THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Eden Crescent Share Block Ltd v Olive Marketing CC and Others (1075/2020)

[2022] ZASCA 177

(9 December 2022)

MEDIA STATEMENT

The Supreme Court of Appeal (SCA) today dismissed the application for leave to appeal, referred for oral argument, of Eden Crescent Share Block Ltd (Eden) against Olive Marketing CC (Olive). It also dismissed Olive's conditional application for leave to appeal against the Ethekwini Municipality (Ethekwini), as well as Ethekwini's conditional application for leave to appeal against a third party, Shepstone & Wylie.

The matter concerned two neighbouring properties in Durban originally owned by Ethekwini. It sold one of them to Eden (the Eden property) and the other to Olive (the Olive property). For more than 60 years, an obligation had been in place in terms of which the Eden property was required to provide parking for patrons of the Olive property. This obligation had been part of every lease in respect of the Eden property and was also included in the town planning scheme. When Ethekwini sold the property to Eden, the parties agreed in the deed of sale to the creation of a servitude in favour of the Olive property in respect of parking for at least 250 motor vehicles. The servitude was to be registered simultaneously with the transfer of the property to Eden. For reasons of practicality, the parties later agreed that the registration of the servitude would occur after transfer.

Eden, despite its agreement to the creation of the servitude, refused to allow Olive the use of parking spaces on its property. Olive applied in the KwaZulu-Natal Division of the High Court, Durban to enforce the servitude. The application was

referred to trial whereupon Ethekwini was joined as a defendant. Its potential liability to Olive could only have arisen if it was found that the servitude was invalid. Ethekwini, in turn, joined a number of third parties, including Shepstone & Wylie, the attorneys who had registered the servitude. Its potential liability to Ethekwini was similarly dependant on a finding being made that the servitude was invalid. The high court found that the servitude was valid and ordered its enforcement. It consequently dismissed Olive's conditional claim against Ethekwini and Ethekwini's conditional claims against the third parties.

Eden then applied for leave to appeal, which was refused by the high court. On petition to the SCA, it was ordered that the applications for leave to appeal of Eden against Olive, of Olive against Ethekwini and of Ethekwini against Shepstone & Wylie (the only third party taking part in the proceedings at that stage) were referred for oral argument.

Eden argued that the servitude was invalid because it never specified the precise number of parking spaces that were to be made available and where on the Eden property those parking spaces were located. In addition, it argued that the servitude represented an alienation of its property and the special procedures required by the Share Block Control Act 59 of 1980 and the Housing Development Schemes for Retired Persons Act 65 of 1988 for the authorisation of the alienation of property had not been complied with.

The SCA found that the number of parking spaces was clear: Eden had to provide 250 parking spaces and, if it wished to, it could provide more. On the question of the location of the parking spaces, it held that the servitude that had been created was a general, as opposed to a specific, servitude. In the absence of agreement, the dominant owner – Olive, in this case – had the right to choose the location of the parking spaces, subject to it exercising this right *civiliter modo* – reasonably and considerately.

The SCA found that Eden's reliance on the two statutes mentioned above was misplaced. As Eden had always occupied the property, whether as lessee or owner, subject to the parking obligation owed to the Olive property, and it had purchased the property on this basis, there had never been an alienation. Furthermore, having agreed to purchase the property subject to the parking obligation, the subsequent registration of the servitude in fulfilment of that obligation could not be said to be an alienation.

As a result, the SCA dismissed Eden's application for leave to appeal because it had no reasonable prospect of success on appeal. In these circumstances, Olive's and Ethekwini's conditional applications for leave to appeal were also dismissed as they too had no reasonable prospects of success. In all three applications, the costs followed the result.