

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

10487/2008

DATE:

8 SEPTEMBER 2008

5 In the matter between:

ESKOM HOLDINGS LIMITED

APPLICANT

versus

LEONARDO DORFLING N.O.

1st RESPONDENT

ABRAHAM SWERSKY N.O.

2nd RESPONDENT

10 GISELA WEINMANN

3rd RESPONDENT

JUDGMENT

BOZALEK J

15 For many years the applicant herein, Eskom Holdings Limited, has run a power line or power lines across a certain property in the George Municipality known as the Remainder of the Farm Plattekloof No. 131. Its rights to do so have been secured by a series of servitudes over the property, the last one having been registered in July 2005 following an agreement reached between the registered owner of the property and the applicant.

25 The present owner of the property is the Leon Dorfling Family Trust. First and Second Respondents were, at the material time, the trustees of the trust and were cited in that capacity.

Third Respondent represents the other respondents and manages the affairs of the trust.

Since 2005 applicant has, from time to time, performed work on the property either directly or through its contractors with a view to erecting a new power line or lines to replace an existing power line which applicant states has been inadequate for applicant's purposes and which has also physically degraded. Over this period, however, at least two major disputes have arisen between the present registered owner and the applicant regarding the extent of applicant's rights under the servitude and the manner in which it has exercised these rights. Both disputes have led to litigation, namely the present matter, and earlier application proceedings in 2006 which were dealt with by Davis J in a series of judgments.

In May and June this year, applicant's servants and contractors intensified their work in erecting a new power line at the property. However, disputes again arose between it and the owner on a variety of issues, but principally on the scope of applicant's servitudinal rights and thus the work that it was permitted to do on the property. Despite meetings and much correspondence being exchanged, these disputes could not be resolved and on several occasions applicant's employees and/or its contractors were prevented by the owner from

entering onto the property to pursue their work. Accordingly, in late June this year, applicant brought an urgent application seeking to secure its appropriate access to the property. The substantive relief initially sought was a rule *nisi* in the

5 following terms:

1. Directing the first and third respondents to forthwith grant the applicant, its employees or any contractor or person appointed by the applicant access to and over
10 the property...for the purpose of exercising its rights under a notarial deed of cancellation and registration of servitude number K 673-2005.

2. Interdicting and restraining the First and Third
15 Respondents from in any manner impeding access to and over the property by the applicant, its employees or any contractor or person appointed by the applicant for the purpose of exercising the applicant's rights under the notarial deed.

20 A rule *nisi* was obtained on the 2 July 2008 and thus the matter came before me on the return day of the rule. In the intervening period respondents filed a lengthy opposing affidavit and the applicant replying affidavits with the result that the papers comprise some 650 pages, much of it detailed
25 annexures. Both parties filed comprehensive heads dealing

with a variety of legal and factual issues. In the view I take of the matter, however, much of the factual material put before the court is irrelevant because the essential dispute can be disposed of on the facts which are common cause or which are not disputed. Likewise, many of the legal issues raised in the papers and in the heads do not need to be addressed.

Although the application, on the face of it, concerns access to the property, the underlying and core issue is whether applicant's servitudinal rights allow it to erect a power line or lines within a 31 metre zone, as is contended by the respondents, or whether it has the right to do so within a 62 metre zone, as is contended by the applicant. The answer to this question lies, in my view, solely on the interpretation of the terms of the servitude. Furthermore, and no doubt because the respondents' refusal to allow the applicant onto the property from time to time stemmed directly from the dispute between the parties on the aforesaid issue, Mr Schippers, who appeared on behalf of applicant, correctly conceded that if his client's interpretation of its servitudinal rights did not prevail then it could not succeed in this application.

Most of the terms of the servitude required to be set out for the purposes of this judgment and they read as follows insofar

as they are relevant:

"In terms of an agreement entered into by the parties on 13 September 2004:

5 (a)...

