

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH**

Case No.: 756/2017

In the matter between:

STAUFEN INVESTMENTS (PTY) LTD

Applicant

and

THE MINISTER OF PUBLIC WORKS

First Respondent

ESKOM HOLDINGS SOC LTD

Second Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Third Respondent

JUDGMENT

REVELAS J:

1. This is an application brought in terms of Rule 53 of the Uniform Rules of Court, to review and set aside a decision taken by the first respondent to expropriate certain rights over a portion of the applicant's farm, Nooitgedacht (or, the farm), in favour of the second respondent (Eskom), and with regard to an existing electrical substation on the relevant portion. The expropriation decision constitutes administrative action. Accordingly the application is also brought in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The applicant relies on several grounds of review under PAJA.
2. During November 2015 the applicant brought an application (the application for eviction) to terminate Eskom's occupation of the electric substation area which is approximately one hectare of Nooitgedacht presently occupied by Eskom, and has been so occupied for the last two decades by Eskom. The applicant also sought orders directing Eskom to remove all plant equipment and material from the substation area and to rehabilitate such area to accord with surrounding vegetation and topography, as well as an order directing Eskom to remove all five outgoing high voltage power lines on Nooitgedacht and to rehabilitate the land traversed by these lines.

3. The application for eviction was premised on the applicant's assertion, borne out to be correct, that Eskom's occupation of the substation area was illegal (the applicant termed it "unlawful") in that no servitude in respect of its use of a portion of Nooitgedacht was ever registered in the offices of the third respondent (the Registrar of Deeds, Cape Town). Eskom opposed the application and filed a counter-application seeking relief to the effect that an existing, but unregistered deed of servitude be registered.
4. On 15 April 2016, and by agreement between the parties, orders were made on the terms following terms:
 1. Eskom shall terminate its occupation of the substation area of approximately 1 hectare on the farmland to vacate the farm;
 2. all plant equipment and material shall be removed from the substation area and the area shall be rehabilitated to accord with the surrounding vegetation and topography;
 3. Eskom shall remove the five outgoing high voltage power lines on the farm and rehabilitate the surrounding areas traversed by such power lines to accord with the surrounding vegetation and topography. However, the

implementation of those orders (eviction orders) was suspended pending the finalisation of Eskom's application for expropriation of certain rights over the substation area. Consequently, in the event that the application for expropriation failed, the eviction orders would become operative immediately. Should the application for expropriation succeed, the eviction orders would fall away. Eskom was further ordered to bring its application for expropriation within a period of six months from the orders granted, but was given the right to approach this court for an extension of that period on good cause shown.

5. Eskom sought two extensions of the aforesaid period (one on application to this court and opposed by the applicant). It was also necessary for Eskom to launch an application to compel the first respondent to take a decision. After these and other delays the expropriation decision was taken on 30 September 2016. The application for expropriation submitted to the first respondent by Eskom was made in terms of section 26(1) of the Electricity Regulation Act¹ and the Expropriation Act². The first respondent's decision as communicated to Eskom read:

¹ Act 4 of 2006

² Act 63 of 1975

"Further to my letter dated 9 December 2015 and the Minister of Energy's recommendations contained in her letter dated 4 February 2010, I wish to confirm that Eskom Holding SOC Limited, that I have approved that the following servitudes (the extent of which appear more fully in SG Diagram No 1232/2014 dated 21 January 2015) across land being part of the farm Nooitgedacht 664, Uitenhage Registration Division, Eastern Cape Province, held under Title Deed T27811/2014 owned by Staufen Investments (Pty) Ltd:

- (1) An electrical substation in extent 10 000 square meters;*
- (2) The right to convey electricity over the property by means of 132kv and 22 kv overhead power lines; and*
- (3) A right of way (access road) 6 meters wide.*

An Independent Professional Valuer, Mr John Henry Boshoff of Jeffreys Bay, has finalized his assessment of the compensation payable to the property owner. This assessment will shortly serve before the Land Affairs Board (established in terms of the Land Affairs Act, 1987 to advise the State on the value of immovable property and the rights therein).

Once just and equitable compensation for the property rights has been determined, a notice of expropriation will be served on the property owner and all affected parties."

- 6. It is necessary to set out in some detail the history and background which preceded the present application.
- 7. The farm Nooitgedacht is 249,374 hectares in extent and situated about 10km from the town of Addo. It was purchased

by the applicant from a company called Amber Bay Investments 34 (Pty) Ltd (Amber Bay). The deponent to the applicant's founding affidavit, Mr Wallace Barnes, a farmer, was at all relevant times a director of Amber Bay and the applicant. Amber Bay had purchased Nooitgedacht from a Mr Lingenfelder in 2007. Mr Lingenfelder had purchased the farm in 2005 from a Mr Grundling who, in the same year, purchased the farm from a Mr Mr Hitge. Transfer of the farm from Amber Bay to the applicant took place on 11 October 2014.

