THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1075/2020

In the matter between:

EDEN CRESCENT SHARE BLOCK LTD	**Applicant**
and	
OLIVE MARKETING CC	**First Respondent**
ETHEKWINI MUNICIPALITY	**Second Respondent**
and	
SHEPSTONE & WYLIE	**Third Party**

Neutral citation: *Eden Crescent Share Block Ltd v Olive Marketing CC and Others* (1075/2020) [2022] ZASCA 177 (9 December 2022)

Coram: Dambuza ADP, Molemela and Plasket JJA and Basson and Siwendu AJJA

Heard: 9 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11:00 am on 9 December 2022.

Summary: Application for leave to appeal in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 – validity of servitude – whether servitude invalid on account of vagueness – whether general or specific servitude – whether special procedures

envisaged by s 8(1)*(c)* of the Share Block Control Act 59 of 1980 and s 4B of the Housing Development Schemes for Retired Persons Act 65 of 1988 required for validity of servitude.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Moodley J sitting as court of first instance):

1 Eden Crescent Share Block Ltd's (Eden) application for leave to appeal is dismissed.

2 Eden is directed to pay the costs of Olive Marketing CC (Olive), including the costs of two counsel where employed.

3 Olive's application for leave to appeal against paragraph 6 of the high court's order is dismissed.

4 Olive is directed to pay the costs of the Ethekwini Municipality (Ethekwini), including the costs of two counsel where employed.

5 Ethekwini's application for leave to appeal against paragraph 7 of the high court's order is dismissed.

6 Ethekwini is directed to pay the costs of Shepstone & Wylie, including the costs of two counsel where employed.

JUDGMENT

Plasket JA (Dambuza ADP, Molemela JA and Basson and Siwendu AJJA concurring)

[1] In application proceedings subsequently referred to trial in the KwaZulu-Natal Division of the High Court, Durban, the first respondent, Olive Marketing CC (Olive) succeeded in obtaining an order to enforce a servitude against the applicant, Eden Crescent Share Block Ltd (Eden). Its success meant that its conditional claim for

damages against the second respondent, the Ethekwini Municipality (Ethekwini),[1] joined as a defendant when the matter was referred to trial, and Ethekwini's conditional claim against a number of third parties, including Shepstone & Wylie, the firm of attorneys which registered the servitude, were dismissed. Leave to appeal having been refused by the high court, Eden petitioned this court for leave, while Olive and Ethekwini petitioned for leave to appeal, conditionally, against the dismissal of their claims. This court made an order referring all of the applications for leave to appeal for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013, with the usual rider that the parties should be prepared to address the merits if called upon to do so.

[2] Eden owns erf 11496, Durban, while Olive owns erf 12424, Durban which adjoins Eden's property. I shall, unless the context otherwise requires, refer to these properties as 'the Eden property' and 'the Olive property'. Both parties purchased their properties from Ethekwini. The deed of sale concluded by Ethekwini and Eden provided that a parking servitude of at least 250 parking spaces would be created over the property in favour of Olive's property. In the deed of sale concluded by Ethekwini and Olive, it was recorded that the property enjoyed the benefit of a parking servitude over erf 11496. Eden has consistently refused to provide parking to Olive and has asserted that the servitude is invalid. This dispute resulted in the proceedings in the high court and is the subject matter of this application for leave to appeal.

[3] The contours of the dispute are fairly narrow. While Olive, Ethekwini and Shepstone & Wylie, the only third party to participate in these proceedings, argue that the servitude is unimpeachable, Eden asserts that it is invalid for two broad reasons. First, it is a specific servitude that has not identified essential elements, namely the precise number and location of the parking spaces. As this has not been agreed, the servitude-creating agreement is inchoate, vague and unenforceable. Secondly, to the extent that the servitude amounted to an alienation of Eden's property, because it was not approved in terms of the special procedures provided for in s 8(1)*(c)* of the Share

[1] References to Ethekwini include, for the sake of convenience, its predecessor, the Durban City Council.

