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Case No 164/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EDEN VILLAGE (MEADOWBROOK) (PTY) LTD ... First Appellant

LIEFDE EN VREDE ..... Second Appellant

AND

EDWARDS, RONALD ERNEST ..... First Respondent

EDWARDS, AVICE VERNON ..... Second Respondent

Coram: JOUBERT, HOEXTER, NESTADT, EKSTEEN et F H GROSSKOPF, JJ A

Heard: 10 November 1994

Delivered: 11 May 1995

J U D G M E N T

EKSTEEN, JA :

The Eden Retirement Village tends to conjure up in the mind visions of the primeval paradise, and when in addition one reads that it is being managed by a company known as Liefde en Vrede, one may be forgivien for thinking that it holds out promise of the dawn of some millennial age for all who seek to dwell within its bounds. That blissful prospect, however, was not vouchsafed to Mr and Mrs Edwards (the respondents) after they came to live in this would-be delectable meadow.

In August 1986 they entered into a written agreement with first appellant - the owner and developer of Eden Village - in terms of which they

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lent it R59 900 as an interest-free loan. In return they were to receive vacant and undisturbed possession of a house in the village from 1 April 1987 to the death of the longest living of them. This house was to be built according to certain agreed specifications. The respondents also undertook to pay a monthly levy to be determined by the management company, ie Liefde en Vrede (the second appellant). The agreement went on to provide that the cost of water and the rates and taxes would be included in the levy; that "the complex Eden Retirement Village" would offer ia a frail care centre, a recreation centre where meals would be provided at a nominal charge, a 7 day free holiday at Warner Beach annually, and that there

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would be full security at the main gate and patrolling of the grounds. In pursuance of this, and other agreements concluded with other people, Eden Village was built and the houses occupied by retired persons.

The possibility that the complex may at some future date be converted into a development scheme in terms of the Sectional Titles Act (No 95 of 1986) (hereinafter referred to as "the Sectional Titles Act") was held out in clause 5.4 of the agreement which provided that:

> "5.4 On completion of the unit and in the event of a Sectional Title Register being opened the occupier may cause a mortgage bond in an amount equal to the loan to be registered over the unit as security for repayment of the loan."

Nowhere in the contract was there any undertaking by the first appellant to convert the complex into a

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development scheme (ie a sectional title scheme) at any future time or at all. The clause I have quoted merely holds out the possibility of such an event occurring in the future and no more.

Clause 13 of the agreement provided that

> "13 This agreement represents the entire agreement between the parties who acknowledge that no warranties have been made save as are set forth herein."

As the number of residents grew so did the discontent at the administration and management of the village, and more particularly at the way in which the monthly levies were being spent. So serious did the dissatisfaction become that it was eventually agreed to submit the dispute between the

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residents and the appellants to the mediation of Professor Louise Tager who had been appointed chairman of the Business Practices Committee. The meetings attendant on the mediation seem to have been held during 1990, and the parties, which included "the greater majority of residents" agreed to abide by the decision of Professor Tager. At one of the meetings the first appellant indicated that it had begun to take steps to open a sectional title register and bound itself to take all steps necessary to expedite the opening of the register. It appears from the papers that the first appellant had instructed a firm of land surveyors, town planners, and sectional title

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consultants on 1 October 1990 to prepare sectional plans for the units in Eden Village.

The mediation procedure was apparently completed before the end of 1990, and on 15 January 1991 Professor Tager sent her ruling to the representatives of the residents, and presumably also to the appellants. This ruling provided for the administration of the village to be undertaken by a committee consisting of five residents, to be elected from among the body of residents, as well as a representative of each of the appellants. The committee would be responsible for all "staff matters" and would be entitled to see and monitor the books of account relating to the village.

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Pursuant to this ruling the appellants agreed to the election of a residents' committee on which they were also represented, and that this committee be "afforded limited rights of participation in the management and administration" of the village. Such a committee was then duly elected. There is some dispute on the papers as to whether the appellants complied with all aspects of Professor Tager's ruling. The respondents say they did not. The appellants deny these allegations. In any event the friction between the appellants and the residents seems to have continued. A series of letters containing allegations and counter-allegations passed between their attorneys. Eventually by letter

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dated 8 October 1991 the appellants purported to cancel the "agreement" relating to the administration and management of the village, and to regard the elected committee of residents as "defunct and without authority". Appellants would in future administer the village on their own.