8. The current proportions (249,3714 hectares) of Nooitgedacht was originally part of a farm described as portion 4 of farm 119, Nelson Mandela Bay Municipality, Division of Uitenhage, Eastern Cape Province (the original farm). This farm was owned by a Mr Hartman. The original farm measured 149, 8943 hectares and was held under title T30430/81. The original farm was sold to a Mr Hitge in 1991 and subsequently subdivided into three portions.
9. The first was portion 5 of the original farm. The second and third portions were consolidated with portions of surrounding farms to form the farms Nooitgedacht and Hitgeheim respectively, both owned by Mr Hitge, who bought the original farm from Mr Hartman in 1991. Portion 5 is owned by the State pursuant an

expropriation application and is used by the Department of Water and Sanitation and the Nelson Mandela Bay Municipality with regard to the Nooitgedacht Water Treatment Plant. Portion 5 abuts Nooitgedacht and 50% thereof is undeveloped. The significance of this property, in so far as the applicant is concerned, will become apparent later herein.

10. During 1997, Eskom began the construction of the electrical substation on the farm Nooitgedacht, when it was still owned by Mr Hitge. According to the applicant, it can be inferred that Eskom and Mr Hitge actually intended the substation to be constructed on Hitgeheim, and not Nooitgedacht. By the time the applicant bought the farm in 2014, the substation had been in existence on Nooitgedacht for seventeen years. The substation site occupies approximately 10 000 square meters (one hectare) of the farm and has a 132 kilovolt line providing electricity to it, and five 22 kilovolt lines which exit the substation and providing electricity, via its high voltage overhead power lines, to several farms, townships, and the National Addo Elephant Park.
11. After Amber Bay purchased Nooitgedacht, in 2007, it became evident that Eskom's legal entitlement to maintain a substation on Nooitgedacht was tenuous. Eskom first noticed that there

was an omission on the part of the land surveyor concerned to ensure that servitude rights were captured on diagram of the subdivided properties. Consequently the substation and power lines were not reflected on the diagram attached to the relevant title deed and the error was thereafter repeated in each subsequent transfer.

12. When the application for Eskom's eviction was in progress, the applicants attorneys instructed Mr Gerhard Joshua Britz, a conveyancer and property law specialist, to establish from the records of the third respondent (the Registrar of Deeds) in Cape Town, whether a notarial deed of servitude was ever registered, and if so whether it was endorsed against the title deed of the servient property (Nooitgedacht).

13. Mr Britz found that:

"A servitude K884/985 was endorsed on page 9 of the title deed No T77933/1991 of Portion 4 of the Farm 119 on the 4th of September 1998 in the following terms:

"Remainder

Kragtens serwituut K884/98S gedateer 3/2/97 is die binnegemelde eiendom onderhewig aan 'n reg van weg 6 (ses) meter wyd tgv ESKOM.

Soos meer volledig sal blyk uit gesegde Not Akte

Akteskantoor

KAAPSTAD

1998-09-04”

14. Mr Britz further found that the aforesaid original endorsement only records the servitude of a right of way (contained in paragraph 1 of the notarial deed of servitude K884/98S) and not the right to use an area of 1 240 spare meters in extent or the right to lead electricity on or over Portion 4 of the Farm 119 (contained in paragraphs 2 and 3 of the notarial deed of servitude K884/98S). The last mentioned two servitudes were not endorsed against the title deed of the servient land.
15. The omission to carry forward the reference to the last mentioned two servitudes was apparently due to a mistake or oversight. The endorsement in respect of the right of way servitude referred to above, was carried forward as a condition in all the subsequent title deeds, but the servitudes created in paragraphs 2 and 3 of the notarial deed of servitude K884/98S were not endorsed against or carried forward in any subsequent deed.
16. Mr Britz also established that a servitude K723/1999S referred to in paragraph II.D of the title deed of Nooitgedacht is a servitude in favour of the Republic of South Africa – thus the State, and therefore irrelevant insofar as Eskom’s rights are concerned.