(b) the owner hereby grants to Eskom for itself, its successors, assigns or licensees

10 A. A perpetual servitude of electric power transmission 31 metres wide over the property, subject to any existing servitude or other real right, to convey electricity across the property by means of 2 (two) overhead power lines each consisting of conductors, cables and/or appliances mounted on poles or structures with such structure supporting mechanisms as may be necessary or convenient; and

15

B. A perpetual servitude for telecommunication and other related purposes over the property substantially along the route referred to in A above, by means of conductors, cables and/or appliances mounted on poles and/or structures with such structure supporting mechanisms as may be necessary or convenient; (hereinafter together with the

20

25

restriction area referred to in 3.1, referred to as the "Servitude Area")

1. The servitude/each of the servitudes shall include the following-

5 1.1 the right to erect such structures and works
on the property or to erect or lead such
conductors, cables, appliances or other
equipment on or over the property as may be
necessary or convenient in exercising the
servitude;

10

1.2 the right to enter and be upon the property at
any time in order to construct, erect, operate,
use, maintain, repair, re-erect, alter or inspect
the structures, works, appliances, conductors,
or cables on the property or in order to gain
access to any adjacent property in the
exercise of similar rights;

15

1.3 the right to use existing roads giving access
to the property or roads running across the
property and gates on the property and to
erect in any fence such gates as may be
necessary or convenient to gain access to or
egress from the property and to gain access
to any power line, telecommunication
conductors, cables or accessory equipment;

20

25

1.4 the right to remove any trees, bush, material, grass or structures within the restricted area defined in clause 3 hereof and the right to cut or trim any tree in order to comply with the restrictions referred to in clause 3 hereof;

1.5 the right to utilise various conductors, installations and apparatus in the servitude area for radio and/or microwave and telecommunication and other related purposes.

1.6 every ancillary right necessary or convenient for the proper exercise of the servitude to convey electricity across the property and for telecommunication purposes.

2. Eskom shall exercise its rights subject to the following terms and conditions-

2.1 Eskom shall ensure that any gates used by it are kept closed.

2.2 Eskom shall pay compensation-

2.2.1 Where damage is caused intentionally to any property by Eskom, its employees or contractors, to enable Eskom to use or to continue to use the servitude area for its intended purpose, or

2.2.2 Where damage or injury is caused by any

negligent act or omission on the part of Eskom, its employees or contractors.

2.3 No compensation is payable for damage to natural vegetation and also not for damage to crops, orchards, vineyards or planted crops or trees within the servitude area.

3. With regard to the owner, the following special restrictions are placed on the use of the property/properties namely-

3.1 No building or structure may be erected or installed above or below the surface of the ground within 15.5 (fifteen comma five) metres of the centre line of any power line or within 6 (six) metres from any structure supporting mechanism;

3.2 No trees shall be planted within the servitude area nor be allowed to grow to a height in excess of the horizontal distance of that tree from the nearest conductor of any power line or to grow in such a manner as to endanger that line should it fall or be cut down;

3.3 No material which may in the opinion of Eskom endanger the safety of any power line shall be placed within 15,5 (fifteen comma five) metres of the centre line of any power

line;

3.4 No mining activities or blasting operations shall be carried out within 500 metres of the centre line of any power line, without the prior written permission of Eskom.

4. Eskom shall have the right to:

4.1 let any portion of the servitude area and/or any of the installations and apparatus thereon to any third party on such conditions and uses

10 Eskom may deem fit;

4.2 cede or alienate all or any of the rights granted in terms hereof to any third party, be it before or after exercising of the option before or after registration of the servitude in the relevant deeds office.”

15

Mr Schippers, for the applicant, contends that the servitude, from a size point of view, consists of the 31 metre corridor referred to in clause A plus the restricted area referred to in sub-clause 3.1. That sub-clause provides that the owner may not erect or install any building or structure within 15,5 metres of the centre line of any power line. Thus, by presupposing that there will be two power lines placed at the extremities of the 31 metre zone and adding 15.5 metres on each side, it is

25 contended on behalf of the applicant that the total width of the

servitude corridor amounts to 62 metres. Within this area, submits Mr Schippers, applicant may exercise fully its rights under the servitude including the right to erect poles or structures, if necessary with structure supporting mechanisms.

