

SOUTH AFRICA / JUDGMENT

# Van Der Burgh v Eskom Holdings Soc Limited (64002/2012) [2013] ZAGPPHC 526 (11 October 2013) [2013] ZAGPPHC 526

## COURT

North Gauteng High Court, Pretoria

## BEFORE

F Kathree-Setiloane

## CASE / FILE NUMBER

64002/2012

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REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 64002/2012

DATE: 11 OCTOBER 2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

VAN DER BURGH, WAYNE.....Applicant

and

ESKOM HOLDINGS SOC LIMITED..... Respondent

## J U D G M E N T

KATHREE-SETILOANE, J:

- [1] The Applicant, Mr Wayne van der Burgh (“the Applicant”) is the registered owner of certain farm land, Portion 475 of the farm Witpoort No 406 registration division JR, Gauteng Province. The Respondent is Eskom Holdings SOC Limited (“Eskom”) an electricity supply corporation. It has a servitude, Deed of Servitude No. 532/1958, over the Applicant’s property. The servitude allows it to convey electricity across the Applicant’s property by means of wires and/or cables or other appliances, underground or overhead along the line of route described in the Deed of Servitude and also to erect, use, maintain all poles, towers,

and all other appliances necessary or incidental to the conveyance of electricity.

- [2] In related proceedings Eskom admitted that it erected two H-pole structures (pylons and lines used for the transmission of electricity) outside the ambit of the servitude area. In light of these admission, the Applicant now approaches this Court for an order declaring that the H-pole structures, which have been erected on his property by Eskom “fall outside of the ambit of the relevant servitude” on his property, and directing the respondent to remove the H-Pole structures and the lines connected thereto within 14 days from date of the order. The Applicant also seeks an order declaring that Eskom is in contempt, alternatively in breach of a court order, which was made by this court on 2 May 2012, under case number 22939/12, by agreement between the parties. At the hearing of the matter, the Applicant abandoned the relief sought in relation to Eskom’s contempt of the court order, but it persists with the relief sought relating to Eskom’s breach of the court order.

## Background

### facts

- [3] The events giving rise to this application are essentially common cause between the parties. They are that the Applicant, together with 11 other owners of immovable property situated in the Blue Hills Estate and Beaulieu area, launched an urgent review application

before this court under case number 22939/12 on 24 April 2012 (“the review application”). In the review application, the Applicant seeks interdictory relief inter alia restraining Eskom from taking any further steps to complete the construction of the new Lulamisa-Crowthorne 88kv power line (“the

new power line”), pending a review of Eskom’s conduct in commencing and implementing the construction of the new power line.

- [4] The basis for the review application relates to Eskom’s conduct in commencing and implementing construction of the new power line. The applicants in the review application allege inter alia that:
- (a) Eskom did so without the requisite statutory approval, authorisation and consent of the City of Johannesburg and the MEC for Agricultural and Rural Development, Gauteng Provincial Government (alternatively the Minister of Environmental Affairs);
  - (b) pylons and power lines erected by Eskom on the applicants’ properties as part of the new power line were erected outside the ambit of the applicable servitudes; and
  - (c) Eskom’s conduct constitutes unlawful, unreasonable and procedurally unfair administrative action.
- [5] On 29 April 2012, Eskom filed a brief opposing affidavit in the review application. Thereafter, on 2 May 2012, an order by agreement

(“the order”) was taken before Matojane J, which was to serve as an interim agreement pending the conclusion of the review application. The order enabled Eskom to continue to implement the construction of the new power line subject to certain conditions. The order reads in relevant part:

‘1 [Eskom] may continue to install power lines to the rebuilt pylons which it has erected on the properties to the Applicants forming part of [Eskom’s] project named Lulamisa-Crowthorne 88Kv Line Rebuild, Project Number CN-STM-0906-1146-00001/wjs2ll1, subject to the following:

1.1 [Eskom]:

1.1.1...

1.1.4 Will at all times ensure that the pylons, cables, and all the infrastructure which it installs and utilises for purposes of the operation and erection of the rebuilt line are within the ambit of and strictly confined to the servitude area...

1.1.5 Agrees to the interim arrangement without prejudice to its contention that the rebuilt line is presently between 80% and 90% complete. . .

3 Pending the final determination of the relief sought in Part B of the Notice of Motion, [Eskom] furthermore:

3.1 . . .

3.3 [Eskom] undertakes that it will not infer from the Applicant’s agreement to the interim arrangement that the Applicants regard the stringing of the rebuilt lines or the complete construction of the infrastructure as lawful;”

3.4 [Eskom] waves and abandons its right to argue in these or substituted or related proceedings that the fact of the installation of the infrastructure and lines by it on the properties of the Applicants (and/ or the costs which the [Respondent] has incurred in installing such works and/ or the inability to supply electricity as a consequence of its removal in terms of the interim arrangement is a reason why this Honourable Court should not declare such infrastructure and lines to be unlawful and/or order that such infrastructure should be removed.