17. In terms of K884/985, a right of way, 6 meters wide was granted to Eskom over the original farm. In terms of the same deed, Eskom had the right to lead electricity over the farm. The rights referred to, were purportedly derived from an option granted by Mr Hitge and purportedly exercised by Eskom on 27 September 1991. Eskom was unable to provide any proof that the option was indeed exercised. In terms of the written option, the option to acquire servitude would have lapsed in May 1992.
18. In its application for its eviction, Eskom relied on the option to register a servitude concluded with Mr Hitge and an alleged way leave agreement. Neither of these two agreements were registered and Mr Hitge never deposed to an affidavit to confirm that there were such agreements, as the applicant points out, the only right which Eskom ever enjoyed over the farm Nooitgedacht, was an undefined "reg van weg ses meter wyd" and at best gave rise to personal rights against a prior owner of the farm. Any such agreement allowed the respondent to use an area of 1240 square meters to construct a substation Portion 4 of farm 119, i.e. the original portion 4 of the farm. Even before the conclusion of the way leave agreement, construction of the substation commenced, and power lines were erected across the farm. Since then the area occupied and used by Eskom has

grown to 10 000 square meters, and, given the growing demand for electricity more extensive occupation is expected.

19. When the present review application was argued all the parties accepted that Eskom had no legal right entitling it to have access to and maintain and operate the substation on the portion of Nooitgedacht (0,4% of the farm) currently under its control.
20. The applicant gave a full account of what it perceived as Eskom's obtuse conduct and intractable approach to the dispute therein. The applicant firstly demonstrated that the providence and authenticity of the way leave agreement and option were dubious. With the assistance of a handwriting expert, Ms Palmer, who prepared a report in this regard, the applicant referred to certain features of these documents which tend to support the applicant's contention that someone had manipulated this document in an attempt to demonstrate that Eskom indeed had real rights in the portion of the farm under consideration.
21. Counsel for Eskom properly conceded that such conduct was 'indefensible'. None of the respondents, sought to rely on these documents in opposing the review application. Regrettable as such conduct may be, on its own, it does not render the expropriation reviewable.

22. The applicant contends that the continued occupation of the substation site has impacted negatively on its farming activities in the following ways:
23. The presence of the substation site causes a continued high volume of vehicular and pedestrian traffic of Eskom staff, the staff of a security firm engaged by Eskom (Monoceros Trading 155 CC) and their visitors. The applicant maintains that locks on gates had been cut on occasion and the security personnel and their visitors walk around on Nooitgedacht as they please. In its replying affidavit, filed in opposition to Eskom's expropriation application, the applicant also informed the first respondent that the homestead on Nooitgedacht had been broken into. Mr Barnes believes that the uncontrolled human and vehicular traffic on the farm poses a serious security risk not to mention a substantial nuisance factor.
24. In the review application the applicant alleges that the substation site is right in the middle of an area which comprises 14% of the farm's high quality arable land, suitable for planting crops. The remainder of the farm consists of bush veld suitable to game only. The applicant wishes to introduce larger game in addition to small game (Duiker etc) on the farm, such as Zebras, Impala, Blesbuck and Red Hartebees. It intends to plant crops

- such as Pecan Nut trees as well as introducing the Zebra to graze in between the Pecan nut trees in a pastoral setting on the piece of arable land presently occupied by Eskom.
25. The applicant explained that its farm vehicles have to move around the substation site to gain access to the unoccupied portions of the farm, causing unnecessary inconvenience. In addition, the land below and around the power lines have become useless for planting crops, in particular the planting of Pecan Nut trees because, according to the applicant, the land in the areas mentioned has become sterilized by the overhead electric lines.
26. Building rubble is stored on the site and fences surrounding it, are in a dilapidated state, all of which causes an aesthetically unpleasing sight. The applicant contends that this has reduced the farm's commercial value particularly since the substation site is very visible from all the relevant borders of the farm. There is a road over the farm to gain access from the road to the substation site which is used by Eskom personnel, their visitors, and the employees of a security company engaged by Eskom. At times a fleet of motor vehicles are parked on the site, according to Mr Barnes. Since its construction, the site occupied by the substation has steadily increased in size and usage by Eskom.

That has was demonstrated by photographs and Google Earth depictions taken over a number of years. More brick built structures have been erected by Eskom on the substation site since it was occupied by Amber Bay and the applicant

27. Mr Barnes became increasingly uneasy with the high volume of vehicular and human traffic over the farm, the area on and around the substation. The applicant requested Eskom to install fences and around the substation site, and gates at appropriate places. At some point one of Eskoms' officials engaged in correspondence with the applicant regarding the applicant's concerns, and offered to put in locks on the gates. The applicant contends that nothing was done by Eskom to alleviate the situation. Ultimately the parties were unsuccessful in their attempts to resolve the dispute in fruitless meetings to conclude practical fencing, access and security arrangements.

