



## 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

**Date:** 16 April 2021

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgment of the Supreme Court of Appeal*

*BW Brightwater Way Props (Pty) Ltd v Eastern Cape Development Corporation  
(1235/2019) [2021] ZASCA 47 (16 April 2021)*

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Today the Supreme Court of Appeal (SCA) handed down judgment upholding the the cross-appeal against an order of the Eastern Cape Division of the High Court, East London and replaced the order.

The dispute between Brightwater and the ECDC is based on a lease agreement concluded between them in respect of the property situated at Farm 31 Coffee Bay, Mqanduli. At that time, the Bothas, who previously leased the same property remained in occupation of portion B thereof. From the commencement of the lease agreement, Brightwater sought in various ways to hold ECDC to its obligation to provide it with vacant possession of portion B, but in vain. ECDC refused to act against the Bothas on the basis that the lease agreement was void by reason of non-fulfilment of a suspensive condition to which it was subject. This led Brightwater to lodge an application seeking the High Court to declare the lease agreement valid including ancillary reliefs, amongst others that, Brightwater provide it with undisturbed possession of the property.

ECDC opposed the application and also brought a counter-application in terms of which it sought to set aside the lease agreement. It relied on the principle of legality as adopted in the *Gijima* matter. The High Court dismissed the main application, upheld the counter-application and ordered ECDC to pay the costs of both applications. Despite this finding, the High Court did not order the setting aside of the lease agreement. In invoking s 172(1)(b) of the Constitution, it ordered that the counter-application succeeds only to the extent that the lease agreement concluded between the parties was declared constitutionally invalid. This order was, later at the request of Brightwater, supplemented by the High Court to mirror a paragraph in *Asla* that stated that the order of constitutional invalidity did not have the effect of divesting

Brightwater of any rights to which it was entitled under the lease contract, but for the declaration of invalidity.

On application to it, the High Court granted both parties leave to appeal to this court (including ECDC cross-appeal). However, Brightwater abandoned its appeal without tendering costs. ECDC persisted with its cross-appeal and also pressed for the costs occasioned by the withdrawal of the appeal.

Consequently, the only issue before the SCA was the cross-appeal, more specifically whether the order declaring the lease agreement constitutionally invalid whilst preserving all of Brightwater's rights under that agreement, was competent. In upholding the cross-appeal, the SCA held that the High Court misdirected itself by making the order which, in effect, nullified the declaration of invalidity by effectively upholding the contract in all respects, including future rights. It declared the lease agreement to be of no force and effect.

The SCA also upheld the cross-appeal regarding the costs of the counter-application. The cost order of the High Court thus remained intact with regard to the main application because the cross-appeal did not include same. Brightwater was thus ordered to pay the costs of the counter-application and the cross-appeal.