On 25 October 1991 the respondents approached the Witwatersrand Local Division on notice of motion seeking a declaratory order against the first appellant -

> "That Regulations 7 to 14 inclusive published in Government Notice R 1351 of 30 June 1989 in terms of the Housing Development Schemes for Retired Persons Act No 65 of 1988 are applicable to Respondent's retirement village being Eden Village (Meadowbrook)."

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First appellant opposed the application and filed an answering affidavit on 13 December 1991. Therein it alleges i a that -

> "preparations in respect of the opening of a consolidated Sectional Titles Register are well under way."

After the respondents had filed their replying affidavit they applied to the court to join the second appellant as second respondent. This application was granted and that is how the second appellant became a party to the suit.

On 11 May 1992 second appellant filed its answering affidavit. From the allegations in para 4 thereof and in the annexures thereto, it appears that first appellant applied to the Germiston City Council,

(which is the local authority exercising jurisdiction over the land on which Eden Village had been established) for its approval of the proposed sectional title development. This application appears to have been made on 17 February 1992, and on 17 March 1992 the City Council approved the application subject to the registration of a right of way along the eastern boundary of the property in favour of the Council.

After several more affidavits had been filed by both sides the court granted the order prayed for. The present appeal is brought against the grant of that order.

In argument before us Mr Slomowitz

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who appeared for the appellants, relied on the following four grounds for his submission that the declaratory order should not have been granted, viz

1 That as it had been the intention of the appellants to convert the housing development scheme established by them to a sectional title scheme, and that they had applied to the Germiston City Council for and obtained their approval for the scheme, the regulations in question could not apply.

2 In any event, he submitted, the regulations promulgated were ultra vires the authority conferred on the Minister by

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section 11 of the Housing and Development Schemes for Retired Persons Act No 65 of 1988 ("the Act").

3 The regulations could not be regarded as having been made in terms of the said section 11 as they had been made by the Minister of Trade and Industry and Tourism and not by the Minister of Economic Affairs and Technology as contemplated by the Act.

4 The respondents ought to have joined all the residents of Eden Village as they must be regarded as having a direct and substantial interest in the matter.

I shall deal with each of the grounds in

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turn.

The First Ground.

The Act came into force on 1 July 1989.

In section 1 a "retired person" is defined as

> "a person who is 50 years of age or older"

and a "housing interest" in relation to a housing development scheme, as

> "any right to claim transfer of the land to which the scheme relates, or to use or occupy that land".

A "housing development scheme" is defined as meaning

> "any scheme, arrangement or undertaking -
> (a) in terms of which housing interests are alienated for occupation contemplated in section 7 (i e only by retired persons or their spouses), whether the scheme, arrangement or undertaking is operated pursuant to or in connection with a

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development scheme, or a share block scheme or membership of or participation in any club, association, organisation or other body, or the issuing of shares, or otherwise, but excluding a property time-sharing scheme, or

(b) declared a housing development scheme by the Minister by notice in the Gazette for the purposes of this Act."

A "development scheme" means a development scheme as defined in section 1(1) of the Sectional Titles Act, and a "share block scheme" means a share block scheme as defined in section 1 of the Share Blocks Control Act 1980 (Act No 59 of 1980).

The term "housing development scheme" therefore embraces a large variety of schemes aimed at providing housing for retired persons, and includes ia a sectional title scheme, a share block

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scheme and a scheme such as the present one where a "life right" is granted. This is further emphasised by the definition of a "right of occupation" which is defined to mean -

> "the right of a purchaser of a housing interest -
>
> (a) which is subject to the payment of a fixed or determinable sum of money by way of a loan or otherwise ... ; and
>
> (b) which confers the power to occupy a portion in a housing development scheme for the duration of the lifetime of the purchaser ... but without conferring the power to claim transfer of the ownership of the portion to which the housing interest relates".

Acting in terms of section 11 of the Act the Minister promulgated certain regulations by Government Notice 1351 of 30 June 1989 ("GN 1351"). These

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regulations, in the first place, imposed obligations on a developer in respect of the advertising and sale of units. Regulations 7 to 14 provided for the establishment of a management association consisting of the developer and each of the residents. This association is given wide powers of control, management and administration of the whole scheme. Regulation 2, however, provided that

> "2 Regulation 7 to 14 shall not apply to a housing development scheme operated pursuant to or in connection with a development scheme or a share block scheme."