Blocks Control Act 59 of 1980 (the Share Blocks Act) and s 4B of the Housing Development Schemes for Retired Persons Act 65 of 1988 (the Retired Persons Act), it is invalid.

Background

[4] An arrangement has been in place for over 60 years, by means of different mechanisms, in term of which the Eden property has provided parking for people using the Olive property. The potential for difficulties arising was, of course, limited while Ethekwini owned both properties.

[5] As far back as the 1960s, Olive's property was used as an ice rink. Later, a cinema was added to it. Eden's property was initially required to provide parking for patrons of the ice rink and the cinema on the basis of a provision in a long lease. In early 1967, Ethekwini rezoned Eden's property to provide, inter alia, that it 'shall only be used for the parking of vehicles, and be fenced, hardened, arranged and laid out, and means of ingress and egress established, all to the satisfaction of the City Engineer'.

[6] Ethekwini then began to negotiate with Durban Holiday Inn (Pty) Ltd (the Holiday Inn), which wished to build a hotel on the property. The lease that was concluded by Ethekwini and the Holiday Inn, in May 1972, provided that 250 parking spaces were to be reserved 'exclusively for use by the patrons of the cinema and/or Icedrome'. This right was also confirmed in the lease concluded by Ethekwini and the operator of the ice rink and cinema. By this stage, the town planning scheme applicable to the Eden property had been amended to provide that, in addition to the parking required by the Holiday Inn, '250 parking spaces shall be provided for the exclusive use by patrons of the Cinema and/or Icedrome'. This provision remains in force to this day.

[7] The Holiday Inn constructed a hotel on the Eden property. It also built a multi-storey parking lot, as an integrated component of the hotel. On two occasions, it

applied unsuccessfully to Ethekwini for the relaxation of its obligation to provide 250 parking spaces for patrons of the Olive property.

[8] In the early 1990s, the Holiday Inn ceded its lease to Renhill Properties Share Block Ltd. The parking obligation remained in place. In 1993, a property developer, Scott & Scott Property Investments CC (Scott & Scott) obtained a cession of the lease. The obligation to provide 250 parking spaces for patrons of the Olive property still remained in place.

[9] In 1994, Scott & Scott and Ethekwini agreed that Eden would become the lessee of the property in order to develop a retirement scheme on it, and that, in due course, Eden would purchase the property from Ethekwini. In July 1994, Eden and Ethekwini concluded an agreement of sale in respect of the property.

[10] The deed of sale provided, inter alia, that: the 'existing lease of the lot shall terminate on date of transfer';[2] the property would only be used and developed 'in accordance with all relevant Municipal By-Laws and Town Planning Scheme Regulations in force from time to time';[3] it would 'only be used for the purpose defined in section 4C of the Housing Development Schemes for Retired Persons Act 65/1988';[4] and in the event of the cancellation of the agreement, Eden would 'remain bound by the terms and conditions of the Notarial Deed of Lease in terms of which it occupies the lot and shall continue to abide by [the] terms of such Lease . . .'.[5]

---

[2] Clause 3.1.
[3] Clause 13.1.
[4] Clause 13.2. Section 4C(1) of the Retired Persons Act provides:
'*(a)* No developer shall alienate a right of occupation in relation to a housing interest which originated as from the commencement of the Housing Development Schemes for Retired Persons Amendment Act, 1990, or enter into an agreement having such effect or purporting to have such effect, unless the title deed of the land concerned to which such right relates, has, with the consent of the owner of that land and, if the land is encumbered by a mortgage bond, the consent of the mortgagee, or, in the case of a participation bond, the consent of the nominee company concerned as contemplated in the Participation Bonds Act, 1981 (Act 55 of 1981), in whose favour the bond is registered, been endorsed by a registrar as defined in section 102 of the Deeds Registration Act, 1937 (Act 47 of 1937), to the effect that such land is subject to a housing development scheme.
(b) For the purposes of paragraph *(a)* it shall be deemed that a right of occupation in relation to a housing interest originates as soon as a developer alienates the first right of occupation in a housing development scheme.'
[5] Clause 16.3.

