

TRUSTEES FOR THE TIME BEING OF
THE ALAN DOGGETT FAMILY TRUST Appellants

and

MAUREEN KARAKONDIS 1st Respondent

ADMINISTRATOR OF THE CAPE 2nd Respondent

MUNICIPALITY OF THE CITY
OF CAPE TOWN 3rd Respondent

REGISTRAR OF DEEDS, CAPE TOWN 4th Respondent

JOUBERT, J A.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

TRUSTEES FOR THE TIME BEING OF

THE ALAN DOGETT FAMILY TRUST Appellants

and

MAUREEN KARAKONDIS 1st Respondent

ADMINISTRATOR OF THE CAPE 2nd Respondent

MUNICIPALITY OF THE CITY

OF CAPE TOWN 3rd Respondent

REGISTRAR OF DEEDS, CAPE TOWN 4th Respondent

Coram: JOUBERT, E M GROSSKOPF, VIVIER, EKSTEEN J J A

et NICHOLAS A J A

Heard: 16 August 1991

Delivered: 26 September 1991

JUDGMENT

JOUBERT, J A:

This is an appeal against a judgment of KING J in the Cape of Good Hope Provincial Division dismissing an application against the First Respondent. With leave of the Court a quo the appellants now appeal to this Court.

For purposes of the appeal it is necessary to outline in brief the relevant facts of the case as follows:

1. On 4 February 1981 the appellants by deed of transfer T 5207/1981 became the registered owner of erf 1616, situated in the residential area of Camps Bay Extension No 2 in the Municipality of Cape Town. The street address of erf 1616 is 22 Upper Francolin Road, Camps Bay. The dwelling-house on erf 1616 which is situated on a mountain slope commanded an

unobstructed view across lower lying properties and their buildings, including erf 1642 (then vacant land), towards the bay and the sea.

2. On 2 September 1981 a certain Schübel, the owner of erf 1642, entered into a deed of sale with the First Respondent in terms of which a portion of the erf was sold to the latter. The sale was expressly made "subject to sub-division in process to be granted".
3. Application for the subdivision of erf 1642 into two portions was made on 26 November 1981 by land surveyors De Villiers and Reid on behalf of Schübel to the Provincial Administration of the Cape.
4. The appellants in their letter, dated 13 April 1982, to the Provincial Secretary objected to the proposed subdivision of erf 1642 on the ground that the unobstructed mountain and sea view from

erf 1616 would be impeded should dwelling-houses be built on the two subdivided portions of erf 1642.

5. The application for the proposed subdivision of erf 1642 was approved by the Second Respondent (the "Administrator") on 30 November 1982 in terms of sec. 9 of Ordinance 33 of 1934 (the "Ordinance") subject to certain specified conditions. These conditions fell into two categories. The first category consisted of a condition of subdivision which provided that "development on the subdivisinal portions be restricted to one storey above the street level of Upper Francolin Road." (My underlining). I shall henceforth refer to this condition as "the building restriction". It is of paramount importance to note that the Administrator's approval did not require registration of this building restriction to be effected in the title deeds of

the two subdivided portions of erf 1642. The second category on the other hand comprised certain specified conditions which were to be inserted as conditions of title in the title deeds of the two subdivided portions of erf 1642 "unless they or similar conditions are already registered against the parent property(ies)".

6. When Schübel by deed of transfer T 35618/1983 on 31 August 1983 transferred erf 2428, a portion of erf 1642, to the First Respondent there was, in accordance with the Administrator's approval, no mention therein of the building restriction limiting development on that erf to one storey above the street level of Upper Francolin Road. Deed of transfer T 35618/1983 does, however, contain a number of conditions of title, viz. conditions taken over from earlier deeds of transfer (Conditions

A-D), certain conditions of establishment of the Township of Camps Bay Extension No 2 imposed by the Administrator (Condition E) and conditions imposed by the Township Owners (Conditions F and G).

7. It was common cause that the First Respondent was unaware of the existence of the aforementioned unregistered building restriction when she obtained transfer of erf 2428 or at any material time.
- This aforementioned unregistered building restriction was non-existent when she bought an undivided portion of erf 1642 from Schübel on 2 September 1981.
8. On 24 June 1988 the attorneys of the appellants sent a telegram to the First Respondent claiming that building operations on erf 2428 were in breach of the building restriction which restricted development on that erf to one storey above the street level of Upper Francolin Road. She was

also threatened with an urgent application for an interdict to halt such operations if she proceeded with them. No response was received from her and the building operations continued.