...’

[6] On 10 September 2012, Eskom filed supplementary answering papers in the review application. Significantly, in these supplementary

answering papers Eskom conceded that the H-pole infrastructure built by it on the Applicant’s property was built outside the ambit of the servitude area applicable to the Applicant’s property, and thus unlawful. Eskom alleges, however, that it only became aware of the fact that the offending infrastructure had been unlawfully constructed during consultations with counsel in the lead - up to the filing of its supplementary answering papers on 10 September 2012. The Applicant disputes this allegation. Following the filing of Eskom’s supplementary answering papers in the review application the Applicant agreed to suspend any litigation for a period of

negotiation to allow Eskom to remedy the illegality and ensure compliance with the order.

- [7] The negotiations broke down and the Applicant demanded that Eskom comply with the order, and remove the offending structures from the Applicant's property to remedy the illegality. The Applicant afforded Eskom a further period within which to propose a timeline for the removal of the offending infrastructure from his property, failing which the Applicant advised Eskom that he would launch the present application. Eskom failed to comply with the Applicant's demand and, on 6 November 2012, the Applicant launched the current proceedings to compel Eskom to comply the court order.

#### Abuse of court process

- [8] The first defence raised by Eskom is that the Applicant's attorney has sought to force Eskom into settling the matter, and for this reason the present application "constitutes an abuse of process, irrespective of whether the Applicant is entitled to the relief sought". Eskom alleges that the driving force behind the current application is the Applicant's present attorney, Mr Norton who, because he is the husband of the first applicant in the review application, is conflicted and has been unable to act in an objective manner. In addition, Eskom alleges that both Mr Norton and the Applicant have behaved unreasonably and in an abusive manner toward Eskom's officials, by amongst other things, refusing to consent to the erection of structures in order to correct the situation. Eskom goes so far as to argue that the Applicant has engineered a situation where it wants all the structures removed, but resists replacement thereof, because the Applicant does not want Eskom to rectify the situation, but rather wants Eskom to capitulate and settle on his terms.

- [9] I am of the view that these allegations are without any factual basis. I find no evidence on the papers indicating that either the Applicant or Mr Norton have acted in an unreasonable or abusive manner towards Eskom and its representatives. It is apparent,

in this regard, that even though Eskom had admitted that it had erected the H-pole structures outside the servitude area on Applicant's property, both the Applicant as well the other applicants in the review application, agreed to attempt to resolve the matter through settlement negotiations with Eskom, in the hope that Eskom would, pursuant to its constitutional responsibility, remedy its conduct, and remove the offending structures.

- [10] It was only once the settlement negotiations had broken down, did Mr Norton, on behalf of the Applicant, demand the removal of the offending structures from the Applicant's property by close of business on 26 October 2012. When Eskom failed to comply with this demand, Mr Norton afforded Eskom a further opportunity to provide a proposed time-line for the removal of the offending structures from the Applicant's property. Needless to say, Eskom ignored this request as well. It is clear, in my view, that both Mr Norton and the Applicant have acted reasonably in these proceedings and have afforded Eskom repeated opportunities to rectify its illegal conduct. I accordingly find that this application does not constitute an abuse of court process nor is it directed at forcing Eskom to capitulate and settle the dispute on the Applicant's terms.

[11] A further contention advanced on behalf of Eskom is that the Applicant's "real motive" for launching this

application is to force Eskom to install underground cables as opposed to overhead structures. In support of this contention,

Eskom relies on an allegation made by the Applicant in his reply to Eskom's supplementary affidavit, in which it is alleged that Eskom has failed to put before the court other practical alternatives to remedy the current illegality, including for example placing the cables underground (subject to obtaining the requisite approvals). This allegation is made in the context of the Applicant's

response to Eskom's revised proposal, which the Applicant contends remains flawed because it is still not predicated on obtaining the requisite prior regulatory approvals, and his neighbour is not prepared to consent thereto. Similar allegations are made by the applicants' in the review application. I find it difficult on the basis of a single allegation in the Applicant's reply to Eskom's supplementary affidavit, in the current application, to conclude that the "real motive" behind this application is to force Eskom to install underground cables as opposed to overhead structures. In any event, and even if it were true that the Applicant wants underground cables installed, it does not assist the applicants in the review application to have such cables installed only on the Applicant's property. The contention of Eskom on this score is, therefore, manifestly unfounded.