[11] Clause 15 is central to this appeal. It is headed 'PARKING SERVITUDE' and provides:

'15.1 It is recorded that in term of clause 9 of the Deed of Lease l42/72 registered in respect of the lot, the Lessee (and in this case the Purchaser) is obliged to provide and have available parking on the lot for at least 250 motor vehicles for the Lessee of the adjoining property described as Lot 11444 Durban (the dominant tenement).

15.2 It is agreed that a parking servitude over the lot shall be created in favour of the dominant tenement and registered by Notarial Deed simultaneously with registration of transfer of the lot in the name of the Purchaser whereby parking for at least 250 motor vehicles is secured over the lot in favour of the dominant tenement. The cost of registering such servitude, which shall be prepared and registered by the City Council's Attorneys, including survey costs and the preparation of the survey diagram, shall be borne by the Purchaser.

15.3 The servitude shall contain inter alia, the following conditions:

15.3.1 The servitude area shall be used for the purposes of parking at least 250 motor vehicles and shall be made available for the exclusive use of the dominant tenement.

15.3.2 The Purchaser may charge a tariff for the use of the servitude area comprising the parking area which may not be more than the average amounts charged for a similar period of time for parking by parking garages in the vicinity of the lot.'

[12] Despite clause 15.2 contemplating the simultaneous registration of the servitude and the transfer of the property, this did not happen. For pragmatic reasons, it was agreed by Eden and Ethekwini that transfer would proceed and the servitude would be registered later. Transfer occurred on 16 April1996.

[13] The servitude was registered on 18 February 1997. The deed of servitude recorded that Eden had granted, on 28 July 1994, in favour of the Olive property, described as the dominant tenement, 'in perpetuity, together with all the rights necessary and incidental to the use and enjoyment thereof, a certain Servitude to provide parking for at least 250 motor vehicles' over the Eden property, described as the servient tenement. The servitude was subject to three conditions. They are:

'(a) The cost of preparation and registration of the Deed of Servitude, including survey costs and preparation of the survey diagram shall be borne by the Grantor.

(b) The Servitude area shall be used for the purpose of parking at least 250 motor vehicles and shall be made available for the exclusive use of the dominant tenement.

(c) The Grantor may charge a tariff for the use of the servitude area comprising the parking area which may not be more than the average amounts charged for a similar period of time for parking, by parking garages in the vicinity of the servient tenement.'

[14] In or about August 2003, Ethekwini published a developers brief that called for offers to purchase the Olive property and proposals to develop it. The developers brief made specific reference to the parking servitude over the Eden property in favour of the Olive property. Olive submitted an offer on 19 September 2003. Olive and Ethekwini concluded an agreement of sale on 22 September 2008. Clause 8.3 of that agreement recorded that 'a parking servitude has been created and registered over the adjoining property described as Erf 11496 Durban in favour of [erf 12424] . . . whereby parking for at least 250 motor vehicles has been secured for the exclusive use of patrons or users of [erf 12424]'. Transfer of the property was registered on 21 September 2009.

The issues

The nature of the servitude

[15] The first attack on the validity of the servitude is that it is a specific, as opposed to a general, servitude that is void for two reasons. First, it does not identify the parking spaces. Secondly, the number of parking spaces it provides for is uncertain.

[16] The second issue can be dealt with summarily. The servitude provides that Eden must make available to Olive parking for 'at least 250 motor vehicles'. There is no uncertainty about this. All it means is that Eden must provide 250 parking spaces and, if it chooses or agrees to provide more, it may do so. As it may charge for the parking, there may be an incentive for it to offer more than 250 parking spaces.

[17] I turn now to the first issue. It is necessary in the first instance to determine whether the servitude is a specific or general one. A general servitude was defined by

Cameron and Froneman JJ, in *Tshwane City v Link Africa and Others*,[6] to be a servitude that allows 'the dominant owner to select the essential incidental rights of the necessary premises and to take access to them as needed for the exercise of the servitude'.

