or any of the cases that have followed it, to hold otherwise. What they require for a decision to be justifiable, is that it should be a rational decision taken lawfully and directed to a proper purpose.*
>
> *[90] If that is the case, and if the decision is one which a reasonable authority could reach it would in my view meet the requirements of item 23(2)(b) ...*".

[42] In Bullock the Court was required to deal with a matter somewhat similar to the present: an application to set aside the registration of a servitude granted by the Premier of a province over private land. On appeal, Cloete JA overruled the decision of the Court *a quo* and held that the Premier's activities indeed constituted administrative action. As I have said, Mr Rourke SC accepted that the S.G.'s addition of "Servitude Note 3" in 1999 constituted administrative action which was capable of review and it is therefore not necessary to deal with the point further.

[43] Mr Scholtz SC stressed that the court should be astute not to approach the matter as a reconsideration of the merits, thereby conflating the important distinction between appeal and review.[2] He urged the court to have regard to the manner in which the S.G. arrived at his decision in 1999 rather than the substance of the decision itself.

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[2] Pepkor Retirement Fund & Another v Financial Services Board & Another 2003 (6) SA 38 (SCA) at para [48].

[44] In its answering affidavit Surego sought to introduce evidence extraneous to that which served before the S.G. For example, it relied on an aerial photograph taken in 1936 from which it claimed that the locality of the servitude road over the erstwhile Lot 2 could clearly be seen. This road was said to coincide with the locality of the "*farm road*" recorded on diagram 1324/1929, and it was said that it is inconceivable that the parties would have agreed to the registration of a servitude right of way some other location on Lot No. 2.

[45] Further, Surego sought to rely on the title deeds of certain of the surrounding properties to demonstrate the location of other right of way servitudes in the vicinity and the possible convergence of these servitudes with the right of way over Portion 10.

[46] I am of the view, given the manner in which the issues have been defined, that it is impermissible in these proceedings to have regard to any facts or circumstances that were not before the S.G. in 1999. There is no suggestion, for example, that the S.G. committed a procedural irregularity by failing to have regard to material information that was not before him. Accordingly, all that a court may consider for the purposes of this review are the documents which were before the S.G. and which are contained in the Rule 53 record delivered by him.

THE POWERS AND DUTIES OF THE S.G.

[47] Powers and duties of the S.G. are set out in some detail in s6 of the Land Survey Act, No. 8 of 1997, the statute under which the S.G. purported to act in this case. Of relevance here are only s6(1)(c)(i) and (iii) thereof:

"6. <u>Powers and duties of Surveyor-General</u>

(1) A surveyor-general shall be in charge of the office in respect of which he or she has been appointed and shall, subject to this act –

(a) ...

(b) ...

(c) on the diagram of any piece of land –

(i) define the geometrical figure representing any portion of that land, the transfer of which has been registered in a deeds registry, and deduct the numerical extent of that portion;

(ii) ...

(iii) define the geometrical figure and make the necessary endorsements in respect of any servitude or lease over or on that land which has been surveyed in terms of this Act and registered in a deeds registry".

[48] The S.G. derives the powers and duties in regard to a survey diagram (as described in s1 of the Survey Act) from s6(1)(c)(i) and (iii). These sections must be read with s6(1)(d) which entitles the S.G. to:

> "*(d) cancel or amend in accordance with the provisions of any law any general plan or diagram*".

And, in terms of s36, the S.G. may

> " *correct any error in the numerical data, figure or wording of a diagram registered in a deeds registry*".

THE REVIEWABILITY OF THE S.G.'S DECISION

[49] Counsel for Great Force argued that the S.G. was only empowered by the statute to correct an error in the "*numerical data, figure or wording*" contained in the 1999 diagram. In purporting to exercise this function the S.G. says in the memorandum of 15 May 2013 that he acted in terms of "*Sect 6(c)(iii)*" – presumably an intended reference to s6(1)(c)(iii) – and "*Regulation 73(2) of the Deeds Registrars* [*sic*] *Act 47/1937 by adding a note on the diagram of portion 10* ...".

[50] It is not clear to me that the S.G. was in fact empowered by the said statute and the regulations to effect the annotation which was inserted as "Servitude Note 3". It is conceivably arguable that such action does not constitute the "*correction*" of "*an error*" as defined. However, the question as to whether the S.G. acted *ultra vires* was not raised in either the papers or in argument by Great Force and I shall accordingly assume that the S.G. was in fact so empowered.