[12] In so far as Eskom claims that it only became aware of the fact that the offending infrastructure had been unlawfully built on the Applicant's property when Eskom's representatives consulted with counsel prior to filing supplementary answering papers in the review application on 10 September 2012, it is clear from the papers that Eskom was, in fact, made aware by the Applicant, on 9 March 2012, that the offending infrastructure exceeded the servitude area on the Applicant's property. The Applicant contacted Eskom's offices during early March 2012 to advise Eskom that the offending infrastructure had been unlawfully erected. On 9 March 2012, Ms Martie Heynecke ("Heynecke"), of Eskom's offices, telephoned the Applicant to discuss the matter. It is evident from the transcript of the recording of the Applicant's conversation with Heynecke, that the Applicant specifically advised Heynecke that the offending infrastructure exceeded the servitude over his property, that Heynecke understood this and arranged for representatives of Eskom to go to the Applicant's property for purposes of verifying that the infrastructure has been erected unlawfully. I consider it necessary in this judgment to repeat the relevant portions of the transcript of the telephonic discussion between the Applicant and Heynecke which read:

[Heynecke]: "So, I think they said to me that you have a problem with the towers. You're not happy as to where the towers are placed. Is that correct?"

[Applicant]: "Yes".

[Heynecke]: "okay. And what are there? Are there any other problems from that?"

[Applicant]: “With one tower I’m pretty happy, but I’m not happy with the way they’ve put the towers next to each other and it’s going to be spread over that servitude. I don’t believe that’s right”.

[Heynecke]: “So are you saying that we went out of our servitude area?”

[Applicant]: “Ja, I’m saying that that thing is past the legal, whatever you – the documentation that you guys have”.

[Heynecke]: “No, no but the thing is, there are 2 problems from what I can see: The one is that you don’t agree with the tower positions. The second is that you think that we place towers outside of our servitude area.”

[Applicant]: “No, what I am saying: You’re going outside of your servitude area according to the legal documents – yes”.

[Heynecke]: “Okay, so that’s why I’m saying to you Bruce will have to address the towers. He’s the engineer. I can’t do anything about that.”

...

[Heynecke]: “Ja, no. No I’m saying that I’m going to send him there with the engineering surveyor.”

[Applicant]: “Okay that’s fine.”

[Heynecke]: “Okay, just what I need to ask as well. Will you provide us with all the Eskom documentation – the deed of servitude and everything, I suppose?

[Applicant]: “Ja, well you must remember: I’ve just bought this property.”

[Heynecke]: “Ja so she never gave you the information.”

[Applicant]: “Oh, she gave me the information. She gave me – she really had it – she even agrees. She says that they’re going outside of that documentation. We spoke to Bruce and he kind of agreed at the end of the day that that’s it.”

[Heynecke]: “He agreed? Yo,yo,yo. Okay, because if we did go out, that’s huge issues.”

[13] In the discussions that followed, the Applicant and Heynecke made arrangements for Eskom representatives to visit the Applicant’s

property in order to verify that the offending infrastructure is outside the ambit of the servitude. The Applicant contends that it is clear, therefore, that Eskom had been aware of the illegality since March 2012, but had failed to take steps to remedy the illegality, despite having been advised of it, by the Applicant, at this time. Eskom, however, denies in a supplementary affidavit, filed on 13 February 2013, that it was aware of the illegality since March 2012. It alleges, in this regard, that Mr Bruce Ntshuntsha (“Ntshunsha”), a senior electrical engineer on the project admitted that the Applicant expressed the view that the erection of the two H-pole structures side-

by-side would be outside the area of the servitude, but that Ntshunsha did not agree with the Applicant's understanding of the servitude, and made this clear to him. However, it was only when consulting with counsel that he "changed his mind". Whilst this may be so, neither Ntshunsha's nor Heynecke's confirmatory affidavits have been attested to and commissioned, and their respective versions are, therefore, not properly before the court. In the circumstances, I am compelled to the conclusion that Eskom was aware as far back as March 2012 that the H-pole infrastructure was erected outside the ambit of the servitude.

[14] The contention advanced by the Applicant is that even after 10 September 2012, when Eskom admitted that it had acted unlawfully, it failed to develop a workable and reasonable plan to relocate the infrastructure so that it fell within the servitude. Inexplicably,

Eskom continued to resist the Applicant's requests to be provided with detailed design drawings that Eskom claimed were the basis of its proposal to remedy the illegality. On Eskom's own version it received a proposal from a third-party company,

Structatcom (Pty) Ltd ("Structatcom"), on 28 September 2012 to relocate the offending infrastructure, however, it waited for over a month until 31 October 2012 to appoint another third-party company, Trans-Africa Projects ("Trans-Africa"), to prepare the design for the revised infrastructure. On 7 November 2012, this proposal was put to the Applicant's

attorney. Inexplicably, however, the proposal failed to remedy the illegality in that the proposed structured remained outside of the servitude area.