In the present appeal both parties approached the matter on the basis that these regulations did not apply to Eden Village at the time of

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their promulgation because Eden Village had been established before 30 June 1989. On 14 June 1991, however, the Minister, by Government Notice R 1349 ("GN 1349") issued a further regulation which provided that

> "1 Regulations 7 to 14 of Government Notice R 1351 of 30 June 1989, shall be applicable to any housing development scheme irrespective of the date of completion of such scheme, excluding a housing development scheme conducted in pursuance of a development scheme or a share block scheme."

Although Regulation 2 of GN 1351 is couched in the negative whereas the abovequoted regulation is framed in the positive there can be little doubt that they were both intended to have the same

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result, viz to provide for the application of regulations 7 to 14 of GN 1351 to a housing development scheme which is not "operated pursuant to or in connection with" or "in pursuance of" a development scheme or a share block scheme.

If a housing development scheme takes the form of a sectional titles scheme and is designed to provide housing for retired persons, it will be governed not only by the Act but also by the Sectional Titles Act. In terms of section 4 of that Act a developer would, in the first instance, have to apply to the local authority exercising jurisdiction over the area in which the land to be developed is situated for approval of the proposed scheme. After such

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approval has been obtained a draft sectional plan drawn up or vouched for by a land surveyor or an architect must be submitted to the Surveyor-General for his approval (sections 7 and 8). Only after the Surveyor-General has approved of the scheme may the developer apply to the appropriate Registrar of Deeds for the opening of a sectional titles register and for the registration of the sectional plan (section 11). When the Registrar of Deeds is satisfied that all the statutory and other legal requirements have been complied with, he will register the sectional plan and open a sectional title register (section 12).

It is only when a sectional title register has been opened that a developer can transfer

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units in the scheme to purchasers thereof, and it is only then that a body corporate can come into existence. Section 36(1) provides that

> "36(1) With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and every person who thereafter becomes an owner of a unit shall be a member of that body corporate."

This body corporate shall thereafter be solely responsible for the control, management, administration, use and enjoyment of the sections and of the common property in the scheme (sections 35 to 38). In such a scheme therefore the residents will control their own

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destiny, and when the last unit has been sold the developer shall, except in certain exceptional circumstances, disappear from the scene altogether.

In the case of a housing development scheme taking the form of a share block scheme in terms of the Share Blocks Control Act, the participants will also have a say in the control of the scheme. Not only will the acquisition of a share or shares in the share block company entitle the holders thereof to the use of specified parts of the immovable property in respect of which the company operates the scheme (section 7(2)), but such acquisition also accords them a vote in the conduct of the affairs of the company (section 10) and the right collectively to appoint at least one or

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two of the directors (section 12(1)).

I need not consider the nature of a share block scheme any further as it is not relevant to the issues in the present appeal. Suffice it to say that both in a sectional title scheme and in a share block scheme the residents will be able to participate in the general administration and running of the scheme. The regulations published in GN 1351 on 30 June 1989 were clearly designed to afford a similar form of participation to residents in a scheme under the Act which was not a sectional titles scheme or a share block scheme as well. In fact the provisions of regulations 7 to 14 seem to have been largely taken from very similar provisions contained in sections

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36, 37 and 38 of the Sectional Titles Act. Furthermore, since both the latter Act and the Share Blocks Control Act made adequate provision for the participation of residents in the control of their residential schemes it was not necessary, and was in fact undesirable, that regulations 7 to 14 should apply to them.

In advancing his first contention that these regulations did not apply to Eden Village, Mr Slomowitz submitted that the first appellant intended to convert Eden Village from a "life interest" scheme to a sectional title scheme; that first appellant had applied to the Germiston City Council for its approval and that such approval had been granted on 17 March 1992; and that, at the time that the application had

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been brought in the court a quo and when the appellants had filed their answering affidavits first appellant still intended submitting his sectional title plans to the Surveyor-General for his approval. In these circumstances, Mr Slomowitz submitted, a sectional title scheme was in existence, and that regulations 7 to 14 could therefore not apply. He submitted that the sectional title scheme had come into existence as soon as first appellant had applied to the Germiston City Council for its approval or, at the latest, when such approval had been granted.

