

SOUTH AFRICA / JUDGMENT

# Badenhorst and Others v Surveyor-General, Cape Town (147/97) [1999] ZASCA 23 (29 March 1999)

**[1999] ZASCA 23**

## COURT

Supreme Court of Appeal

## BEFORE

Hefer, Grosskopf, Marais, Streicher, Farlam

## CASE / FILE NUMBER

147/97

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## THE SUPREME COURT OF APPEAL

## OF SOUTH AFRICA

Case No. 147/97

In the matter between: FREDERIC JOHANNES BADENHORST 1st Appellant  
HEINRICH JACOBUS BADENHORST 2nd Appellant  
ETIENNE FRANS BADENHORST 3rd Appellant  
and THE SURVEYOR-GENERAL, CAPE TOWN Respondent

Coram: HEFER, GROSSKOPF, MARAIS, STREICHER JJA and FARLAM AJA

Heard: 5 MARCH 1999  
Delivered: 29 MARCH 1999

## JUDGMENT

STREICHER JA/

STREICHER JA:[1] The appellants are the trustees of the Schuster's River Trust No 1 ("the Trust"). They are the registered owners of a property at present described as Remainder of Erf 766 Scarborough ("erf 766"). The respondent is the Surveyor-General, Cape Town. During about May 1921 the respondent approved a general plan, S91 ("S91"), in respect of a proposed township named The Schoester's Kraal Township No 1 ("Schoesters Kraal Township") which had been laid out, surveyed and beacons by land surveyor Fischer. Erf 766 formed part of Schoesters Kraal Township and was divided into 16 lots numbered 664 to 679. On 16 January 1996 the respondent approved subdivisional diagrams in respect of the lots numbered 664 to 670 and renumbered them erven 935 to 940. However, shortly thereafter the respondent requested the Registrar of Deeds to ensure that no registration of transfer of the erven was effected. The respondent's attitude is that "S91" had been replaced by another general plan, S101 ("S101"), which did not

include erf 766, and that the subdivision was prohibited in terms of the Land Use Planning Ordinance 15 of 1985 (Cape) ("the Land Use Planning Ordinance"). As a result a caveat was placed against the transfer of the six erven. An application by the appellants for an order declaring that the respondent acted unlawfully was dismissed by the court a quo. This is an appeal, with the leave of the court a quo, against the dismissal of the appellants' application.[2] In terms of s 23(1) of the Land Use Planning Ordinance no person may subdivide land except in accordance with an application granted under s 25 of the Ordinance unless the Premier (previously the Administrator) has exempted the subdivision from the relevant provisions of the Ordinance. However, s 23(2) provides that land which on the date of commencement of the Townships Ordinance 33 of 1934 (Cape) ("the Townships Ordinance, 1934") had been laid out as a township or had been subdivided by means of an actual survey into erven and public places and the plan of which had been registered in the office of the Surveyor-General concerned, shall be deemed to be a confirmed subdivision for the purposes of the Ordinance. S 6 of the Townships Ordinance, 1934 also required the establishment of a township and the subdivision of land to be done in accordance with that Ordinance unless it was land which at the commencement thereof had been laid out as a township or which had been subdivided by means of actual survey into erven and public places and the plan of which had been registered in the office of the Surveyor-General. S 6 of the Townships Ordinance 13 of 1927 (Cape) ("the Townships Ordinance, 1927"), which was the predecessor of the Townships Ordinance, 1934, and which came into operation on 2 December 1927, contained a similar provision in respect of the establishment of townships.[3] Before the Townships Ordinance, 1927 came into operation town planning was not regulated, otherwise than by way of limited powers of control granted to certain municipalities. Since erf 766 was not then situated within a municipal area such control measures are not relevant to this matter. Whenever an owner of a larger tract of land wanted to sell off a piece of the land, all that was required was for a transfer diagram to be prepared by a qualified land surveyor on which the cadastral boundaries of the land to be transferred, were shown. These boundaries had to be noted on the diagram of the "parent property". With the advent of township developments it became customary to prepare general plans. These were plans, which were normally prepared by qualified land surveyors, which showed the proposed layout of stands and which were prepared in order to simplify and facilitate the process of transfer diagram preparation. If, for example, two hundred erven were to be deducted from the "parent property" it would become progressively more difficult to show each successive deduction on the diagram of the "parent property".[4] The Schoesters Kraal Township consisted of 679 erven. Erven 664-679 (now erf 766) were separated from the rest of the township by a roadway. Between May 1921 and July 1923 a number of the erven shown on S 91, other than 664 - 679, were transferred to new owners. Most of the erven were transferred in batches. As could be expected the portions of land transferred were described as lots, with their appropriate numbers, in the Schoesters Kraal Township No 1. [5] On 13 July 1923 all the remaining land shown on S91, was consolidated with some additional land and transferred to Messrs Seeton and Le Sueur. The consolidated land so transferred was described as Scarborough Estates. The land was surveyed and beaconed by land surveyor Fischer in May 1923 and transfer diagram no A1276/1923 in respect thereof was approved by the respondent. According to a note on diagram A1276/1923 one is to look at S91 for the subdivision