[18] The way in which a problem such as this is to be approached was dealt with by Hefer JA in *Nach Investments Ltd v Yaldai Investments (Pty) Ltd and Another*.[7] A deed of sale had provided that a seller 'reserves to itself and its successors in title . . . a servitude of right of way in perpetuity . . . the exact route of which servitude is to be determined by agreement between the seller . . . and the purchaser . . .'. When no agreement had been reached despite several attempts, the purchaser applied for a declaratory order that the servitude was void for vagueness and invalid.

[19] Hefer JA's starting point was that the route of a right of way is not an essential term, in the sense that the parties are free to either constitute the right of way on a specific route or generally. If a general servitude is created, 'the entire servient tenement is subject to the servitude and the grantee may select a route provided only that he does so *civiliter modo*'.[8] Hefer JA then made a second observation about servitudes that do contain a reference to a route. He stated:[9]

'The second observation is that where the formulation does contain such a reference and the route is said to be determinable by agreement, the servitude may or may not be valid depending on the intention of the parties. If the intention is to constitute a specific right of way, ie one which may only be exercised along a specifically defined route, the agreement is inchoate at least as to a material term and for that reason it is unenforceable until the route is agreed upon. But the agreement is perfectly valid and enforceable if a general servitude is intended and there is a reference to a future agreement merely because the parties contemplate that the route will eventually be agreed upon. What is envisaged in such a case is an initial general right which may be converted to a specific one by subsequent agreement. Accordingly, where there is a dispute about the nature of the right conferred on the grantee in

---

[6] *Tshwane City v Link Africa and Others* [2015] ZACC 29; 2015 (6) SA 440 (CC) para 142.
[7] *Nach Investments Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A).
[8] At 831C-E. See too A J van der Walt *The Law of Servitudes* (2016) at 418-420.
[9] At 831F-H.

any given case, the intention of the parties is decisive. It is to be determined, of course, by interpreting the agreement according to the normal rules of construction.'

[20] Clause 15 of the deed of sale embodies the agreement to create the servitude and the deed of servitude mirrored its terms in material respects. Both instruments refer to the costs of a survey diagram being borne by Eden. When the servitude was registered, however, there was no survey diagram. One is not required for the registration of a general servitude. For what it is worth, the Registrar of Deeds in all likelihood must have been satisfied that he was dealing with a general servitude. More importantly, in both instruments, no reference is made to where on the servient property the parking spaces are to be; and no reference is made either of any agreement to agree to this in the future. The servitude is simply created 'over the lot' and 'in favour of the dominant tenement'. This makes it clear that the parties intended that the entire servient tenement was subject to the servitude and that Olive had the right to select the parking spaces, subject to acting *civiliter modo*.[10] From a practical perspective, I am sure that the *civiliter modo* principle would restrict the choice of parking spaces to within the parking garage.

[21] My findings that the servitude is a general servitude, that no mention was made at all of where on the servient tenement the parking spaces were to be and no mention was made of this being agreed in the future, distinguish *Seale and Others v Minister of Public Works and Others*,[11] which was relied on by Eden. In that case, the servitude had been held to have been a specific one that had identified three general locations for points of access to the Hartbeespoort Dam, the specifics of which had to be agreed to by the parties but had not been. In these circumstances, Van der Merwe JA held that '[m]aterial elements of the right of access would therefore only be determined by further agreement' and this amounted to 'an agreement to agree',[12] which was unenforceable as no deadlock-breaking mechanism had been put in place.[13]

---

[10] This means no more than that Olive must, in choosing the parking spaces, act 'reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner' (*Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* [2006] ZASCA 118; 2007 (2) SA 363 (SCA) para 21).
[11] *Seale and Others v Minister of Public Works and Others* [2020] ZASCA 130.
[12] Para 27.
[13] Para 32.

[22] The result of my findings set out above is that the servitude is not invalid on account of its failure to specify the location of the parking spaces. There are no reasonable prospects of success on appeal in relation to the first ground of attack on the validity of the servitude.

The Share Blocks Act and the Retired Persons Act

[23] I turn now to the question whether the servitude is invalid as a result of the absence of approvals in terms of s 8(1)*(c)* of the Share Blocks Act and s 4B of the Retired Persons Act.