[15] Eskom alleges that, on 11 November 2012, Trans-Africa reverted with a revised design and provided Eskom with a revised proposal for both a temporary and permanent solution to remedy the illegality. In this regard, Eskom states that Structacom prepared "detailed drawings" of the proposed new design on 13 November 2012. Curiously, however, and without any explanation, Eskom claims that whilst Structacom has prepared these detailed drawings, Eskom had not been provided with them and has instead only been provided with a "general arrangement". These detailed drawings have not been sent to the Applicant, nor have they been placed before the Court.

[16] On 4 December 2012, approximately three weeks after the alleged completion of the detailed design drawings, Eskom's representatives met with the Applicant's legal representative and provided "concept drawings" relating to the proposal to remedy the illegality. The concept drawings did not enable the Applicant's attorneys to assess whether, this time, the proposal did in fact cure the illegality. Eskom was advised that the Applicant required detailed design drawings before the Applicant could agree to any proposal.

[17] Notably, it was only when the Applicant launched this application that Eskom crafted its proposal. This proposal has now been

supplemented by a revised proposal in terms of which Eskom's design engineers have altered one aspect of its original proposal,

relating to “body extension” to remedy the illegality. Eskom’s revised proposal appears from Eskom’s supplementary affidavit dated 11 February 2013. The Applicant, however, contends that both the original and the revised proposals are fundamentally flawed and unworkable, as Eskom has failed to get the necessary environmental and regulatory approvals, an issue which I will return to later in the judgment.

#### Lis alibi pendens

- [18] A further defence raised by Eskom is that the court is precluded from hearing this application on the basis of the doctrine of lis alibi pendens. Eskom contends, in this regard, that the relief sought by the Applicant in these proceedings is “identical relief” based on an “identical cause of action” in the review proceedings, and on this basis the application should be rejected. The requisite elements for the application of lis alibi pendens are well established. A party raising the defence must demonstrate that the institution of further proceedings between the same parties related to the same cause of action.[1] If it is demonstrated by the party raising the defence that these elements are met, the onus shifts to the party who instituted the proceedings to persuade the court to exercise its discretion to hear the second matter on the basis that the balance of equity and convenience favour the adjudication of the second dispute.[2] A plea of lis alibi pendens is thus available to a defendant or respondent who can show that there are pending proceedings[3] involving the same parties[4] based upon the same cause of action[5] and in respect of the same subject-matter (although the form of relief need not be the same).[6]
- [19] It is not in dispute that there is pending litigation involving the same parties and regarding the same subject-matter. The Applicant, however, submits that the relief sought and the causes of action in the current application are not identical to those in the review application. Eskom maintains, however, that the Applicant’s contentions are unfounded because in his amended notice of motion in the review application, the Applicant seeks an order declaring that the pylons and lines are not within the ambit of the servitude, and in the present proceedings the Applicant seeks the same order. Eskom points out that although, in the present application, the identical assertion is made, the Applicant seeks to deflect this issue by contending that the basis of the present application relates to the order agreed to between the parties (the contempt application), and the Applicant’s vindicatory property rights.
- [20] The Applicant argues that in order for Eskom to establish the defence of lis alibi pendens, it would have to demonstrate that the present application was concerned with the lawfulness of the decision of Eskom to commence and implement of the new power line – matters in issue in the review application. Eskom, however, contends that whilst the lawfulness of the commencement and erection of the structures is indeed in issue in the review application, there are additional

issues, in particular whether it has erected the structures outside the servitude area, which have not been raised in those proceedings.

It argues that in respect to prayers 1 and 3 of the current application, the Applicant's cause of action is based upon his

ownership of the land, and that similarly the alternative relief sought in prayers 6 and 7 of the amended notice of motion, in the review application, is also based upon the applicants' ownership of the land. Eskom also argues that in both cases the Applicant contends in essence that he, qua owner, is not obliged to suffer Eskom's structures on his land, yet in law he can only claim that he is not allowed to suffer the presence of such structures outside of the servituted area. In addition, Eskom contends that in respect of prayer 2 of the notice of motion in the present application, which is directed at finding Eskom in breach of the court order, the applicants have raised the same argument i.e. that Eskom was in breach of the court order in the review application. On this basis, Eskom submits that the relief sought in both cases is the same; the allegations made in support of such relief in both cases are the same; and the causes of action in both cases are the same.

[21] The Applicant contends that Eskom's reliance on the defence of *lis pendens* is entirely misplaced because the basis for the present application related to: (a) the order agreed between the parties – and it is Eskom's breach of this order that has given rise to the present applicant; and (b) the Applicant's right to the vindication of his property. I agree with the Applicant that in order for Eskom to succeed in establishing the defence of *lis alibi pendens*, it would need to establish that this court has been called upon, in this application, to determine the lawfulness of the commencement and implementation of the new power line – matters in issue in the review application. The question as to whether or not Eskom has acted unlawfully in erecting the infrastructure, on the Applicant's property, is not at issue in this application

- not least of all because Eskom has admitted as much. The issue in this application is rather Eskom's purported conduct in breaching the terms of the court order, by failing to remove the unlawful infrastructure from the Applicant's property.