In considering these submissions it is necessary in the first place to determine whether, in circumstances of the present case, it can be said

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that Eden Village was being "operated pursuant to or in connection with" or "conducted in pursuance of" a sectional title scheme. It certainly was not, even on Mr Slomowitz's submissions, being so conducted on 14 June 1991 when GN 1349 was promulgated. Nor, to my mind, can it be said to have been so conducted at the time when the application was brought or when the answering affidavits were filed. In terms of the provisions I have outlined above a sectional title scheme cannot be said to have come into existence until the developer has received the approval not only of the local authority concerned, but also of the Surveyor-General and the Registrar of Deeds. Either of these may withhold approval thereby

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delaying the coming into existence of the scheme for an inordinate period of time, or even preventing it from coming into existence at all. In any event it seems to me that it cannot properly be said that any housing development scheme is being operated or conducted in pursuance of a sectional title scheme until at least a sectional title register has been opened and a body corporate brought into existence. The Oxford English Dictionary gives the meaning of "operate" as "to direct the working of; to manage, conduct, work (a ... business) .... ", and "conduct" "to direct, manage, carry on (a ... business ....)" A housing development scheme cannot therefore be said to be operated or conducted in pursuance of a

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scheme which has itself not yet received final approval and is therefore not yet in existence. It is not enough for a developer merely to intend to bring such a scheme into existence, nor are any of the preliminary steps such as the approval of a local authority sufficient. In order for a housing development scheme to be operated or conducted pursuant to a sectional title scheme it seems to me that there must be a sectional title register and a body corporate in existence.

Mr Slomowitz sought to rely on an unreported judgment of Spoelstra, J in the matter of Sorgvrye Maande en 'n Ander v Die Voorsitter van die Huiskomitee Protea Aftree-Oord (Heuwelsig) en Ander (Case No 749/91 (T)). From the judgment in that

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case it would appear that the applicants sought a declaratory order that regulations 7 to 14 of GN 1351 did not apply to the housing development scheme known as Protea Aftree-oord (Heuwelsig) ("Protea"). The second applicant in that matter was a property developer who had been responsible for developing Protea. It had already disposed of rights of occupation in respect of several units in the scheme, which had been acquired by the respondents who had taken occupation at the time the application was brought. It was common cause that the scheme constituted a housing development scheme in terms of the Act. It was also common cause that, in the contracts that the second applicant had concluded with the respondents he had undertaken to open

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a sectional title register in respect of the scheme and to dispose of some of the sectional title units when, in his discretion, he decided to do so. At the time the application was brought the sectional title register had not yet been opened. How far the second applicant had got in his professed intention to do so does not appear from the judgment. The court made the declaratory order sought and held that regulations 7 to 14 did not apply to Protea. The learned Judge's reasons for coming to this conclusion are not very clear to me. They seem to be contained in the following passage from his judgment.

> "Ek stem saam met Mnr. van Wyk se betoog dat ontwikkelingskemas soos gedefinieër in die Wet op Deeltitels juis daarop dui dat

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> hierdie skema nie 'n voltooide skema hoef te wees nie, vir sover die bewoording in die omskrywing van ontwikkelingskema daarop dui dat dit geboue is wat geleë is of opgerig gaan word en dat dit dus iets is wat ook in die toekoms nog kan ontwikkel."

It is true that the definition of a "development scheme" contained in the Sectional Titles Act does refer to

> "a building or buildings situated or to be erected on land .... to be divided into two or more sections"

but this does not mean that a scheme which has not yet received the approval of the Registrar of Deeds and in respect of which no sectional title register has been opened can be regarded as a scheme which is already in existence. The learned Judge did not

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consider the wording of regulation 2 of GN 1351.

Where there is no sectional title register for a scheme, and hence no body corporate, it is difficult to see how it can ever be said that the scheme is being operated pursuant to a development scheme - ie a sectional title scheme. Had the learned Judge considered this apsect, it seems to me that he must then have come to a different conclusion.

In the present case the sectional title scheme had not yet come into existence at the time the application had been brought and consequently Eden Village was not at that time being "operated pursuant to or in connection with" or "conducted in pursuance of" a development scheme or a share block

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scheme. Regulations 7 to 14 if GN 1351 were therefore applicable to the scheme.