[24] Section 8(1)*(c)* of the Share Blocks Act provides:

(1) Notwithstanding anything to the contrary contained in any law-

. . .

(c) a share block company shall not have the power, save with the approval by special resolution of a general meeting of the share block company, to alienate or cede, as the case may be, any immovable property of which it is the owner or any of its rights to immovable property of which it is not the owner and in respect of which it operates a share block scheme.'

[25] Section 4B of the Retired Persons Act provides:

'(1) Unless at least 75 per cent of the holders of rights of occupation in a housing development scheme consent thereto the land concerned may not be alienated free from such rights . .

(2) Any alienation taking place without the consent of the holders as contemplated in subsection (1) shall be null and void.'

Section 1 of the Act defines the term 'alienate, in relation to a housing interest', to mean:

'(a) sell, exchange, lease, donate, grant or otherwise dispose of or place at disposal; or

(b) the making of an irrevocable offer to acquire the interest for consideration.'

[26] The argument advanced on behalf of Eden was that because the servitude agreed to in July 1994, before any shares in the share block company were sold to retirees, was not registered simultaneously with transfer, on 16 April 1996, but only on

18 February 1997, transfer of an unencumbered property occurred and, when the servitude was registered, the encumbrance of the servitude amounted to an alienation. As an alienation of immovable property of a share block company requires the authorisation of a special resolution of a general meeting of the company, and this did not occur, the servitude is invalid. A similar argument was made in respect of s 4B of the Retired Persons Act: the alienation was never consented to by at least 75 percent of the holders of rights of occupation of the Eden property with the result that, in terms of s 4B(2), the alienation was a nullity.

[27] In order to assess the merits of this argument, it is necessary to track the development of the right in favour of the Olive property to parking spaces on the Eden property. Clause 3.1 of the deed of sale provided that the lease that had been in place would only terminate on the date of transfer. The obligation to provide parking to patrons of the Olive property was a term of Eden's lease. It was therefore obliged in terms of the lease to provide parking from the date of the signing of the deed of sale in July 1994 until the date of transfer on 16 April 1996.

[28] Clause 15.2 of the deed of sale provided that the parking servitude would be created simultaneously with registration of transfer. As, by agreement, registration of the servitude did not occur at the same time as transfer, as initially envisaged, the servitude that came into existence on 16 April 1996 was unregistered from that day until 18 February 1997.

[29] The effect of an unregistered servitude was set out as follows by van der Walt:[14]

'In this respect, registration is a validity requirement for the creation of servitudes; prior to or in the absence of registration, there is no valid servitude yet but merely a personal right that is valid only between the parties to the agreement in which it is embodied.'

He adds that the personal right includes a right to the co-operation of the other party in the registration of the servitude and personal rights identical to the servitude.[15] In

[14] Note 8 at 92-93.
[15] Note 8 at 93, fn 112.

Bowring NO v Vrededorp Properties CC and Another,[16] Brand JA held that a purchaser with knowledge of an unregistered servitude 'will be bound, not only to give effect to the servitude, but also to co-operate in having the servitude registered'.

[30] So, from the date of transfer on 16 April 1996 until the registration of the servitude on 18 February 1997, the owner of erf 12424 – Ethekwini – enjoyed personal rights against Eden, in the terms embodied in clause 15 of the deed of sale, in respect of parking spaces for at least 250 vehicles on Eden's property. On registration of the servitude, these personal rights were converted into real rights enforceable against Eden and its successors in title. And in the background, the town planning scheme imposed precisely the same obligation on Eden.

[31] It is apparent from what I have set out above that there was no time, from when Eden first leased its property until the registration of the servitude, that it was free of the obligation to provide 250 parking spaces for the patrons of the Olive property. When it purchased the property it did so subject to the parking obligation and it agreed then to the creation of a parking servitude. It never enjoyed occupation or ownership of the property free from the parking obligation in one form or another. It cannot therefore be said to have alienated any part of its property. For this reason, s 8(1)*(c)* of the Share Blocks Act and s 4B of the Retired Persons Act have no application and have no effect on the validity of the servitude. In any event, having agreed to purchase the property subject to the parking obligation, the subsequent registration of the servitude in fulfilment of that obligation cannot be equated to an alienation of the property.