[22] The relief sought in the present application arises from the Eskom's failure to comply with the order made by agreement between the parties. As is the case in the review application, the relief sought in the current application does not concern the decision of Eskom to commence and implement the new power lines. In prayers 6 and 7, respectively of the notice of motion in the review application, the applicants seek declaratory relief that the pylons and lines, which have been erected by Eskom on their properties, or which traverse over their properties, are not within the ambit of servitudes 344/1958 and 532/1955, and mandatory relief that Eskom be directed to remove from the applicants' properties the pylons, structures, foundations, cables, wiring or any other component pertaining to Eskom's projects. Prayers 6 and 7 of the notice of motion, in the review application, are alternative prayers to the relief sought in prayer 5 thereof, in terms of which the applicants,

in that application, seek a declarator that the servitudes in question are void for vagueness, on the basis that they do not exactly prescribe the width of the servitudes in relation to the extent of the area, afforded to Eskom, for erecting pylons and lines on or over the applicants' properties. However, in the current application the Applicant seeks declaratory relief that the offending infrastructure, which has been erected on his property, falls outside the ambit of the relevant servitude 532/1955, and an order directing Eskom to remove the offending structures.

- [23] Eskom has admitted that the H-Pole structures have been erected outside the ambit of servitude area. The admission is tantamount to the resolution of the dispute in relation to the question of whether the infrastructure falls outside the ambit of the servitude or not. There is therefore no need for the court in the review application to make a determination on the dispute. In the circumstances, there is no possibility of another court deciding this issue, and arriving at a different decision from this court. In addition, the applicants in the review application seek to set aside the decision of Eskom to commence and implement the project, because it failed to obtain the necessary environmental and town planning approvals from the City of Johannesburg, none of which are in issue in this application. Accordingly, the court is not precluded by the doctrine of *lis alibi pendens* from hearing this application.

#### Interpretation of the order

- [24] I now turn to the primary dispute in this matter which concerns the interpretation of the order of 2 May 2012. The basic principles applicable to the construction of all documents are applicable to the interpretation of a court judgment or order[7]. In other words, the meaning has to be ascertained primarily from the language of the judgment or order as construed accord according to the usual rules. If on a reading of the judgment or order, its meaning is clear and unambiguous, no extrinsic facts or evidence are admissible to contradict, vary, qualify or supplement the order. But if any uncertainty emerges, the extrinsic circumstances leading up to the court's grant of the judgment or order may be investigated and taken into account in order to clarify it.[8] Where the court order records a settlement agreement the principles relating to the interpretation of contracts should also be applied to determine the meaning of the agreement.[9]
- [25] The Applicant submits that by virtue of Eskom's admission in its answering affidavit, in the review application, that it had erected the H-pole structures outside the ambit of the servitude, Eskom is in breach of the court order dated 2 May 2012. Eskom, however, maintains that notwithstanding the fact that its infrastructure has been unlawfully erected on the Applicant's

property, it is not in contempt, alternatively breach of the order since the order only applies to its conduct after 2 May 2013. The Applicant, no doubt, argues that Eskom's interpretation of the order is unsustainable, and directed at evading the relief sought by it since, on a plain reading of the order, it is clear that Eskom agreed that "at all times" it would ensure that the infrastructure

on the Applicant's property remains within the ambit of the relevant servitude. In addition, it argues that the alternative construction contended for by Eskom is illogical, as it would entail reaching the absurd conclusion that Eskom was obliged to act lawfully after 2 May 2012, but was not obliged to have done so before this date. The Applicant submits, in this regard, that the plain reading of the order is entirely consistent with the background facts, in term of which the Applicant drew Eskom's attention to the breach of the servitude in March 2012, prior to the conclusion of

the order. The Applicant points out that it was for this very reason, that it specifically included clause 1.1.4 into the order which provides that Eskom:

'will at all times ensure that the pylons, cables and all the infrastructure which it installs and utilises for purposes of the operation and erection of the rebuilt line are within the ambit of and strictly confined to the servitude area as set out in the

Notarial Deeds of Servitude which are applicable to each of the Applicants' properties, and that it complies strictly with the terms of such servitudes.'