9. On 30 June 1988 the Appellants launched an urgent application against the First Respondent for a temporary interdict restraining her from continuing with building operations on erf 2428 in breach of the building restriction. She resisted the application which was to be heard on 6 July 1988. The next day SELIKOWITZ J made an order by consent according to which the Appellants did not proceed with their application for interim relief but were permitted to file supplementary affidavits within 14 days. The First Respondent furnished an undertaking to the Appellants "that to the extent that the degree of completion of the building may

be an issue affecting the Court's discretion to order the demolition of the building, such issue will be determined on the supposition that all building work effected after 6 July 1988 be disregarded".

The question of costs stood over for later determination.

10. The Appellants filed an amended Notice of Motion, dated 12 August 1988, as well as a supplementary affidavit. They sought as final relief an order declaring the development on erf 2428 to be restricted in accordance with the building restriction and compelling First Respondent to demolish that part of the building on the erf which was in breach of the building restriction. The other relief sought is not relevant for purposes of the appeal.

11. By an application dated 5 August 1988 the Appellants sought the joinder of the Administrator, the

Municipality of Cape Town and the Registrar of Deeds, Cape Town, as 2nd, 3rd and 4th Respondents respectively, against whom costs were claimed jointly and severally should they oppose the application.

The application for joinder was granted.

12. The Appellants in a supplementary affidavit, dated 25 October 1988, raised the complaint that title Condition E 5(d) of deed of transfer T 35618/1983 relating to erf 2428 limited the erection of the main building to 7.87 m from the street boundary line whereas the building was in breach thereof built 4.5 m from the street boundary line. The amended Notice of Motion was, however, not amended to provide for this building line complaint.

The first question that falls to be decided is whether or not the building restriction is binding on the First Respondent. The Court a quo held that it was not

binding on her.

The building restriction embodies all the elements of the common law servitus altius non tollendi (D 8.2.12, Voet 8.2.8, Caepolla (ob. 1477), Tractatus de Servitutibus Urbanorum Praediorum, cap. 26 & 27) in favour of properties situated on a higher level than erf 1642 on the mountain slope in question. In granting Schübel's application for the subdivision of erf 1642 the Administrator made it subject to the two categories of conditions, mentioned supra. He imposed the conditions in pursuance of the powers conferred on him by secs. 9(8), 14 A (1) and 18(1), (3) of the Ordinance. Sec 3(1) of the Provincial Powers Extension Act 10 of 1944 lays down the method of registration of such conditions, viz. that "that condition may either be inserted in the relevant deed of transfer or be registered by means of a notarial deed, and the officer in charge of the deeds registry concerned shall endorse on the title deed of any

land retained by the transferor every such condition which relates to the land so retained."

The Administrator must obviously have been aware of the fact that the conditions of subdivision imposed by him were either to be registered in the title deeds of subdivided portions or not. This is apparent from the distinction which he made between the two categories of conditions in the present matter. In respect of the first category which comprised the building restriction he prohibited registration thereof because he obviously intended it to be a non-servitotal condition which was not to run with the two subdivided portions of erf 1642 as servient tenements. On the other hand he specifically insisted on the insertion of the second category of conditions as conditions of title in the title deeds of the two subdivisions of erf 1642 (unless they or similar conditions were already registered in the title deed of erf 1642) in order to run as registered servitotal

conditions with the two subdivided portions of erf 1642 as servient tenements. I may mention that the conditions of the second category were in fact not inserted in the deed of transfer T 35618/1983 of erf 2428 because they had already been inserted in the title deed of erf 1642 as appears from Conditions of Title E nrs 3 and 4 in the deed of transfer of erf 2428. Furthermore, para 2 of the Third Annexure to the Administrator's approval of the subdivision of erf 1642 states the following:

"The owner shall disclose the existence of the aforesaid condition in any deed of sale in respect of these portions." (My underlining).

It appears from the context of the Third Annexure that the words "the aforesaid condition" refer to para 1 thereof which contains a condition that "a building of a valuation of not less than R7 000 shall be erected on each vacant deducted portion (including the first deducted portion) within a period

of 2 (two) years from the date of Registration in the Deeds Office, of such deducted portion. (Section 14 A of Ordinance No 33 of 1936)". It is therefore abundantly clear from the context of the Third Annexure that para. 2 thereof is inapplicable to the building restriction. The inference is therefore inescapable that the Administrator did not intend the building condition to be binding on any person other than Schübel as applicant for the subdivision of erf 1642. In my judgment the building restriction was never intended by the Administrator to be an unregistered servitude : it was a mere non-servitotal condition which was binding on Schübel.