of the land depicted on that plan.[6] Subsequent to the aforesaid consolidation and transfer of land Messrs Seeton and Le Sueur, on 14 November 1924, obtained a certificate of registered title in respect of all the land depicted on S91 excluding the lots that had been transferred and excluding erf 766. The land in respect of which the certificate of registered title was issued was described as Scarborough Township. The land was surveyed and beaconed by land surveyor Fischer in July 1923 and the diagram in respect thereof, diagram no A2379/1923, was approved by the respondent on 8 August 1923. For the subdivision of the property depicted on this diagram one is, according to a note on the diagram, to look at S101. S101 is a general plan of the Scarborough Township i.e. of the area that was previously known as the Schoesters Kraal Township, excluding the erven that had been transferred and excluding erf 766. It shows the locality of the lots which were excluded at the time of transfer. In the case of lots which had been transferred in batches it shows the outer boundaries of the batches. Save as aforesaid there is no material difference between S91 and S101. After the approval of S101 and for some time before the Townships Ordinance, 1927 came into operation, lots excluded from S101 were transferred and deducted with reference to S91 and lots shown on S101 were transferred and deducted with reference to S101.[7] In 1935 the remainder of Scarborough Estates was transferred to Scarborough Seaside Estates (Pty) Ltd which in turn, on 26 June 1936, transferred erf 766 to Leslie Simpson. The property (erf 766), according to diagram no 1909/1936, had been surveyed in May 1923, i.e. at the time that the consolidated Scarborough Estates was surveyed, and the transfer diagram was approved on 27 May 1936. The property was described as "Portion RK portion of The Scarborough Estates". No subdivisions were shown on the diagram but it does contain a notation to the effect that the original diagram is no 1276 of 1923.[8] The court a quo dismissed an argument by the appellants that S91, in so far as it related to erf 766, could only be cancelled with the consent of the owners of erven in the township or with the sanction of the court and concluded that there had been a valid partial cancellation of the township in respect of erf 766; that the subdivisional rights previously attaching to erf 766 had been abandoned and that S91 had been cancelled in so far as erf 766 was concerned. The judge a quo said:

*"I am well aware that people do not lightly abandon their rights and I am familiar with the case law which recognises this position. . . . But I cannot see what interpretation to put upon the known facts other than the obvious one: which in my opinion is that Messrs. Seeton and Le Sueur, for reasons which satisfied them, resolved upon the partial cancellation of the township in respect of erven 664 to 679; and that effect thereto was given by the preparation, filing and acceptance of general plan S.101. The subsequent transfer to Simpson of Portion RK is consistent with this conclusion."*[9] The appellants rely on the provisions of s 23(2) of the Land Use Planning Ordinance. They can only succeed if on the date of commencement of the Townships Ordinance, 1934, erf 766 had been laid out as a township or had been subdivided by means of actual survey into erven and public places and if the plan in respect thereof had been registered in the office of the respondent. It is apparent from the foregoing and admitted by the respondent that that happened. However, the respondent contends that S91 was cancelled and replaced by S101 with the exception of the excluded lots specifically mentioned. [10] In the light of the conclusion to which I came it is not necessary to decide whether the appellants or the respondent bore the onus of proof in respect of the defence raised by the respondent. I shall assume in the appellants' favour that the respondent bore such onus.[11] The court a quo interpreted the respondent's defence as an assertion

*that the rights that had previously attached to erf 766 had been abandoned. Strictly speaking that categorisation is not correct. A cancellation of S91, in so far as it related to erf 766, would not, before the Townships Ordinance, 1927 came into operation, have precluded a subsequent subdivision of erf 766. All that was required for a subdivision was that a transfer diagram be prepared by a qualified land surveyor. The right to subdivide would therefore not have been affected by a cancellation of S91.[12] No direct evidence that S91 was replaced and cancelled by S101 was tendered. There is also no evidence that such evidence would have existed had such a replacement and cancellation been effected. It follows that no adverse inference can be drawn from the fact that such evidence was not tendered. There are however a number of indications that the owners of Scarborough Estates i.e. the owners of the land that formerly comprised Schoesters Kraal Township, as well as the respondent, intended S101 to replace S91 and thereby to cancel S91 save in so far as it related to lots in Schoesters Kraal Township which had been transferred by 13 July 1923.[13] Firstly, I can think of no reason and the appellants were unable to suggest any, why Seeton and Le Sueur would not have included erf 766 in the certificate of registered title taken out by them and in the new general plan if they still intended the whole area comprising the Schoesters Kraal Township to constitute a township.[14] Schoesters Kraal Township was laid out on portions of two properties namely the farm Kogelfontein and the farm Schoesterskraal. Mr Beyers, a land surveyor, whose supporting affidavit and replying affidavit was filed by the appellants, suggested two*