28. On 13 August 2014, the applicant wrote to Eskom with the request with a written undertaking to cease its unlawful conduct proposed the following:

"In order to normalize the situation, the following steps need to be taken:

8.1 You will need to compensate our client for the area that you are occupying unlawfully;

- 8.2 The area including a right of way to the area, and the overhead power lines will need to be properly identified in a servitude diagram;
- 8.3 You must build your own exclusive access gate at the first entrance from the main servitude road at a place mutually agreed upon, which gate must be kept closed and locked;
- 8.4 You must maintain the access road, 3 meters wide, from this gate to the Eskom servitude gate;
- 8.5 You must maintain a proper fence around the Eskom servitude area;
- 8.6 You may not encroach on any other part of our client's property or cause a nuisance to our client;
- 8.7 A proper servitude will need to be registered; and
- 8.8 You will need to carry the cost of all the aforesaid."
29. Eskom resolved that it would obtain a proper servitude registered over Nooitgedacht to legalize its occupation of a portion of the farm and offered the applicant a sum of just over R220 000,00 as compensation for its granting Eskom the option to acquire such a servitude. The applicant was not amenable to consent to the registration of any servitude over its property in favour of Eskom or to grant the option desired by Eskom. The parties had reached an impasse. The applicant therefore demanded that Eskom vacate the farm within a reasonable period and make good any damage caused to the farm. Eskom

had no intention of leaving, and on 7 November 2014, the applicant launched its eviction application.

30. Eskom opposed the application on the basis that it had until recently believed it had real rights over the farm to maintain and have access to its substation site, and that its usage of the farm had been in practice for many years. Eskom also argued the obvious point, that the evacuation of the substation would have an enormous impact on the citrus and tourism industry and all the townships that relied on the electricity supplied to them by this particular substation.
31. The solution suggested by the applicant to Eskom's problem, was that the entire substation be relocated to another site, on the adjacent farm (Portion 5) already owned by the State. The applicant points out that 50% of portion 5 (the Government's farm), abutting the farm Nooitgedacht, has an undeveloped portion within meters from the substation. According to the applicant the inconvenience of Eskom moving the substation to that farm could be accommodated by allowing for a reasonable period (four years) to effect such a move. Eskom maintained it would take six years to move the substation at a cost of R112 million. In addition the electricity supply to various consumers would be interrupted. Eskom's position, as upheld by the first

respondent, is that the proposed solution is impractical and far too costly. These arguments were also ventilated in the present review application still and goes to the heart of the expropriation dispute between the parties.

32. The applicant opposed the application for expropriation and raised several of the complaints set out above. Herein the applicant also relies on these aspects in the review application presently under consideration.

Expropriation Applications:

The Applicable Legislation and Legal Principles

33. Section 2(1) of the Expropriation Act, 63 of 1975, gives the Minister the power to expropriate “any property for public purposes” and to either approve or decline an application for expropriation.

34. The State (as represented by the first respondent in the present matter) may expropriate land or a right in land in terms of s26 of the Regulation Act only:

(1) to facilitate the achievement of the objectives of the Electricity Regulation Act; and then only

(2) if a licensee (in this instance the second respondent) is unable to acquire that land or the right therein by agreement with the owner and

(3) the land or such right is reasonably required by a licensee for “facilities which will enhance the electricity infrastructure in the national interest”.

35. The expropriation powers of the first respondent are further regulated by the Expropriation Act in terms of which that power is (subject to an obligation to pay compensation) to expropriate any property for public purposes.

36. The above statutory provisions remain subject to section 25 of the Constitution in terms of which:

“(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”;

(2) property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property;
and
 - (e) The purpose of the expropriation.
- (4) For the purposes of this section-
 - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
 - (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
 - (9) Parliament must enact the legislation referred to in subsection (6)."
37. Expropriation, even if it is carried out in terms of a law of general application, remains a deprivation of property and any such deprivation must not be arbitrary. If an expropriation is arbitrary, the resulting limitation or deprivation falls to be assessed in terms of s36 of the Constitution which reads as follows:
- "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and the extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

38. By virtue of section 33 of the Constitution, the applicant has the right to administrative action that is lawful, reasonable and procedurally fair. This right is given effect to in PAJA (being the national legislation referred to in section 33(3) of the Constitution) which imposes on the State a duty to give effect to the above right. The State nevertheless has an obligation in terms of section 7(1) of the Constitution to “respect, protect, promote and fulfil the rights in the Bill of Rights”. That obligation falls to both the first respondent and Eskom since both of them fall within the definition of “organ of state” in the Constitution.