It is convenient at this stage to consider the main classes of conditions which may appertain to townships and erven, viz.:

1. Conditions of establishment. They are usually prescribed by an Administrator in a schedule to his proclamation proclaiming the township an approved

township. Upon proclamation of the township they acquire statutory force, imposing obligations upon the township owner which he must perform.

See Peri-Urban Areas Health Board v Breet N O and Another, 1958(3) S A 783 (T) at p 787 A-B, Malan and Another v Ardconnel Investments (Pty) Ltd, 1988(2) SA 12 (A) at p 39 C-D.

2. Conditions of title. They are also set out by an Administrator in a schedule to his proclamation proclaiming the township an approved township. When the township owner transfers an erf in the approved township to a purchaser he is obliged to insert in its deed of transfer those conditions of title which relate to that erf. Upon registration of the deed of transfer they become registered servitudes. See Ex Parte Gold, 1956(2) SA 642 (T) at p 647 B-C, Malan's case (supra) at p 39

D-E.

3. Conditions of subdivision. They comprise those conditions of title which an Administrator upon subdivision of an erf in an approved township requires to be inserted in the title deeds of the subdivided portions of the erf. Upon registration of the title deeds they accordingly become conditions of title and as such registered servitudes.

The position in the Cape of Good Hope Province requires special consideration because its procedure regarding the establishment of an approved township is materially different from the procedure in the other Provinces. In broad outlines the essential steps which have to be taken before the formal notification by the Administrator of the approved township are the following. After the Administrator approves of the application for the establishment of a township the applicant has to submit to the Surveyor-General a general plan of the

proposed township (sec 19(1)). After approval of the general plan and diagram by the Surveyor-General the applicant must lodge them with the Registrar of Deeds with a copy of the conditions on which the Administrator granted his application as well as the title deed by which he holds the land in question (sec 20(1)). The Registrar of Deeds thereupon registers the township and informs the Administrator accordingly (sec 20(6)(a)). The Administrator in terms of sec 20(6)(b) then causes a notification of the approved township to be published in the Provincial Gazette. See Dönges and Van Winsen, Municipal Law, 2nd ed., p 611-612. It will be noticed that in the Cape of Good Hope Province, unlike the other Provinces, there is no proclamation by the Administrator with schedules thereto containing the Conditions of Establishment and the Conditions of Title. Upon registration of the deed of transfer of an erf the conditions of title, in so far as applicable to the particular erf,

are inserted in the title deed. They become registered servitudes. Likewise upon the subdivision of an erf the conditions of subdivision inserted in its title deed become conditions of title and as such registered servitudes.

In this Court Mr Rosenthal, on behalf of the Appellants, contended that the Administrator imposed the building restriction by exercising an administrative act which had the force of law and was binding on the First Respondent despite the fact that the building restriction was not registered in the title deed of erf 2428 and that she had no knowledge of its existence when she bought and obtained transfer of erf 2428. He sought to rely on the decisions in Duze v Eastern Cape Administration Board and Another, 1981(1) S A 827 (A) at p 841 C-E and Thompson v Port Elizabeth City Council, 1989(4) SA 765 (A). These decisions are, however, distinguishable and do not support his contention. In Duze's case this Court held that the Eastern Cape Administration

Board was empowered according to the relevant statutory enabling provisions to determine and charge rentals administratively which were payable in respect of housing in Black residential areas. It was held that the Eastern Cape Administration Board acted intra vires the statutory enabling provisions in charging the appellant the monthly rentals for the dwelling (p 841 A-H). It could even with the approval of the Minister of Co-operation and Development administratively charge for services provided outside a Black residential area (p 842 A-D). The manner in which the determination and charging of the rentals was performed administratively was not in issue and accordingly not canvassed.

In Thompson's case the Administrator, in granting an application for the establishment of a township situated within the Municipality and Division of Port Elizabeth, in terms of sec 14 A(1) imposed in the Conditions of Establishment a condition in respect of certain erven (including

the erf subsequently transferred to Thompson) which required buildings to be erected on them of a certain value within a particular period of time. Thompson did not have actual knowledge of the particular condition when he bought his erf or at the time of the registration of the erf in his name. In the magistrate's court the Port Elizabeth City Council in terms of sec 14 A(2) sued Thompson for the payment of a certain sum of money as a penalty for his non-compliance with the particular condition of establishment. The magistrate held Thompson liable for payment of the penalty despite his lack of actual knowledge of the particular conditions when he bought his erf or at the time when it was transferred in his name. A Full Bench of the Eastern Cape Division confirmed the magistrate's decision. This Court on appeal confirmed the decision of the Court a quo. The ratio decidendi of this Court's decision was that the particular condition had the force of law (p 770 D-E) and that the owner's

liability under sec 14 A(2) was not dependent upon his knowledge of the particular condition breached by him. Since the purpose of the conditions of establishment was to ensure orderly urban development the provincial legislature could not have intended that liability for the penalty was dependent upon the owner's knowledge of the particular condition (p 770 G-I).