[51] Mr Scholtz SC confined the argument regarding reviewability of the S.G.'s decision to a fairly narrow focus. It was said that the decision was arrived at on the basis of incorrect facts and unfounded assumption on the part of the S.G.

[52] It was argued firstly that the S.G.'s assumption that the farm road on the 1952 diagram was in fact the servitude (**RS**) on the 1886 diagram, was not based on any facts before the S.G., and, in fact, flew in the face of the 1929 diagram on which the servitude was pertinently recorded as being located at points "**a-b**" – at that stage clearly traversing the erstwhile Portion 5. Given that Portion 10 arose out of the subdivision of Portion 4 it should have been obvious to the S.G., had he properly considered the relevant diagrams, that the servitude granted in favour of Westford could never have been located across Portion 10.

[53] Then, it was argued that the S.G. erred in assuming that a "*farm road*" and a right of way of servitude were synonymous with each other, in circumstances where he offered no explanation for making this assumption. In the answering papers Surego put up an affidavit by Mr Johan Meiring, a land surveyor in private practice for more than 28 years, who tendered his views as an expert. Mr Meiring suggested that on older SG diagrams the use of expressions such as "*road*" or "*farm road*" generally indicated the existence of a servitude. This historical practice was therefore put up by Surego as an explanation for the S.G.'s conflation of the two terms.

[54] While it may be that the two phrases had come to be used synonymously in past practises, the point is of no consequence in this matter since the S.G. did not proffer this as an explanation for his decision.

[55] The high water mark of the S.G.'s explanation here is that he had reason to doubt the accuracy of the "**RS**" servitude on the 1886 diagram purely because that diagram "*was not accurate owing to the early date of the survey*".

[56] That assumption by the S.G. is a startling one to say the least. The surveying of land must by its very nature be a precise practice conducted in the public interest. Accurate surveys of that which forms one of the corner stones of modern economic growth, *viz*. the ownership of land, are a prerequisite for the establishment and recordal of the positions of boundaries between different lots of land and, further, the recordal of individual rights in relation thereto.[3] To that end a detailed and carefully managed system of land registration exists in our country which system serves as a source of information to interested parties, and the public in general, of who has ownership of which rights in land. To talk of a perceived lack of accuracy in such circumstances seems to me to be anathema to the very practice and purpose of land surveying and the associated registration of rights in regard to land. What the S.G. appears to be saying in this case is that a more recent survey will necessarily be preferred over an older survey because old survey diagrams were not always performed with the desired degree of accuracy. An argument such as that would, in my view, seriously undermine and compromise the integrity of the entire system of land registration in our country.

[57] But there is a more fundamental concern in this case. If regard be had to the 1952 diagram, it will be seen that the "*farm road*" (**a-b**) is not located with reference to any fixed geometric or trigonometric points or coordinates, and in such

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[3] LAWSA Vol. 14 (First Reissue) p 133 para 119.

circumstances is manifestly no more accurate than the 1886 diagram which also lacks such points and coordinates. It bears mention, however, that both diagrams are drawn according to scale and the position of "**a-b**" and "**RS**" on the respective diagrams can be accurately measured according to that scale.

[58] In the circumstances I agree with Great Force that the S.G.'s decision to amend the 1999 diagram is based on incorrect facts and unfounded assumptions. In terms of Pepkor[4] such material mistake of fact affords an affected party ground for review of an administrative decision.

[59] There is in my view, in any event, a more general basis to consider the reviewability of the S.G.'s decision. The bedrock of the exercise of public power in our law in the constitutional era is the principle of legality, and the requirement that the exercise of such power must be rational.[5] The approach was summarised by Chaskalson P in Pharmaceuticals at 708:

> *"[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass*

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4 58-59 paras 47-8. See too Bullock at 270 para 16.

5 Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council, 1999 (1) SA 374 (CC); Pharmaceutical Manufacturers Association of SA: In re: Ex Parte: President of the Republic of South Africa, 2000 (2) SA 674 (CC); Masethla v President of the Republic of South Africa, 2008 (1) SA 566 (CC); Albutt v Centre for the Study of Violence and Reconciliation, 2010 (3) SA 293 (CC).

constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle".

[60] Having considered the matter fully, I regret to say that the grounds offered by the S.G. for the addition of "Servitude Note 3" are lacking in both logic and rationality. The decision is therefore reviewable on this basis also.