[32] These provisions do not apply for another reason too. The deed of sale was signed in July 1994. It was signed on behalf of Eden by Mr Anthony Scott, a director of the sole shareholder of Eden, namely Scott & Scott. At that stage, Eden had not sold a single share to a retiree. That only commenced in December 1994. Neither the Share Blocks Act nor the Retired Persons Act have any application for that reason and

[16] *Bowring NO v Vrededorp Properties CC and Another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 8.

because, when Eden concluded the agreement of sale, it never alienated anything. Instead, it acquired the property, but it did so subject to the parking obligation.

[33] My conclusion is that the servitude is not invalid on account of any conflict with the Share Blocks Act or the Retired Persons Act. There are consequently no reasonable prospects of Eden succeeding on appeal in relation to the second ground of attack on the servitude.

The conditional applications for leave to appeal

[34] After the matter was referred to trial, Olive initiated a claim for damages against Ethekwini. It was conditional on the high court finding that the servitude was invalid. As the high court pointed out, 'absent a finding that the servitude is invalid, there is no dispute and no lis between [Olive] and [Ethekwini]'. As it upheld the validity of the servitude, it dismissed, in paragraph 6 of its order, Olive's claim against Ethekwini with costs. Olive's application for leave to appeal against this order is conditional on leave to appeal being granted to Eden.

[35] After Ethekwini had been drawn into the fray, it initiated third party proceedings against, inter alia, Shepstone & Wylie. Its claim against Shepstone & Wylie was also conditional on the servitude being found to be invalid. As a result of the high court finding that the servitude was valid, it dismissed, in paragraph 7 of its order, Ethekwini's conditional claim against Shepstone & Wylie with costs. Ethekwini's application for leave to appeal against this order is also conditional on leave to appeal being granted to Eden.

[36] Even though a central plank of the cases of Olive, Ethekwini and Shepstone & Wylie is the validity of the servitude, the basis for raising it differs from party to party. It is the basis for Olive's case against Eden; it is the principal defence raised by Ethekwini against Olive's claim; and it is likewise the principal defence of Shepstone & Wylie in the third party proceedings brought by Ethekwini. In this scheme, there is a lis between Olive and Eden, a separate conditional, lis between Olive and Ethekwini and yet another separate conditional lis between Ethekwini and Shepstone & Wylie.

[37] As Eden's application for leave to appeal cannot succeed, both Olive's application for leave to appeal against the dismissal of its claim against Ethekwini, and Ethekwini's application for leave to appeal against the dismissal of its third party claim against Shepstone & Wylie have no reasonable prospects of success. Both must be dismissed with costs.

The order

[38] I make the following order:

1 Eden Crescent Share Block Ltd's (Eden) application for leave to appeal is dismissed.

2 Eden is directed to pay the costs of Olive Marketing CC (Olive), including the costs of two counsel where employed.

3 Olive's application for leave to appeal against paragraph 6 of the high court's order is dismissed.

4 Olive is directed to pay the costs of the Ethekwini Municipality (Ethekwini), including the costs of two counsel where employed.

5 Ethekwini's application for leave to appeal against paragraph 7 of the high court's order is dismissed.

6 Ethekwini is directed to pay the costs of Shepstone & Wylie, including the costs of two counsel where employed.

_____

C Plasket

Judge of Appeal

APPEARANCES

For the applicant:	A Annandale SC and W N Shapiro SC
Instructed by:	Livingston Leandy Inc, Umhlanga Rocks McIntyre Van der Post, Bloemfontein
For the first respondent:	M Pillemer SC
Instructed by:	Eversheds Sutherland (KZN) Inc, La Lucia Honey Attorneys, Bloemfontein
For the second respondent:	G Goddard SC
Instructed by:	Luthuli Sithole Attorneys, Durban Matsepes Inc, Bloemfontein
For the third party:	S R Mullins SC and P J Wallis SC
Instructed by:	Clyde & Co, Sandton Honey Attorneys, Bloemfontein