39. A decision resulting in a deprivation of property is arbitrary if it does not provide sufficient reasons for the deprivation, or if it is procedurally unfair. The fact that there may be less restrictive means to achieve the same purpose is a factor to be taken into account.

40. Section 195 of the Constitution is also relevant. It reads as follows:

“(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-orientated.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximize human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness,

and the need to redress the imbalances of the past to achieve broad representation.

- (2) The above principles apply to-
 - (a) administration in every sphere of government;
 - (b) organs of state; and
 - (c) public enterprises.
- (3) National legislation must ensure the promotion of the values and principles listed in subsection (1).
- (4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
- (5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
- (6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

The Expropriation Decision

41. The reasons advanced by the first respondent for his decision were the following:

"5. After scrutinizing the expropriation application of Eskom, and after having due regard to the legal framework outlined above, I was satisfied that

Eskom's application complies in all respects with the applicable legal prescripts. More in particular, I consider that:

5.1 All the formal and procedural requirements stipulated in the Regulations have been met.

5.2 The expropriation of the land rights on behalf of Eskom will facilitate the achievement of the objectives of the Electricity Act. The facilities for which the land rights are required have been in operation for nearly 20 years, and supply the electricity infrastructure needs of consumers in the towns of Addo and the Sundaysriver Valley and all the farmers who contribute to the commerce and output of the surrounding area. The expropriation of the land rights will ensure that the security of the electricity supply to the consumers in those areas will be safeguarded.

5.3 Eskom has been unable to acquire the land rights by agreement, despite the fact that it has offered compensation to the owner.

5.4 The facilities enhance the electricity infrastructure in the national interest; as it could impact on the National Gross Domestic Product (GDP) if local farmers were compromised by the demolition of the facilities.

5.5 The expropriation of the land rights is required for a public purpose and in the public interest; in that it is in the interest of the public at large that electricity supply to the electricity consumers in the areas of the town of Addo and the Sundays River Valley remains stable and secured.

6. In considering the deciding on Eskom's application, I took into consideration the objections by Staufen as contained in pages 93 to 143 (the

reply) and 144 to 820 (the annexures) of the application and weighed it up against the motivation provided by Eskom in the application.

7. Despite Staufen's objection that the description of the land rights is vague, I was satisfied that the application contained a full description of the land rights required to be expropriated. More in particular, I took into account that Eskom has attached a draft diagram to the application, which has subsequently been approved by the Surveyor-General, from which the full extent and location of the required land rights can be determined.

8. The objection raised by Staufen that alternative suitable land exists (Portion 5 – which already belongs to the State), cannot be sustained as it will entail the demolition and re-erection of existing infrastructure at an estimated costs of R120 000 000 resulting in prolonged outage of electricity to the town and farms of Addo and the Sundays River Valley area, which will be severely detrimental to the customers of that area.

9. In my view, demolishing the existing facilities, just to re-erect same facilities on alternative land will be fruitless and wasteful and will be defeating the objectives of the Electricity Act.

10. I have considered the history of the negotiations between the parties as detailed by Eskom and by Staufen in its reply. While there are factual disputes about what exactly caused the breakdown in negotiations between the parties, it is not in dispute that negotiations indeed broke down, that Eskom offered to purchase the land rights in question and that Staufen rejected Eskom's offer without submitting a counteroffer. I am therefore satisfied that Eskom is unable to acquire the land rights by agreement with

the owner as required by Section 27(3) of the Electricity Regulation Act, 2006.

11. In considering the objection relating to the negative impact on the farming activities of the property as alleged by Staufen, I considered that the facilities existed on the property prior to the acquisition of the property by Staufen and that Staufen was at all times aware of the existence thereof at the time it purchased the property. Consideration was also given to the fact that the Electricity Act requires the facilitation of a fair balance between the licensee and the public. In balancing the rights of the licensee and the public, it is essential to have regard to the rights and interest of the public at large, which includes customers, end users and investors in the electricity supply industry-not only the specific landowner affected by the expropriation.

12. Finally, I have considered that the interference on Staufen's farming activities is not unreasonable given the important public purpose served by the facilities. In any event, Staufen will be offered just and equitable compensation for the actual financial loss it has suffered as a result of the interference caused by the facilities (if any)."

42. The applicant raised a very comprehensive list of grounds for review in its very long founding affidavit. The list covers four pages and I do not intend to list them all here. In view of the approach I adopt to the matter, I will deal with those grounds which can be regarded as directly pertinent to the question at hand and which were raised in argument.

43. The two main arguments and grounds of review advanced on behalf of the applicant are:

(1) that the purpose of the expropriation application was not to facilitate the objects of the Electricity Regulation Act, but to *ex post facto* regularize and legalize Eskom's unlawful occupation of Nooitgedacht which is not an objective envisaged in the aforesaid Act.