APPLICATION FOR CONDONATION OF THE LATE FILING OF THE REPLYING AFFIDAVIT

[61] Mr Rourke SC urged the court to consider the delay of almost 14 months in the filing of the replying affidavit as so gross that it warranted the refusal of the application for condonation for late filing without more. The explanation put up by Great Force's attorney in this regard demonstrates that its lead counsel was involved in other protracted matters and that the settling of the reply was accordingly delayed

by his non-availability. Given that the same counsel were involved in the matter throughout it is understandable (from a cost efficiency point of view) that Great Force did not wish to change jockeys midway through the race, as it were. One cannot lose sight either of the fact that Surego did not seek to compel the filing of the affidavit in terms of the Rules of Court at any stage. This demonstrates that Surego was in no particular hurry to procure the set down of the matter and, the court is left with an overall impression that the parties were litigating at a leisurely dawdle which suited them, and that no particular prejudice was occasioned to either party by either the late filing of the replying affidavit or the concomitant delay in the argument of the matter ultimately.

[62] On the other hand the reply contains matter which is generally useful to the court in coming to a just decision on the dispute in that it seeks to answer a number of issues introduced in the reply which were not properly traversed in the founding papers. In my view is vital that this dispute between the parties is properly fleshed out given that it affects not only the current owners but all successors-in-title too. The finding of reviewability of the S.G's decision is obviously an important factor given that consideration of the prospects of success are part and parcel of the exercise in considering whether or not to grant condonation. I am therefore inclined to grant the condonation sought and consider that it would be in the interests of justice to admit the replying affidavit. The conduct of Great Force's legal representatives in delaying the filing of the reply is a factor to be considered in relation to costs.

THE APPROACH AT COMMON LAW IN RELATION TO DELAY IN INITIATING REVIEW PROCEEDINGS

[63] The common law principle that applies to the institution of review proceedings, in the absence of any prescribed time period, is that such proceedings should be instituted within a reasonable time.[6] The proper approach to the question of undue delay in such circumstances (an issue that was raised by Surego in the present matter), as set out in the judgment of Miller JA in Wolgroeiers[7] is as follows:

> 61.1 Firstly, a court must decide whether the proceedings were brought within a reasonable time;
>
> 61.2 secondly, if not, it must decide whether the unreasonable delay ought to be condoned, in which event it must exercise a discretion taking into account all relevant factors, including, but not limited to, any prejudice to a respondent.

[64] The application of this two stage approach adopted in Wolgroeiers was usefully summarised by Griesel J in Camps Bay Ratepayers.[8] In my view the following aspects of that judgment are relevant in the context of the present matter:

> 62.1 What amounts to a reasonable time depends on the facts of each case – the length of time is not necessarily decisive;

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6 Yuen v The Minister of Home Affairs & Another, 1998 (1) SA 958 (C) at 968G.
7 Wolgroeirs Afslaers Eiendoms Beperk v Munisipaliteit van Kaapstad, 1978 (1) SA 13 (A) at 39C-D.
8 Camps Bay Ratepayers & Residents Association & Others v Minister of Planning, Culture & Administration, Western Cape & Others, 2001 (4) SA 294 (C) at 306F-207G.

62.2 The rationale for this judicially evolved common law rule is twofold: firstly an unreasonable delay may cause prejudice to the other parties. Secondly finality should be reached within a reasonable time in judicial and administrative proceedings;

62.3 Once delay is raised as a defence in review proceedings, the court must embark on a twofold enquiry which was described by Griesel J as follows at 307D-F:

> "*The first enquiry is whether a reasonable time has elapsed. This is a factual enquiry, the question being whether, in all the circumstances, a period that has elapsed was unreasonable. During this enquiry the court does not, therefore, exercise a discretion although the court does have to express a value judgment ("waarde oordeel") on the reasonableness or otherwise of the delay. Such value judgment cannot be expressed in vacuo, however, but it must depend on the particular circumstances of each case, including the applicant's explanation for the delay*";

62.4 If the court finds that the delay was reasonable the enquiry ends there. If the court, however, concludes that the delay was unreasonable, then it is required to embark upon the second leg of the enquiry this being whether the unreasonable delay should be condoned. During this stage of the enquiry, the court

exercises a discretion which of course must be exercised judicially.

FACTS RELIED UPON BY GREAT FORCE IN REGARD TO DELAY

[65] Great Force says that it only became aware of the SG's decision on 21 December 2012, upon perusal of the report it had received from Mr de Bruyn on that day. This is not disputed by Surego. This report was obtained with a view to opposing the application that Surego had launched against Great Force in the Circuit Court in George, claiming orders that, if granted, would have confirmed the existence of the servitude.