5 For this interpretation of the servitude Mr Schippers relies on a number of textual points. Chief amongst them are, firstly, the phrase:

“hereinafter together with the restriction area referred to in 3.1, referred to as the “Servitude
10 Area”.

This definition, it is contended, makes it plain that the total size of the servitude corridor is 31 metres plus 15.5 metres x 2, i.e. a total of 62 metres.

15 In further support of this contention applicant invokes the provisions of clauses 3.1 and 4.1. Clause 4.1, it is said, similarly makes it plain that applicant has the right to erect installations and apparatus on the entire, i.e. 62 metre wide servitude corridor. Clause 3.1, it is said, also indicates that
20 applicant may build or erect structures outside the 31 metre zone, otherwise the 6 metre restriction, being less than the 15, 5 metre restriction, would serve no purpose.

Mr Schippers relied also on sub-clauses 1.1 and 1.5 read with
25 clause A. He submitted that clause A is descriptive of, but not

exhaustive of the applicant's servitudinal rights. Sub-clauses 1.1 and 1.5 with their respective references to "structure and works on the property" and "installations and apparatus in the servitude area" serve to illustrate that the applicant's construction rights, if I may call them that, are not limited to the 32 metre corridor.

On behalf of the Respondents, Mr Borgstrom contends for a much more restricted interpretation of the geographical extent of applicant's servitudinal rights, namely, that the servitude, as a whole, creates two zones, an inner and outer one. Within the inner zone, a corridor of 31 metres, the applicant may erect the pylons, structures and their supports which carry the power line or lines, but these structures or supports may not encroach outside this corridor. In what I shall refer to as the outer zone, this extending 15.5 metres from the centre line of any power line, as envisaged by clause 3.1, applicant enjoys more limited rights, mainly, but not exclusively, of a negative nature, namely, to enforce upon the owner of the servient property the obligations imposed upon it in terms of sub-clauses 3.1 to 3.3. Within this outer zone, however, applicant also enjoys the positive rights set out in sub-clauses 4.1 to 4.2.

In my view, the interpretation contended for by the respondents is the correct one and must be preferred over applicant's interpretation for a number of reasons. In the first place, on an overall reading of the servitude, such an interpretation emerges as the obvious and logical one whereas the interpretation favoured by the applicant is not supported by either the structure or wording of the servitude. Clause A establishes what appears to be the primary servitude, one of the electrical power transmission, and immediately limits it to a corridor of 31 metres. If its extent was in fact, or could extend to, 62 metres, one would expect this to be clearly stated rather than the expression of an immediate and misleading limitation to 31 metres.

Secondly, clause A in no way stipulates that the two power lines envisaged must be 31 metres apart, a configuration which applicant relies on as extending the size of the servitude corridor. Indeed, one would regard it as well within the applicant's rights to merely erect one line should it see fit. At the very least, it could erect the two lines closer to each other than 31 metres if it saw fit. Thus the respondents' interpretation accords with an inner zone of 31 metres in width and an outer zone, the width of which will depend upon the location of the structures erected, but which cannot exceed 62 metres.

The location in the text of the phrase defining the "servitude area" immediately after the setting out of the two servitudes in clauses A and B is, in my view, telling. It serves to delineate the geographical area established in clause A and clause B from another separate zone, which it terms the "restriction area."

It then follows naturally that different rights and obligations apply in that separate zone, namely, the "restriction area." Having these two areas together and defining them as the "servitude area" does not, in my view, come close to stipulating that the same rights and obligations will apply in the entire zone. When that term, the "servitude area", is tracked through the balance of the servitude it appears four times, in clauses 1.5, 2.3, 3.2 and 4.1. In no instance does its use compel the meaning that applicant is entitled to exercise the sum total of its rights outside the 31 metre inner zone.

Neither do I consider that sub-clauses 1.1, 1.5, 3.1 or 4.1 necessarily support the interpretation contended for by applicant. Clause 4.1 is equally capable of the meaning that any installations or apparatus in or on the servitude area are limited to the inner zone. Clause 4.1 serves a subsidiary purpose within the servitude as a whole. It would be surprising if this sub-clause does much of "the work" of establishing the width of the servitude corridor. Similar

considerations apply to applicant's reliance on the Clause 1.5.

