

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 10487/2008

DATE: 24 OCTOBER 2008

5 In the matter between

ESKOM HOLDINGS LIMITED

APPLICANT

and

LEONARDO DORFLING N.O.

1ST RESPONDENT

ABRAHAM SWERSKY N.O.

2ND RESPONDENT

10 GISELA WEINMANN

3RD RESPONDENT

JUDGMENT

(Application for Leave to Appeal)

15 BOZALEK J

The Applicant in this ruling seeks leave to appeal against my judgment handed down on the 8 September 2008, in fact, leave to appeal to the Supreme Court of Appeal.

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The grounds of the proposed appeal are set out in the notice headed, "Amended Notice of Application for Leave to Appeal" which is dated the 20 October 2008 and which I shall refer to as the amended notice.

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Those grounds relate exclusively to what I found was the sole issue in this matter, namely the meaning and scope of the servitude registered in favour of the applicant over respondents' property. Most of the arguments and points made by Mr Schippers on behalf of the applicant in arguing for leave have been dealt with in my judgment. To the extent that he raised any new points, these have not caused me to reconsider the correctness of the view which I took of the matter.

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The terms of servitude are, however, not crystal clear, there being a few textual indications that the width of the zone in which the applicant's primary servitudinal rights may be exercised may extend beyond the 31 metre corridor. This matter is one of heightened importance for the applicant, which obviously has servitudinal rights over numerous properties. Applicant's counsel, advised from the Bar that there are some 87 servitudes in similar terms.

20 In the circumstances, I am persuaded that there is a reasonable prospect that another court may arrive at a different view of the matter and that LEAVE TO APPEAL SHOULD THEREFORE BE GRANTED.

25 I am not persuaded, however, that it is appropriate for the

appeal to go in the first place to the Supreme Court of Appeal. Although there are few, if any, material factual disputes in this matter, the law component amounts to no more than the proper interpretation of the terms of the servitude.

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In these circumstances, I can see no reason why the appeal should not be dealt with by a full court of this Division.

There remains one further point. Mr Borgstrom, for the
10 Respondent, who opposed the granting of leave, asked that if leave be granted, it be limited to the grounds advanced in Applicant's notice of application or its amended notice. By way of example, he mentioned that the question of issue estoppel initially raised by Applicant but not pursued at the
15 hearing should not be one upon which the Applicant or Appellant could rely in the appeal.

Mr Schippers was quite adamant – in my view incorrectly so – that on appeal Applicant/Appellant could, as a matter of right, rely on any legal point notwithstanding that it was not argued or relied upon before this Court. I am aware of the principle that, where there is no prejudice to the other party, an abandoned legal point may be revived on appeal. See

Paddock Motors (Pty) Ltd vs Igesund, 1976 Volume 3, SA,

25 page 16, Appellate Division at page 23(d) to (h). This does

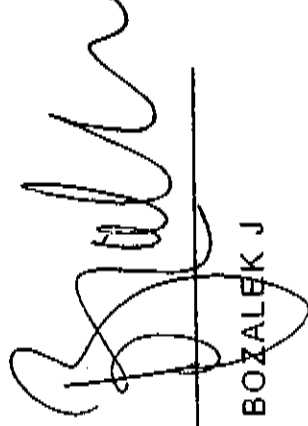
not mean, however, that the applicant has a right to argue any ground of appeal not covered by the terms of the leave as opposed to a "right" to ask the Court of Appeal to allow it to do so. See Ganes and others vs Telekom Namibia Limited 2004, Volume 3, SA, page 615 at (b) to (f). I make it clear then that I am granting leave to appeal on the grounds set out in the amended notice of application for leave to appeal.

The following order is made:

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1. Applicant is granted leave to appeal the decision to the full bench of this court on the grounds advanced in its amended notice of application for leave to appeal.
2. The costs of this application will be costs in the appeal.

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BOŽALEK J

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