[66] In February 2013, during consultations held by Great Force's lawyers with Mr Beyers, it was concluded that in order to oppose the application in the Circuit Court, the SG's decision should first be set aside on review.

[67] Great Force submits that, taking into account the intervening festive season at the end of 2012, and having regard to the complexity of the matter, it launched the present application for review of the SG's decision within a reasonable time that it became aware of it, and that the second leg of the enquiry is therefore not applicable.

[68] An alternative argument is advanced in the event of it being found that Great Force did have knowledge of the existence of a servitude and that its delay to institute review proceedings was therefore unreasonable in the circumstances.

[69] It is argued that Surego's reliance on the principle that public documents constitute effective notice of the content thereof to the public at large is misconceived. In the context of considering the reasonableness of a delay to institute legal proceedings, Great Force argues that actual knowledge of a cause of action and the subsequent inaction to pursue it is the only relevant consideration.

[70] The argument proceeds along the basis that, having taken transfer of the property at the end of 2007, Dr Saaiman's behaviour in not perusing the title deeds before filing it away for safekeeping was not unreasonable. Similarly it is said that there was obviously no reason for him to subsequently scrutinise the title deeds on the occasions when the property was utilised for leisure purposes. Great Force concedes that Dr Saaiman was informed by the estate agent of the existence of a servitude across the property while viewing the property before purchasing it and further that after taking occupation of the property a jeep track was seen leading across the property in the direction of Westford.

[71] Even that knowledge, says Great Force, was not sufficient to alert Dr Saaiman to the exact location of the servitude. After all Westford's use of the servitude in the past had been limited to a monthly trip for farming purposes and, apart from that, the only other people noticed using the road were equestrians.

[72] It is said that Dr Saaiman became aware of the fact that Westford intended using the road for the conveyance of charcoal through the use of heavy vehicles at the beginning of 2011. Here , it is noteworthy that he was immediately galvanised into action and sought legal advice. That process eventually led to Surego initiating legal proceedings in the Circuit Court some 18 months later. Clearly, it is

suggested, Surego was not in a hurry to bring matters to finality. And, given the nature of the relief sought by Surego in the Circuit Court , it would have been foolhardy for Great Force to commence its own application resulting in further unnecessary litigation.

[73] Mr Scholtz SC went on to refer the court to the following passage from the judgment of Griesel J in Camps Bay Ratepayers at 307C in regard to considerations of prejudice:

> *"Prejudice may take many forms. The official whose decision is sought to be reviewed may have forgotten the relevant facts. The recollection of the relevant facts by those concerned may have faded – memory being unfaithful at times. Others may no longer be available. Documentary proof may have been destroyed or may have disappeared. Other parties may have acted on the strength of the decision to their prejudice*".

It was pointed out that there was no suggestion in the papers, either by Surego or the SG, of prejudice of the nature as referred by Griesel J, nor that Surego has been prejudiced in any other manner by the delay in launching the present application.

[74] It was said that Great Force, on the other hand, would suffer significant prejudice since use of the servitude for the conveyance of charcoal wiould not only be contrary to the principle of *civiliter modo*, but would also destroy the use and enjoyment of the property as a holiday home and significantly impact on its value. In

the circumstances the court was asked to exercise its discretion in favour of Great Force and to condone the delay in launching the present application.

SUREGO'S RESPONSE ON THE ISSUE OF DELAY

[75] Mr Rourke SC anchored Surego's response to two decisions of the Supreme Court of Appeal – Associated Institutions Pension Fund v Van Zyl[9] and Beweging vir Christelike-Volkseie Onderwys v Minister of Education.[10] In Associated Institutions the court issued a stern warning to parties to refrain from adopting a supine attitude stressing that applicants are expected "*to take all reasonable steps available to it to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision*".

[76] In Christelike-Volkseie Onderwys the court noted that the effect of a refusal to condone compliance with the delay rule constituted the withholding of a remedy and that in such circumstances the merits need not be addressed in determining the issue. The enquiry as to whether condonation should be granted or not has two stages. Firstly has there been undue delay and secondly should the delay be condoned or refused? If the first enquiry is answered in the affirmative then the delay will only be condoned if the explanation for it is acceptable.

[77] It was said that Dr Saaiman knew from October 2007 of the existence of a track running across the property which constituted a "*servitude road*". Further he knew from the time that occupation of the property was taken that that servitude road

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9 2005 (2) SA 302 (SCA).
10 [2012] 2 All SA 462 (SCA).

was utilised from time to time by Surego as well as other parties such as Eskom and equestrians. In addition, Dr Saaiman is criticised for adopting a supine attitude and for not investigating the position regarding the servitude across its property for some 5½ years.