The Second Ground

Here Mr Slomowitz relied on the submission that the regulations were ultra vires the authority of the Minister in that section 11 of the Act did not empower him to make regulations of such wide and far-reaching import as those he had purported to make. He submitted that they went beyond the true meaning to be assigned to the words used in section 11 and that the regulations had the effect of depriving the first appellant of the control of what was effectually its property and transferring it to a management association of non-owners.

Section 11 of the Act gives the Minister

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the authority to make regulations in respect of a variety of matters. Those relevant to the present case read as follows viz -

"11(1) The Minister may make regulations -

(a) ....

(b) ....

(c) regarding the alienation of housing interests and the control over and the operation of housing development schemes, including the payment of levies and the establishment of levy funds;

(d) ....

(e) regarding the establishment and utilization of facilities or services contemplated in section 4(1)(o) ;

(f) ....

(g) ....

(h) regarding any matter which is required or permitted to be prescribed by regulation, or is considered necessary or expedient to be so prescribed in order to achieve the objects of this Act;

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(i) ...

(2) A regulation may prescribe penalties for a contravention thereof or failure to comply therewith ....

(3) A regulation under paragraph (c) or (e) of sub-section (1) may provide for the application thereof also in respect of housing development schemes erected at any time before the commencement of this Act."

The wording of this section is of a wide and embracing import and envisages regulations "regarding the control over and the operation of housing development schemes" and "regarding any matter which is ... considered necessary or expedient to be so prescribed in order to achieve the objects of this Act". It even authorises the application of regulations to "housing development schemes erected at any time before the

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commencement of this Act".

When one has regard to the objects of the Act the reason for such wide authorisation becomes more apparent. The Act falls within the category of what might be termd "social" or "consumer protection" legislation. Its object is to protect elderly or retired persons investing their savings in a housing development scheme from possible exploitation by a developer. As an example of this one may have regard to section 2 to 4 of the Act which provide in considerable detail what a contract for the acquisition of a housing interest by a retired person should contain: details as to exactly what he is acquiring and what his obligations

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will be, and also what other facilities or services will be provided. These sections also bind the developer to provide the facilities promised; if the landed property is unencumbered to keep it unencumbered; and to give an estimate, for a period of three years in advance, of what the upkeep of the scheme is likely to cost. So too, sections 4A, 4B and 4C give the holder of a right of occupation very considerable security by requiring the endorsement of that right against the title deed, and according that right priority over any other right whether or not such other right has been registered or endorsed against the title deed, and irrespective of the time when such other right was registered and endorsed. The whole Act is designed

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to protect the rights and the interests of the retired persons, and recognizes the fact that the residents have a vested interest in the housing development scheme in which they have chosen to stay.

Similar housing schemes held under sectional title or share block afford their residents control of the administration and management of the scheme, and, as I have indicated, the regulations in question seek to afford to the holders of a "life right" or a right of occupation in a housing development scheme under the Act some similar say in the control over or operation of that scheme. It is true that the fixed property in the scheme will continue to be owned by the developer, and this aspect seems to

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have been recognized in the regulations we are considering. The developer shall be a member of the management association to which the control and administration of the scheme is entrusted (Reg 7). The management association will be under a duty to insure the buildings relating to the scheme and keep them insured to their replacement value against fire, and against other risks as it may determine (Reg 8(a) and (b)). It must also maintain the common property and all accommodation "and keep it in a state of good and serviceable repair"(Reg 8(c)). It must ensure compliance with any laws relating to the common property (Reg 8(e)) and keep in a state of good and serviceable repair all plant,

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machinery, fixtures and fittings, including elevators, pipes, wires, cables and ducts (Reg 8(g) and (h)). In order to perform these duties the management association is empowered to impose a levy on all residents and to establish a levy fund (Reg 9). If the association should fail to comply with any of the duties imposed on it by these regulations, the developer could enforce such compliance. In this way the property of the developer will be adequately protected against deterioration. It must also be borne in mind that the first appellant (the developer in this case) was enabled to develop its property by the interest free loans paid to it by each of the residents and that it was subsequently

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maintained and kept in repair by the levies paid by the residents.