(2) that the decision to expropriate is in conflict with the Constitutional principle of legality and the common law and constitutes a deprivation of the applicant's rights in Nooitgedacht and could never be regarded as a legitimate public purpose.

44. The applicant argued that the relevant "public purpose" being the efficient, effective and sustainable supply of electricity envisaged in section 2 of the Electricity Regulation Act, had been met by the unlawful erection of the substation, power lines and attendant infrastructure on Nooitgedacht. in this regard the applicant relies on its undertaking that it would allow Eskom sufficient time (approximately four years was mentioned in argument) to ensure the continued efficient and sustainable supply of electricity from portion 5 and all that remains to be

determined by the parties would be the costs of establishing an alternative substation.

45. The applicant submitted that the first respondent misdirected himself by conflating the regularisation of Eskom's unlawful and unconstitutional conduct with a "public purpose" or "in the public interest". Accordingly the expropriation decision was materially influenced by an error of law was not rationally connected to purposes for which it was taken for a reason not authorized by the empowering provision, for an ulterior purpose and rationally disconnected from the empowering provision, being the purposes of section 25(2) of the constitution and was therefore constitutional and unlawful.
46. The First respondent and Eskom argued in response to this argument that regularising Eskoms' legal entitlement to the piece of land, Eskom currently occupies through expropriation "will enhance the electricity infrastructure in the national interest"³, "is for a public purpose or in the public interest"⁴ and therefore serves the purposes required by the applicable legislative frame work already referred to.

³ Section 26(3)(b) of the Electricity Regulation Act

⁴ Section 2 of the Expropriation Act, 63 of 1975 and section 25(2)(a) of the Constitution (subject to compensation)

47. The first respondent relied on the decision by S Ebrahim J in *Bartsch Consult (Pty) Limited v Mayoral Committee of the Maluti-A-Phofung Municipality*⁵. In that matter the applicant was unsuccessful in its application for review on the grounds that, on the respondent's own version, the applicant's land would not be used for the stated reasons but for the unauthorised purpose of making the land available to a private land developer so as to be part of a shopping complex. The court concluded that it has been established that the expropriation is a *bona fide* one for a public purpose, the motives behind the decision to expropriate are irrelevant to the question of whether the power to expropriate was validly exercised⁶.
48. Section 26 of the Electricity Regulations pertinently requires the decision maker to have regard to section 25 of the Constitution, whereas the Expropriation Act has of course no such requirement, being promulgated before the advent of the constitution.
49. The applicant submits that the selection of the substation site on what would become Nooitgedacht was entirely arbitrary. In its expropriation application Eskom stated that the site has always

⁵ [2015] JOL 33984 (FB)

⁶ At 31 paragraph [6]

been the 'most ideal' but did not advance a factual basis for that assertion.

50. It was also argued on the applicant's behalf that the expropriation decision was procedurally unfair. Only six weeks after the expropriation application had been lodged, the applicant became aware that the first respondent and his department supplemented the requirements of the Expropriation Regulations by adopting an "abridged business process for expropriation (abridged process)" which had been developed with the Department of Public Enterprises, the Department of Energy and Eskom. In terms of that procedure 30 steps has to be taken before implementing the expropriation decision. However, one day before the application to compel him to take a decision, the first respondent announced that he would not follow the abridged process any further. This the applicant contends, deprived it of the benefit of a fundamentally important step, being the provisional consideration by the first respondent of the application and whether the State's intention to expropriate should be advertised for public announcement. This conduct, the applicant submits, is materially procedurally unfair and this fell foul of section 3 of PAJA.

51. The applicant also objected to the fact that in terms of the Expropriation Regulations, Eskom was permitted to comment on the applicant's reply to Eskom's application, and the applicant was not given a copy of Eskom's comments and it was thus deprived from commenting thereon.
52. The procedure prescribed in the Expropriation Regulations imposes several requirements to be addressed and motivated in an application by a licensee (in this instance Eskom) for an expropriation by the first respondent (and which factors must accordingly be taken into account by the first respondent in considering that application) which include:
1. the reasons and motivation why the licensee reasonably requires the land or right it is sought to expropriate with a full description of the facilities in connection with which the land or right is required;
 2. full reasons why the said facilities will "enhance the electricity infrastructure in the national interest";
 3. a full motivation why the requested expropriation "will be in the public interest as contemplated by section 25(2) of the Constitution";