[78] The argument is further predicated on the fact that Great Force's attorney was pertinently advised of the existence of the servitude in January 2011, of the existence of the 1999 survey diagram which forms the subject matter of the current dispute and the fact that Surego relied thereon to reach its property. Mr Rourke SC argued, persuasively in my view, that the knowledge of the attorney is imputed to Great Force on the ordinary principles of agency. On that basis, it is claimed that Great Force had knowledge of the existence of the 1999 survey diagram in January 2011 and delayed for more than 2 years before launching these proceedings in March 2013.

[79] Great Force is criticised for having adopted a supine approach in light of the fact that the relevant information was available to its attorneys and that they failed to take all reasonable steps to investigate the matter at that stage.

[80] The argument concludes on the basis that Dr Saaiman had actual knowledge of the existence of the servitude from the date when the property was purchased – towards the end of 2007. But whatever the extent of that knowledge may have been, Surego says that from at least January 2011 Great Force could reasonably have been expected to acquire knowledge of the 1999 diagram. It is criticised for then failing to take steps to immediately investigate the reviewability of

the SG's decision. And so Surego asks that the first question should be answered in the affirmative and the second question in the negative.

UNDUE DELAY?

[81] Great Force took transfer of the property in December 2007 and launched the current proceedings more than 5 years later – in March 2013. On the face of it, that is undoubtedly a long delay. The question however is whether such delay was undue, or to put it differently, unreasonable. And, as I have already pointed out in relation to Associated Institutions that requires this court to consider the relevant facts of the matter and to express a value judgment which is not to be equated with the judicial discretion which is involved in considering the issue of condonation.

[82] It is not in issue that from the outset Dr Saaiman was , in general terms, aware of the fact that a right of way was exercised over the property. He was told so , albeit perhaps in haste, by the estate agent when he viewed the property. His knowledge after taking occupation of the property seems to have been that the use of the servitude was infrequent and not particularly onerous on the dominant tenement. To be sure, there was nothing at that stage which would have caused Dr Saaiman to examine the title deed and to query whether the servitude had been correctly located by the S.G. on the relevant diagram.

[83] But even had Dr Saaiman done so, he would have discovered nothing in the title deed itself. Had he carefully scrutinized the surveyor's diagram attached thereto he may have discovered that the right of way had been added to the diagram

attached to the title deeds in an unusual manner and place. But, as a lay person, he may just as well have missed it. He most certainly would not have found any reference in the body of the title deed itself to the servitude in favour of Westford, the only reference being to the servitudes referred to above, in favour of Lookout and van Zyl. Most certainly, Dr Saaiman would not have had any reason at that stage to ask for advice as to whether the servitude in favour of Westford had been correctly plotted on the diagram in question. To have expected him to do so is, in my mind, placing too high a duty on the ordinary property owner.

[84] It was only when the envisaged future use of the right of way by Westford was alleged to be not in accordance with the principle of *civiliter modo*[11] (and it must be stressed that I make no finding in this regard), that the servitude was put under the microscope. And once this had occurred Great Force sought to deprive Surego of access over its property to the open area. Thereafter, and despite two abortive threats of legal action by Westford in 2011, the latter eventually (and for reasons unexplained) commenced proceedings in the Circuit Court in September 2012.

[85] It would appear that this initiation of proceedings by Westford to enforce its alleged rights was the catalyst which led to Great Force seeking advice from the very surveyor who had been responsible for the preparation of Diagram No. 1489/1999, and who, it must be stressed, had not initially recorded the existence of the servitude over Portion 10 on such diagram. Indeed, it was only when Mr de Bruyn told Great Force's attorneys shortly before Christmas in 2012 that it was the S.G.'s

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[11] See generally in this regard CG van der Merwe, Sakereg, 2nd ed. at 466-7.

office that had directed the addition of "Servitude Note 3" to that diagram, that Dr Saaiman actually became aware of the fact that there was conduct on the part of a public authority which could be regarded as administrative action.

[86] The chronology shows that soon after the conclusion of the 2012 year-end holiday period, Great Force's lawyers moved into action and sought a second opinion from Mr Beyers. When Mr Beyers advised on 13 February 2013 that it was his view that the servitude had been incorrectly recorded as traversing Portion 10, Great Force knew for the first time that there was a basis to approach the court for the review of unlawful administrative action. The fact is that the application was then launched some 5 weeks later, pursuant to an arrangement between the attorneys.