[26] The Applicant argues that Eskom's contention that the order applied to future conduct is entirely implausible given that it is common cause that the only work that had to be conducted on the offending infrastructure, as at 2 May 2012, was the "stringing"

of power lines. No other pylons or power lines were contemplated on the new power line construction. Therefore, he contends that on any reading of the court order, it is clear that Eskom breached the Court order as Eskom concluded "stringing" the power lines over the Applicant's property (to the offending infrastructure) after 2 May 2012, thus perpetrating unlawful conduct after the conclusion of the order. Significantly, in this regard, the Applicant points out that Eskom agreed, in terms of the court order of 2 May 2012, to ensure that "the pylons, cables and all the infrastructure which it "installs and utilises" for the purposes of the operation and erection of the rebuilt line are within the ambit of and strictly confined to the servitude area, and "that it complies strictly with the terms of such servitudes".

[27] Eskom's principal contention is that it has not acted in breach of the order because the order only relates to future work on the new power line. In other words, Eskom claims that although the infrastructure remains unlawfully on the Applicant's property, it is only any work conducted on this infrastructure after 2 May 2012 that is caught by the order. Eskom finds support for this interpretation in the words "[Eskom] may continue to install power lines to the rebuilt pylons it has erected on the properties of the Applicants" which are recorded in the order, but recognises that it could only do so "subject to" certain conditions. Eskom points out, in this regard, that it had already completed the erection of pylons on the properties of the applicants, and that the right of Eskom to "continue" with the installation of the power lines was recognised in the Court order, but made subject to

certain conditions, which applied to the pylons, cables or infrastructure "which it installs". It contends that the

use of the present continuous tense “installs” in the court order is indicative of the fact that the event (the installation) will take place after the conclusion of the court order, i.e. in the future. Thus, it was only in the future, i.e. after it had decided to continue with the installation, and then proceeded to install, that it had to ensure that such installation was “within the ambit of, and strictly confined to the servitude area”.

[28] I agree with Eskom’s interpretation of the order. In my view, the use of the adverb “subject to”, suggests a relationship between two clauses implying that what appears in the first clause (that which is subject to) is subservient to that which appears in the second clause and means “under the condition that”. What this means is that the restrictions contained in paragraph 1.1.4 could only apply to the situation where Eskom exercised its

discretion or power by actually continuing to install power lines to the rebuilt pylons; it could only apply to future conduct, not past conduct.

[29] Significantly, prior to the court order, Eskom was entitled to erect the structures by virtue of the servitude. If it erected the structures outside the servitude, the Applicant would have been entitled to approach a court to have them removed. However, prior to 2 May 2012 there was no court order, so its obligation not to erect the structures outside the servitude could not have stemmed from a court order which did not exist. Thus, as contended for by Eskom, whatever the source of its obligation not to erect the structures outside the servitude area might have been, it was not and could not be the court order in question. Similarly, in my view, the words “at all times” in the order, cannot be interpreted to place an obligation upon Eskom to do anything prior to the coming into existence of the court order. Thus once the court order was granted, Eskom was obliged to act in accordance with it, but that obligation (to comply with the court order) stemmed from the order itself. Thus, if any reliance at all is to be placed on the Applicant’s interpretation of the order, it would have to demonstrate that the parties had agreed upon the inclusion of some form of mandamus to remove the structures or to remove what had already been done. Without expressly including such mandatory relief in the court order, the court order cannot have retrospective application. The interpretation advanced by the Applicant is absurd and illogical, as there is, after all, nothing in the order which compels Eskom to do anything (i.e. there is no mandamus) – it only restricts Eskom from doing certain things where it chooses to continue with the installation.

[30] Paragraph 1.1.5 of the order records that the rebuilt line was between 80% and 90% complete. The Applicant’s interpretation of the order as applying to both past and future work on the project, will thus render this paragraph of the order meaningless. It is clear on reading paragraph 1.1.4 of the order, in the context of the whole order itself, that the order governs future conduct as it is not formulated as a mandamus to compel the removal of work already done. I am of the view that the order is clear and unambiguous. There is therefore no need to have regard to extrinsic evidence. In the premises, I find that Eskom is not in breach of the court order of 2 May 2012.

[31] Leaving aside the court order, however, Eskom has repeatedly admitted that it has erected the H-pole structures outside the ambit of the width of the servitude. In view of Eskom's admitted unlawful erection of its H-pole structures, it has no right to the continued presence of these structures on the Applicant's property that fall outside the ambit of the servitude. The Applicant is therefore entitled, as owner, to have those structures that fall outside the ambit of the servitude removed immediately. There can be no dispute in the present application that the requirements for vindicatory relief have been established by the Applicant: (a) he is the owner of the property in question; (b) the property remains in existence and is clearly identifiable; and (c) Eskom remains unlawfully on his property. It follows that the Applicant would be entitled the relief sought in prayer 3 of the notice of motion directing Eskom to remove the offending infrastructure and lines connected thereto from the Applicant's property.