In the light of these considerations it seems to me that not only was the Minister legally empowered by the wording of section 11 to issue the regulations, but that, having regard to the objects of the Act, it cannot be said that he exercised his powers unreasonably. The regulations are not therefore, in my view, ultra vires the Minister's authority.

The Third Ground

The third point taken by Mr Slomowitz was that the wrong Minister had acted in making the regulation contained in R 1349. Section 1 of the Act defines the Minister who is authorised to make

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regulations to mean the Minister of Economic Affairs and Technology. The regulations made under R 1351 were promulgated by the Minister of Economic Affairs and Technology. R 1349, however, which had made those regulations applicable to Eden Village, purports to have been promulgated by the Minister of Trade and Industry and Tourism. From the judgment in the court a quo it appears that this point was taken "about a week or so before the hearing". It appears to have been taken in an affidavit by the appellants' attorney Mr G du B Holtman and sworn to by him on the "3rd day of June" - presumably 1992. In it he says that he attempted to trace the source of the authority of the Minister

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of Trade and Industry to promulgate the regulations. He assumed that any transfer of powers from the Minister of Economic Affairs and Technology to the Minister of Trade and Industry would have taken place in terms of section 26 of the Republic of South Africa Constitution Act No 110 of 1983, but he says he could find no notice in the Government Gazette to that effect.

In reply respondents' attorney made an affidavit attaching a letter from Mr J S Foonk, the Director-General in the Office of the State President dated 4 June 1992. This letter has not been attested to but the parties were ad idem that it should be regarded as if all the allegations contained therein had been made on affidavit.

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Mr Foonk says that from its inception in 1988 the Act and any affairs pertaining to it had been dealt with under the aegis of the Department of Trade and Industry. The Minister in whose portfolio that department fell was at that time styled the Minister of Economic Affairs and Technology. The then State President, Mr P W Botha, subsequently retired and when his successor, Mr F W de Klerk took office as State President he constituted a new cabinet, which was formally announced by Government Notice No 2120 appearing in Government Gazette No 12080 promulgated on 27 September 1989 ("GN 2120"). In this cabinet there was no longer any portfolio of Economic Affairs and Technology, but there was a

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new portfolio styled Trade and Industry and Tourism. The Act, which had always been administered by the Department of Trade and Industry, simply remained in that department, but the Minister into whose portfolio it fell was now called the Minister of Trade and Industry and Tourism.

He went on to explain that section 26 of Act 110 of 1983 which dealt with the assignment of powers, duties and functions of one Minister to another, was in his view inapplicable, since there was no transfer from one Minister to another. The matter was rather one which fell within the ambit of section 24 of that Act dealing with the appointment of ministers. That section provides:

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"24(1) The State President may appoint as many persons as he may from time to time deem necessary to administer such departments of State of the Republic as the State President may establish, or to perform such other functions as the State President may determine."

GN 2120 in which the new cabinet was announced does indeed contain a portfolio of Trade and Industry and Tourism but no portfolio of Economic Affairs and Technology.

From these allegations and from the relevant government notice it is clear that on 30 June 1989 when R 1351 was promulgated there was a Minister of Economic Affairs and Technology, but that on 14 June 1991 when R 1349 was promulgated no such Minister existed. There is also no reason

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to doubt Mr Foonk's allegation that the Act had always been administered by the Department of Trade and Industry and that that department now fell within the portfolio of the Minister of Trade and Industry and Tourism. In my view it was not necessary, and indeed would have been inappropriate, to have formally assigned the administration of the Act in terms of section 26 of Act 110 of 1983. An entirely new cabinet had been constituted on 27 September 1989 and, in terms of section 24 of that Act the State President was legally entitled to assign the departments and portfolios as he saw fit. This point, too, therefore cannot succeed.

The Fourth Ground

The last point taken by Mr Slomowitz

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was that of non-joinder. His submission was that all the other residents of Eden Village should have been joined as they must be considered to have had a direct and substantial interest in the matter. This point was not taken in the court a quo. In that court the appellants took the point that the Minister ought to have been joined. The court a quo rejected this submission and Mr Slomowitz expressly abandoned it before us.

It seems to be common cause on the papers that at the time the matter was argued a quo there were 110 residents in Eden Village and that 88 contracts had been signed between those residents respectively and the first appellant. In his

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answering affidavit Mr E D Timcke, the first appellant's manager, alleged that the respondents only enjoyed the "direct support" of some two or three other residents. In his replying affidavit the first respondent denied this and alleged that he enjoyed the support of many more. He annexed signed statements of 74 residents expressing their support for his attempt to obtain the declaratory order sought.