[87] In those circumstances I am unable to hold that there was an unreasonable delay in launching these proceedings. That is a complete answer to Westford's complaint and condonation by the court does not enter into the equation.

[88] However, if it be considered that I am wrong on this score, I would in any event exercise the power to condone the lateness of such delay. In coming to that conclusion, I am of the view that this is not a situation where the party asking for an indulgence has adopted a "*supine attitude*" as Brandt JA termed it in Associated Institutions. The facts of that case demonstrate that the applicant for condonation ought to have been on his guard from a relatively early stage and initiated further enquiries much sooner than he did.

[89] Secondly, the prejudice here to Westford is far outweighed by the prejudice to Great Force (and any of its successors-in-title) which will have to endure

the consequences of an unlawful decision in perpetuity. Finally, in view of the relief which I intend granting, the gate will not be permanently closed to Surego. Given that a proper enquiry by the S.G. as to the existence of a right of way servitude over Portion 10 may ultimately confirm Surego's contentions, it is possible that its position will be reinstated in due course.

APPROPRIATE REMEDY

[90] Mr Scholtz SC asked that, in the event of the court reviewing the S.G.'s decision, the matter be remitted to him for proper reconsideration. He argued with reference to, *inter alia*, the Hangklip Environmental decision of Thring J,[12] that there were no exceptional circumstances present in this matter warranting a determination of the locality of the servitude by this court. Importantly, on that point, I consider that it cannot be said that the outcome of any such reconsideration by the S.G. is a foregone conclusion.

[91] Somewhat surprisingly, Mr Rourke SC did not agree with this suggestion relying on Gauteng Gambling Board.[13] He urged the court to finally determine the position of the right of way. It seems to me that counsel for Surego overlooked the remarks of Heher JA in that case to the effect that "*remittal is almost always the prudent and proper course*". Nor was Mr Rourke SC able to refer the court to any exceptional circumstances which mitigated against remittal. In my view, remittal is in fact the prudent relief to grant in this case.

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[12] Hangklip Environmental Action Group v MEC For Environmental Affairs & Others, 2007 (6) SA 65 (C) at 84G-J.

[13] Gauteng Gambling Board v Silverstar Development Ltd & Others, 2005 (4) SA 67 (SCA).

CONCLUSION

[92] In the circumstances the application for review should succeed with costs, save for the costs associated with the application for condonation of the late filing of the replying affidavit, which costs are to be borne by Great Force – that much was ultimately tendered by Mr Scholtz SC. As a sign of the court's displeasure at the laxity with which the condonation application was approached and the delay in the initiation thereof, those costs will be granted on the punitive scale. For the assistance of the Taxing Master it is recorded that no more than 1 hour was taken up during argument in relation to the application for condonation.

[93] To the extent that the notice of motion did not originally include a prayer for remittal and reconsideration by the First Respondent, and in the absence of a draft order handed up by counsel at the hearing, I have formulated the relief in a fashion which to me seems appropriate. In the event that the parties wish to have the wording thereof varied, they may do so on application to this court within 10 days of delivery of this judgment.

ORDER OF COURT

ACCORDINGLY IT IS ORDERED THAT :

A. The decision of the First Respondent, in terms of which Surveyor-General diagram No. 1489/1999 (a copy whereof is attached hereto as Annexure "A") was amended by the addition of Servitude Note 3 thereto, to the effect that the line **a-b** thereon

represents a praedial servitude described as "*ROW servitude*" over the Applicant's property, being Portion 10 (a portion of Portion 4) of Farm no. 194, in favour of the Second Respondent's property, being Portion 44 of the Farm Westford No. 191, Knysna, be set aside.

B. The matter is remitted back to the First Respondent for reconsideration of the precise locality of the right of way conferred in favour of the said Portion 44 of the Farm Westford No. 191, Knysna in terms of clause 2(b) of the Notarial Deed of servitude of 7 November 1930, and as reflected in SG diagram 1324/1929.

C. The Applicant and the Second Respondent shall be entitled to approach this court within 10 days of this judgment for reformulation of the relief granted in para (b) above in the event that either party is so minded.

D. The Applicant's late filing of the replying affidavit is condoned.

E. The Applicant shall bear the costs of the application for condonation of the late filing of the replying affidavit on the scale as between attorney and client.

F. Save as aforesaid, the costs of the application for review are to be borne by the Second Respondent.

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GAMBLE, J