On the assumption that the imposition of the building restriction by the Administrator as a condition of subdivision was an administrative act intended to have the force of law but which was not required by the Administrator to be registered, then the imposition thereof had to be brought to the knowledge of the First Respondent in order to render it binding on her. See Byers v Chinn and Another, 1928 A D 322 at p 329-331. To hold otherwise would seriously imperil the position of bona fide purchasers and owners of land who buy and own land by virtue of a clean title deed

without any reference to the existence of an unregistered restrictive condition which would diminish the ownership of the land. I accordingly find that there is no substance in the contention of Mr Rosenthal.

He also tried to avail himself of the provisions of sec 61 bis (1) which confer on a local authority the right to have any contravention of a condition of subdivision remedied. Sec 61 bis (1) does not assist him and takes the matter no further.

In view of the foregoing the answer to the first question in my judgment is that the building restriction is not binding on the First Respondent. It is accordingly unnecessary to consider the defences raised by her against the application of the Appellants.

The next question to be decided is whether or not the First Respondent breached Condition of Title E 5(d) of her deed of title of erf 2428. The relevant provisions

of this Condition of Title read as follows:

"E. SUBJECT FURTHER to the following special conditions imposed by the Administrator of the Province of the Cape of Good Hope in terms of Ordinance No 33 of 1934 when approving of the establishment of the Township of Camps Bay Extension No 2 and contained in Deed of Transfer No T

2345/1974:-

1 - - - - -

2 - - - - -

3 - - - - -

4 - - - - -

5 This erf shall be subject to the following further conditions, provided that where, in the opinion of the Administrator after consultation with the Townships Board and the Local Authority it is expedient that the restriction in any such conditions should at any time be suspended or relaxed, he may authorise the necessary suspension or relaxation,

subject to compliance with such conditions
as he may impose:-

(c) - - - - -

(d) no building or structure,
or any portion thereof,
except boundary walls and
fences shall be erected
nearer than 7,87 metres to
the street line which forms
a boundary of this erf - - - -

(e) - - - - -."

(My underlining).

I shall henceforth refer to this condition as the "building
line condition". It was common cause that the building
which the First Respondent was erecting on erf 2428 was situated
4,50 m from the street line. The First Respondent, however,
relied on a general relaxation of the building line condition
by the Administrator. It appeared from the official documents
included in the record that the Administrator on 22 September
1964 granted a general relaxation of the 25 ft (7,87 m) building
line condition required in terms of the title conditions

of erven in Camps Bay Extension No 1. On 11 April 1974 the Director of Local Government approved the Third Respondent's recommendation that a general relaxation of the 25 ft (7,87m) building line distance to 4,5 m should apply to erven in Camps Bay Extensions 2, 3, 4 and 5. On 14 April 1974 the Administrator approved of the recommendation as requested subject to standard conditions. His authority to have relaxed the building line was expressly reserved in Condition of Title E 5(d) with reference to erf 1642 from which the said condition was derived upon the subsequent subdivision of erf 1642 by incorporating it in deed of transfer T 35618/83 of erf 2428. It follows that the Administrator acted within his authority to relax the extent of the building line from 7,87 m to 4,5 m as he did on 11 April 1974 with regard to all erven in Camps Bay Extension No 2 which included erf 1642 (the parent erf of subdivision portion 2428). Mr Rosenthal contended that the Administrator could only have

altered the building line condition by exercising his powers in terms of sec 2(1) of the Removal of Restrictions Act 84 of 1967 and by observing the procedure prescribed by the latter Act whereas he had failed to do so. In my judgment this contention is devoid of substance, since the Administrator relaxed the operation of the building line condition without alteration of the condition itself. It was also raised in the Court a quo and correctly rejected by it. The First Respondent accordingly, in my judgment, did not breach the building line condition as relaxed by the Administrator.

In the result the appeal is dismissed with costs.

C P JOUBERT J A.

E M GROSSKOPF JA
VIVIER JA
EKSTEEN JA
NICHOLAS AJA

Concur.