Similarly, clause 3.1 is easily capable of the interpretation that the 15.5 metre and 6 metre restrictions establish the outer
5 limit within which the owner may not encroach upon the centre line of a power line or upon structure supporting mechanisms whichever distance is the greater. The applicant's reliance on sub-clause 1.1 is also misplaced in my view. If given its literal
10 meaning, it affords applicant the right to erect structures anywhere on the farm whether outside the servitude corridor or not. Clearly, this is a subsidiary clause which must be read subject to clause A.

It must further be borne in mind that the servitude does not
15 purport to stipulate where within the 31 metre zone the power line or lines will be situated and thus the limits or reach of the 15,5 buffer zone on either side of the centre line of such power line or lines.

20 The restriction area is, therefore, more logically not a fixed width. It may very depending upon the configuration of the line or lines within the inner zone. This would accord, furthermore, with economic sense since a constant 62 metre wide zone would potentially entail greater financial
25 compensation to the landowner.

The concept of the two zones, where the rights and obligations differ markedly, has the additional merits of practicality and logic. Within the inner zone the applicant has a right to erect and construct. In the outer zone, its rights are limited to ensuring that no conditions are allowed to develop which may threaten the integrity of its power lines and supporting structures.

What is of decisive weight in determining the correct interpretation of the servitude is the established principle that a servitude agreement must be interpreted strictly and in a manner least burdensome to the owner of the servient tenement. See Pieterse vs Du Plessis 1972 (2) S.A. page 597 and 599 (g) to (h). This principle is subject to the qualification that the nature and extent of the burden must be determined according to the meaning given to the agreement in terms of which the servitude was created. If the meaning thereof is unequivocal, the court is not entitled to depart from it in order to bring about a lesser burden. See Van Rensburg en Andere vs Taute en andere 1975 (1), S.A. 279, (AD) 301H.

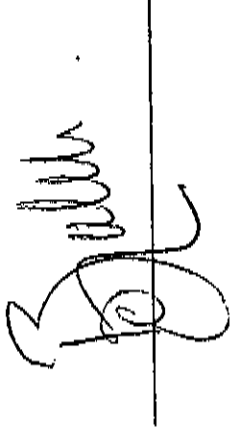
Mr Borgstrom sought to rely also on extrinsic evidence to buttress respondents' interpretation of the servitude, including four different interpretations of the servitude which the applicant had allegedly advanced in discussions. In my view,

it is not necessary to consider such evidence in order to establish the true meaning and reach of the servitude. Further, in my view, the interpretation contended for by the respondents is the clear meaning of the servitude and, as it happens, is considerably less burdensome to the servient tenement. It is common cause or not disputed on the papers that applicant is in breach of the respondents' interpretation of the servitude which, I find, is the correct interpretation thereof. This is so because the midpoint of the foundation works for the pylons or poles which the applicant has constructed are located at the perimeter of the 31 metre zone and therefore extend outside of that zone. In all probability the structures which are intended to be erected thereon will encroach even further outside the 31 metre zone. Mr Schippers thus correctly conceded that if applicant's interpretation of the servitude is rejected, it must fail in the overall application.

Mr Borgstrom contended, albeit rather faintly, for a finding by this court that in terms of the existing servitude the 31 metre corridor could only safely house the 132 kv line and not the two which the applicant is intent on installing. Such a finding is neither necessary for the determination of this matter nor desirable since that particular issue was, in my view, not adequately ventilated on the papers. All other issues in this matter, therefore, fall by the way.

The striking out application brought by applicant was resolved on the basis that, by agreement, and with no order as to costs, the contents of paragraphs 84 and the last sentence in paragraph 193 of the Third Respondent's opposing affidavit
5 are struck out.

In the result the following order is made. The rule *nisi* made on the 22 July 2008 is discharged and the APPLICATION AS A WHOLE IS DISMISSED WITH COSTS.

A handwritten signature in black ink, appearing to be 'Bozalek', is written over a horizontal line.

BOZALEK J