[32] Although Eskom has repeatedly, on the papers, acknowledged that the structures erected by it were constructed outside the ambit of the servitude, and that it is liable to remove them, it contended for the first time at the hearing of the matter, that it is difficult to discern what portion of the infrastructure is within the ambit of the width of the servitude, and what is outside. The argument thus advanced by Eskom is that the court should not grant the order sought by the Applicant, in prayer 3 of the notice of motion, for the removal of the offending structures because it would amount to a *brutum fulmen*. I find this submission to be most disingenuous as Eskom has repeatedly admitted that the H-Pole structures fall outside the ambit

of the servitude. It begs the question: how was Eskom able to ascertain this if the portion that falls within the ambit of the servitude is not discernable from that which falls outside?

#### Alleged prejudice and Eskom's proposal

[33] Eskom seeks to persuade this Court to exercise its discretion in favour of refusing to grant the Applicant the relief he seeks on the basis that consumers of electricity in the area may suffer prejudice as a result thereof. The Applicant contends that there is no basis for this contention, as paragraph 3.4 of the court order makes clear that Eskom has waived its right to raise such an argument. Paragraph 3.4 of the court order reads:

'[Eskom] waives and abandons its right to argue in these or substituted or related proceedings that the fact that the installation of the infrastructure and lines by it on the properties of the Applicants (and/or cost which [Eskom] has incurred in installing such works and/or the inability to supply electricity as a consequence Honourable Court should not declare such infrastructure and lines to be unlawful and/or that such infrastructure and lines should be removed.'

[34] I agree with the contention advanced by the Applicant. Paragraph 3.4 of the court order is clear and unambiguous. It records Eskom's waiver of its right to argue that the fact of installation of the lines and the costs associated therewith, and the impact which its removal would have on its ability to supply electricity should constitute a reason why this Court cannot declare such infrastructure and lines "to be unlawful" and order its removal. Eskom

contends that paragraph 3.4 of the court order was designed to ensure that it does not proceed with the installation and then later, at the hearing of the review application, argue that the process had already been completed or substantially advanced making it impractical and undesirable for the Court to order the removal of the unlawful structures. It argues that this was foreshadowed in the letter from the applicant's attorney, dated 27 April 2012 (Annexure E to the first respondent's affidavit in the review application) in which he stated thus at paragraph 2.3.2:

'[I]f the applicants succeed with Part B of the application [i.e. in respect of the review and setting aside of the decisions of the respondent], no regard should be had to the consequences of the interim arrangement for purposes of determining appropriate final relief. It is untenable for our clients to agree to a compromise only to have the compromise used against them in subsequent proceedings.' (own emphasis)

[35] Eskom accordingly submits that the purpose of paragraph 3.4 of the court order is clear from the abovementioned passage, as applying only to the review proceedings, and as such has no application to these proceedings. I am unable to agree with Eskom's

submission, as the application of the waiver clause in paragraph 3.4 of the court order is not limited to the review proceedings. As is apparent from the express inclusion of the words "in these or substituted or related proceedings", the waiver clause has application not only to the review proceedings but also to "any substituted or related proceedings". The current proceedings are "related proceedings". Eskom is accordingly disallowed from contending, in these proceedings, that the removal of the infrastructure and power lines installed by it on the Applicant's property, and the costs which it has incurred in installing such works and/or the inability to supply electricity as a consequence of such removal, in terms of the interim arrangement, is a reason why the court should not declare such infrastructure and lines to be unlawful and order that such infrastructure should be removed. The waiver clause 3.4 of the order is clear and unambiguous, and the court considers it inappropriate in the circumstances have regard to extrinsic evidence.

[36] In any event, I find Eskom's claims regarding potential prejudice to be at best speculative. The gist of Eskom's

argument, in this regard, is that in the event of a fault occurring on the Crowthorne-Lulamisa or Lulamisa- Noordwyk lines, it is able to restore access to electricity "within no more than a few hours" on the basis that the lines operate as back-ups for each other, but if no such back-up exists (which may occur if it is ordered that the infrastructure is to be removed from the Applicant's property) then it may take Eskom longer to rectify the fault, and consequently consumers may face longer periods without electricity.

[37] It is not Eskom's case that the removal of the offending infrastructure would result in Eskom being unable to deliver

electricity to consumers. The prejudice contended for by Eskom is that if this court orders the removal of the offending infrastructure, and in the event of a fault on the Crowthrone - Lulamisa or Lulamisa - Noordwyk line, it may take longer to restore the electricity than if the infrastructure was not relocated immediately. Even if consumers may suffer prejudice in that they may lose electricity supply for a period whilst Eskom remedies a fault, I am of the view that this cannot be a reason to deprive the Applicant of the relief he seeks, particularly where it was agreed to by the parties, and which agreement was made an order of court that it will

not argue potential prejudice to others or itself, if it were required by a court to remove the illegally erected structures. To do so, in my view, would be to countenance Eskom's unlawful conduct – which it has repeatedly admitted – and

prevent the Applicant from vindicating his property rights.