## reasons

why S101 was framed. Firstly, so he suggested, the new owners probably wanted to give the property a new name namely Scarborough Township as opposed to the two names Kogelfontein and Schoesters Kraal and, secondly, they probably wanted to remove the boundary between Schoesterskraal and Kogelfontein. However, that does not explain why erf 766 was omitted. Beyers said that the reasons for not showing lots 664 to 679 on A2379/23 or S101 were irrelevant. He added that it could simply have been an error or that the owner could have decided not to develop that section of the township at that stage and to save the costs of the land surveyor for including those erven. It is so unlikely that erf 766 was omitted by error that the possibility of an error can be excluded. Furthermore, the costs of including erf 766 which had already been surveyed, beaconed and included in S91 would have been minimal. In the words of appellants' own counsel "S101 did no more than to reiterate (in identical form) S91, save insofar as it does not show Erf 766 (or Portion RK as it was then known)". The suggestion that erf 766 was omitted from S101 in order to save costs is therefore also without merit.[15] Secondly, in terms of regulation 89 of the regulations promulgated under the Land Survey Act, 9 of 1927 (Notice 1997 published in Government Gazette 1739 of 23 November 1928) the subdivisional diagram of a property reflected on a general plan should contain the following note: "For subdivision of the whole of this diagram vide General Plan ...". However, the subdivisional diagram of erf 766, which was approved by the respondent in 1936, did not refer to S91 as it should have done if S91 had not been cancelled in so far as erf 766 was concerned. Diagram A1276/1923 does have a note on it to the effect that for subdivision of the property comprising the Schoesters Kraal Township one should look at S91. However, in terms of the regulation referred to, that note should have appeared on the subdivisional diagram, if S91 was still alive.[16] Thirdly, regulation 10 of the

regulations promulgated under s 59 of the Deeds Registries Act, 13 of 1918 (Notice 1500 published in Government Gazette 928 of 22 November 1918) provided that in describing land in a deed, in the case of land situate in a township, the name of the township should be quoted. For this reason, had S91 not been cancelled in so far as erf 766 is concerned, one would have expected the description of erf 766 in subdivisional diagram 1909/1936 to have been "lots 664 - 679, Schoester's Kraal Township No 1". That is the way in which lots transferred in batches between May 1921 and July 1923 and deducted from S91 were described. However, erf 766 was described as "portion RK portion of The Scarborough Estates".[17] In my view the most probable inference that can be drawn from the foregoing circumstantial evidence is that the owners of erf 766 intended S101 to replace S91 and to cancel S91 in so far as it related to erf 766. Furthermore, that the respondent understood that to have been the owners' intention and that by approving S101 he was agreeing to such cancellation of S91. In the absence of any evidence to the contrary, I am satisfied that it has been proved on a balance of probabilities that S101 replaced S91 save in respect of lots that had already been sold and that S91 was thereby cancelled in so far as erf 766 was concerned.[18] The appellants submitted that in terms of s 30(2) of the Land Survey Act, 9 of 1927 the respondent was only empowered to cancel a general plan with the consent of the Premier of the Province of the Western Cape (previously the Administrator) or if ordered to do so by an order of court and that the position prior to 2 December 1927, when the Townships Ordinance 1927 came into operation, was the same in respect of existing townships. However, s 30(2) was amended in 1941 and again in

1981. Before its amendment in 1941 it provided that the Surveyor-General could amend or alter a general plan but qualified the Surveyor-General's authority to do so where such amendment or alteration affected a public place within the jurisdiction of a local authority authorized by law to close or partially close any such public place or where it had the effect of creating a new public place within the jurisdiction of such local authority. The appellants also argued that the practice appeared to have been that a court order was required for the approval of a new general plan or the alteration of an existing general plan. In this regard they relied on *Marais v Surveyor-General* 1930 CPD 291 ("Marais") and *Ex parte Mossel River Estate Co Ltd* 19 CTR 1072 ("Mossel"). In *Marais* the Surveyor-General refused to register a new general plan in respect of portion of a township without an order of court. However, from the petition in the matter it appears that the alteration of the existing general plan eliminated existing roads and substituted other roads therefor. In *Mossel* the court's sanction was sought and granted in respect of the diversion of a portion of a road. In the present case no public places were affected by the alteration of the existing general plan. It follows that neither the Land Survey Act, 9 of 1927 nor the two cases referred to, support or are authority for the proposition that an order of court was required for the alteration in question. No other authority was referred to in support of the contention and there would appear to be no basis for finding that the law was as suggested by the appellants. I therefore conclude that the cancellation in question did not require the sanction of the court.[19] The appeal is dismissed with costs.

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P E STREICHER JUDGE OF APPEALConcur:

Hefer JA

Grosskopf JAMarais JAFarlam AJA

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Prepared on 11 October 2026 · Esheria