The only interest that the other residents of Eden Village can have in the outcome of the present application would seem to be in the composition of the body responsible for the general administration of the village i e whether the appellants should continue to administer the village on their own without any

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recourse to the residents, or whether the village should be administered by a management association on which both the developer and the residents would be represented, as envisaged by the regulations. At first blush one might be inclined to assume that the latter arrangement would be the one which all the residents would favour as it would give them a say in the daily running of the village in which they lived, and would allow them, to a large extent, to control their own destinies. Mr Slomowitz however contended that there may well be a substantial number of the residents who would prefer to see their village administered by the appellants. This he submitted gave them a direct and substantial interest in the outcome of this application. Mr Kuper

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pointed to the rather tenuous nature of this interest, but did not seriously contend that the other residents might not have such an interest. In the light of the dicta contained in Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) and the cases there referred to, it seems to me that this attitude was justified in the present instance. In view of the fact that the objection had only been taken in this Court, and not in the Court a quo, and in the light of the tenuous nature of the interest, Mr Kuper submitted, however, that we should adopt the expedient referred to in the Amalgamated Engineering Union case (supra) at p 633, and in Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T) at 775.

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This would not only expedite the decision in this matter, but it would also avoid causing the parties unnecessary expense and delay. Mr Slomowitz agreed with this submission.

We accordingly issued a direction to the respondents' attorneys to notify all the residents of Eden Village of these proceedings and of the declaratory order granted by the Court a quo; and to publish this order in a conspicuous place in the village. Residents were called upon, within a period of two weeks from such notification and publication to indicate to the Registrar whether or not they consented to be bound by the judgment of this Court notwithstanding the fact that they had not been cited as parties to the proceedings.

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In the event of all the residents consenting or not expressly refusing to consent, judgment, it was indicated, would be given without hearing further argument. In the event, however, of certain residents not so consenting further instructions as to the course the proceedings were to take would be given.

This direction was complied with by respondents' attorney, and an affidavit confirming this was filed by him. Thereafter a number of residents indicated in letters to the Registrar that they did not want to be bound by our judgment, and it became necessary therefore, to issue further instructions.

Those residents who had indicated their unwillingness to be bound unless they were formally joined

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as parties, were called upon to file such affidavits as they may be advised with the Registrar on or before noon on 21 April 1995, and to brief counsel to argue the matter before us on 11 May 1995. As soon as their opposing affidavits were filed they would be considered to have been formally joined as co-appellants in the matter, and would be bound by any order the Court may make including any order as to costs or otherwise. Should any of them fail to file opposing affidavits they would be considered to have consented to be bound by the judgment of this Court notwithstanding that he or she had not been formally cited as a party to the proceedings. The respondents' attorney was again instructed to deliver this further order to each of the would-be objectors, and to

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publish it in a conspicuous place in the village. This instruction was complied with, and an affidavit confirming that this had been done was once again filed with the Registrar.

No opposing affidavits were filed by 21 April but a letter dated 8 May was received by the Registrar from a firm of attorneys who claimed to represent a number of residents of Eden Village - presumably some or all of those residents who had initially indicated that they "elected" not to be bound by the decision of this Court. The attorneys have now informed the Registrar that on reconsideration their clients had decided to abide by the decision of the Court. This appeal may therefore be considered on the basis that all

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the residents of Eden Village are bound by our decision despite the fact that they had not formally been joined as parties to the suit. When the matter was called on 11 May counsel were afforded the opportunity of addressing the Court in respect of the costs incurred subsequent to the hearing of the matter on 10 November 1994. After considering their arguments I am of the view that these costs should properly be borne by the respondents. They, after all, should have joined the other residents, and their failure to do so occasioned the additional costs.

The order of the Court therefore is:

(1) Subject to (2) below, the appeal is dismissed with costs such costs to include the costs

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of two counsel.

(2) The costs incurred subsequent to the hearing of the appeal on 10 November 1994 are to be paid by the respondents.

J P G EKSTEEN, JA

JOUBERT, JA)
HOEXTER, JA)
NESTADT, JA) concur
F H GROSSKOPF, JA)