Eskom's proposal

[38] The last defence raised by Eskom is that it has developed a proposal to remedy the unlawful presence of its infrastructure on the Applicant's property and, coupled with this, that the impact of removing the infrastructure immediately may result in prejudice to other consumers of electricity in the area – rendering it undesirable for the court to grant the Applicant the relief which he seeks. Eskom alleged in its answering affidavit that “new structures” can only be installed on the Applicant's property at the end of October 2013 to replace the offending infrastructure. However, the Applicant contends that Eskom's proposal is fundamentally flawed and therefore unviable for the following reasons:

- (a) Eskom is obliged to obtain regulatory approvals for the proposal (such as, for example, environmental authorisation, zoning approval and building approval) - processes that typically take many months; and
- (b) Eskom will require permission from the Applicants neighbours who are unlikely to provide their consent given that the proposed new structures will be larger than the existing structures situated on their respective properties.

[39] Other than to allege that the dispute regarding “[its] alleged failure to obtain any of the required regulatory and other consents required in order to construct the new power line, is present before the court in the [review] application”, Eskom does not dispute that its proposals are flawed and thus unviable for failure to obtain the requisite regulatory approvals. This notwithstanding, it alleges in its answering affidavit, which was filed on 6 December 2013 that it can only replace the illegal structures by the end of October 2013 , alternatively that the court give it four months to install the new structures.

[40] Having regard to the fact that Eskom has specifically failed to dispute the flawed nature and unviability of its proposals for failure to obtain the requisite regulatory approvals, I am of the view that the Applicant is entitled to the relief sought in prayers 1 and 3 of its notice of motion in the current application. However, in line with Eskom's allegation in its answering affidavit, that it will only be in a position to replace the offending structures by the end of

October 2013, and to extent that Eskom is indeed in a position to do so, having obtained the requisite regulatory approvals, I deem it fair and just to allow Eskom a period of 30 days from date of this order to remove the offending infrastructure and install new infrastructure.

[41] In the result, I make the following order:

- (1) It is declared that the “H pole” structures (“the offending infrastructure”) and the power lines connected

thereto which have been erected on the Applicant’s property, portion 475 of the farm Witpoort No.406, Registration Division JR, Province of Gauteng, in extent 2.7031 hectares and held by the Applicant in terms of Deed of Transfer No. T25186/2012, by the

Respondent fall outside the ambit of the relevant servitude as set out in the Deed of Servitude No. 532/1955.

- (2) The Respondent is ordered to remove the offending infrastructure and the lines connected thereto from the Applicant’s property within thirty days of the order of this court.
- (3) The Respondent is ordered to pay the Applicant’s costs, which costs are to include the costs consequent upon the employment of two counsel.

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F KATHREE-SETILOANE

JUDGE OF THE NORTH GAUTENG

HIGH COURT, PRETORIA

Counsel for the Applicant: RA Bhana SC assisted by M du Plessis, A Coutsoodis and L Kelly

Instructed by: Nortons Inc

Counsel for the Respondent: FH Odendaal SC assisted by GI Hulley

Instructed by: Cliff Dekker Hofmeyr Inc

Date of Judgment: 11 October 2013

[1] Osman v Hector 133 CPD 503; Painter v Strauss 1951 3 SA 307 (O); Mtshali v Mtambo 1962 3 SA 469 (GW); Williams v Shub 1976 4 SA 567 (C); Richetsveld Community v Alexkor Ltd 2001 4 ALL SA 563 LCC)

[2] Loader v Dursot Bros (Pty) Ltd 1964 2 SA 167 ( O); Friedrich Kling GmbH v Continental Jewellery Manufacturers; Guthmann and Wittenauer GmbH v Continental Jewellery Manufacturers 1993 3 SA 76 ( C) 83; Sikatele v Sikatele 1996 1 All Sa 445 (Tk); Ntshiq v Andreas Supermarket (Pty) Ltd 1997 1 SA 184 (Tk). For an example of factors taken into account in the exercise of the discretion: Van As v Appollus 1993 (1) SA 606 ( C) .

- [3] Van As v Appollus 1993 (1) SA 606 (C )
- [4] Marx and Kantor v Van Diggelen 1935 TPD 29
- [5] Nestle (South Africa) (Pty) Ltd v Mars Inc 2001
- (4) SA 542 (SCA)
- [6] Williams v Shub 1976
- (4) SA 567 (C )
- [7] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012
- (4) SA 593 (SCA) at 603F- 604E
- [8] Firestone SA (Pty) Limited v Genitiruco AG 1977
- (4) SA 298 (A)
- [9] Engelbrecht v Senwes Limited 2007
- (3) SA 29 (SCA) at 32

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