4. the history of negotiations between the licensee and the owner for the acquisition of the land or the right and reasons why the licensee is unable to acquire such land or right by agreement;
 5. the practical alternatives which are open to the licensee if such land or right is not expropriated.
53. In paragraph one of its application for expropriation, Eskom states that the purpose of the expropriation was "to extend the existing land rights with regard to existing Eskom Infrastructure across the property". The applicant infers therefrom that Eskom sought rights to establish infrastructure beyond that which currently exists. In this regard the diagram annexed to Eskom's application is significant. Eight power line servitudes are required ranging in width between 18 and 31 metres which envisages a much larger area than Eskom is entitled to.
54. The further, ancillary rights sought are very broadly stated as to "erect structures conductors, cables... and without limitation, everything else as may be necessary convenient in exercising the right of servitude and that the structure supporting mechanisms may reasonably extend beyond the servitude area."

55. The applicant also alleges that certain facts give rise to a reasonable apprehension of bias both in relation to the procedure followed and in relation to the expropriation decision.
56. In support of its contention that the expropriation decision was biased the applicant referred to the appointment of a senior official in the Department of Public Works, (Mr Govender). This official was appointed by the first respondent, after Eskom launched its application to compel the first respondent to take a decision in the expropriation application. Mr Govender stated in an e-mail that he was to "manage the processing of the expropriation" and believed that the Minister of Energy had "authorized the expropriation". Later in an affidavit, he conceded that his e-mail could have given the impression that the first respondent had already taken a decision, but explained that this was not the case.
57. The applicant complained that its request for correspondence between Eskom and the first respondent's department was not adhered to.
58. The applicant also made reference to the fact that a valuer appointed by the first respondent, Boshoff had visited Nooitgedacht to conduct a valuation which he did not carry out.

After engaging the applicant's representative on the possibility of settlement, Mr Boshoff reported their no prejudice discussions to Eskom and the first respondent.

59. Eskom also provided the Minister of Energy with a summary of the matter with giving the applicant an opportunity to also comment thereon. Since the summary contained inaccurate facts, the applicant was prejudiced in that it had no opportunity to set the record straight in this regard. The latter then advised the first respondent to expropriate. The applicant contends that if it was given the opportunity, it could also have alerted the Minister of Energy of the fact that Portion 5 was available as an alternative site of the applicant's had undertaking to afford sufficient time to relocate the substation to Portion 5.
60. The applicant submitted that Eskom, the Minister of Energy and the first respondent did not, interact objectively and at arms length during the process of expropriation and the outcome was to them a *fait accompli* resulting in the decision to being a bias one.
61. According to the applicant, the Minister of Energy merely repeated Eskom's submissions and made no reference to the

applicant's objections. The applicant was critical of the assertions by the Minister of Energy that:

- (1) the location of the substation was ideal;
- (2) that fair compensation was rejected by the applicant; and
- (3) that a prolonged outage would be severely detrimental to the consumers of the area.

62. Officials of the first respondent's department prepared an Internal Memorandum with regard to Eskom's expropriation application; put it before the first respondent for consideration. It included a recommendation signed by five officials who received the correspondence from Mr Govender referred to earlier.

63. The applicant pointed out that the Internal Memorandum represents only Eskom's position which was repeated in the recommendations and that the first respondent's reasons for his decision, echoes the internal Memorandum which contains inaccuracies. The applicant alleges that its case was hardly given any consideration, particularly that there was a viable alternative to expropriation, i.e. relocation to Portion 5 and that Eskom would be given sufficient time to do so and therefore "no harm will come to any consumer".

Discussion

64. The applicant's argument that the expropriation decision was not made for any of the limited purposes set out in the Electricity Regulation Act, or in the 'public interest' as envisaged in the Constitution and Expropriation Act must be considered first. In my view this argument tends to place an artificially restrictive construction on what is meant by "will enhance the electricity infrastructure in the national interest." Quite plainly, if Eskom's current occupation of the substation site is not regularized – and expropriation is the only route available to achieve that – Eskom will be evicted. The very substantial negative impact the eviction will have on the electricity infrastructure of the area is obvious. There is an eviction order in place, although subject to the overall suspension referred to. If Eskom's occupation is regularised, albeit *ex post facto*, logically the infrastructure would be enhanced thereby. The alternative would be disastrous for the supply of electricity.
65. This brings me to the applicant's next proposition, that the first respondent did not consider its proposal that the substation be relocated to Portion 5, the adjacent farm, and to area only metres away from its current position.

66. According to the applicant such an exercise is feasible and repeatedly mention was made of the applicant's undertaking to give Eskom the opportunity to relocate within a reasonable time a period of four years was mentioned.
67. Eskom's objection that the relocation which the applicant had in mind would costs about R112 million and take six years to implement, coupled with a disruption in electricity supply was met with the applicant's argument that these problems were of Eskom's own making and the arbitrary deprivation of the applicant's property rights trumped such considerations. The applicant argued that considerations of substantial expenditure were not bar to the enforcement and protection of the property rights protected in section 25 of the Constitution. In this regard the applicant relied on the judgment of the Constitutional Court in *Allpay Consolidated Investment Holding and Others VCEC, SASSA and Others*⁷. The applicant amplified this argument with by pointing out that no proper costing of the relocation exercise was ever done. An expert was to be engaged in this regard but no costing figures were presented in evidence.
68. The absence of proper costs estimated for the proposed relocation does not assist the applicant. The dismantling and

⁷ 2014 (4) SA 179 (CC) para [40].

relocation of an entire substation and its overhead power lines would certainly entail enormous expenditure. It would also be naïve to suggest that such an undertaking could be achieved without substantial and highly prejudicial interruptions and power outages to be suffered by the consumers dependent on the substation.

69. Eskom undoubtedly provides a public service and the consumers of the electricity it provides, are vast in number and cover several areas: eg. Uitenhage, Kirkwood, Sundays River and Addo. Eskom thus provides a service for a very important and vital public purpose.
70. The applicant's insistence that Eskom vacate its farm and move its whole infrastructure to an adjacent farm must be scrutinized against the following background in order to strike a fair balance between the applicant's property rights and the aforesaid public purpose.
71. During argument Mr Ford for the applicant stressed that Mr Barnes, the sole director of the applicant is a farmer and that he would be affected by expropriation. How the farming operations are affected by Eskom's operations on Nooitgedacht have been set out in some detail above.

72. When Amber Bay bought Nooitgedacht in 2007, the substation had already been there for ten years. Eskom's failure to establish real rights in respect of the substation was most certainly a *bona fide* error. It conducted its operations on Nooitgedacht in the *bona fide* belief that it had a legal entitlement to do so. At that point Mr Barnes could not have been aware that Eskom had no real rights on Nooitgedacht. Amber Bay purchased Nooitgedacht. Its predecessors in title also accepted the substation without demur. At that point Mr Barnes could not seriously have contemplated that it was possible to get rid of the substation and let Zebra roam under Pecan trees where the substation used to stand. If he bought the farm because he knew Eskom had no legal entitlement, he took a serious risk.
73. Eskom's lack of rights was the result of an error. Eskom did not willfully and grossly violate the principle of legality and the applicant's property rights or "seize" the land as the applicant contended.
74. The decision to expropriate was the correct decision to take in the circumstances. The substation serves the public. The costs and effort involved in dismantling, relocating and installing a new substation a short distance away on a neighboring farm could

rather be applied elsewhere on building a new substation where there is a greater demand for electricity.

75. The first respondent considered the aforesaid factors and his decision to expropriate was not irrational given the facts before him, albeit that his decision had the effect of regularising Eskom's unlawful occupation of the farm. His decision therefore does not fall foul of sections 26(1) and (3) of the Electricity Act. The expropriation is a *bona fide* one, for a public purpose and enhances the electricity infrastructure for the benefit of the public. Given the reasons provided by him, I am unable to find the first respondent's decision was arbitrary.

Procedural Matters

76. The Minister of Energy and first respondent were criticised for stating that the current substation area was the ideal site for the substation. This observation is correct if seen in the context of what it will cost if the substation would be relocated and the disruption that that would entail. The applicant sees it differently for his own reasons which do not coincide with the public interest. It is a matter of opinion based on vested interests, not a flaw in the proceedings.

77. Nothing ought to be read in the first respondent's decision not to follow the abridged process. This was not a case where a substation was to be installed anew and for the first time on the applicant's property. It has been there for years. No purpose would be served by inviting the public to comment thereon.
78. With regard to the complaint that the applicant was not afforded an opportunity to respond to Eskom's reply to its response, it must be noted that Eskom was entitled to reply to the applicant's response to its expropriation application in terms of the Electricity Regulations, Eskom was not obliged to deliver to the applicant a copy of its reply to comment on. This would have led to further exchanges of complaints in circumstances where all the issues between the parties have already been crystallized. In prior litigation where relevant parties gave their versions on oath. Even if Eskom gave incorrect information regarding its rights on the farm to the first respondent, that did not influence his decision. The first respondent made his decision precisely because of Eskom's lack of real rights. The same considerations should apply to the summary that was forwarded to the Minister of Energy who had an interest in the matter.
79. The first respondent also gave consideration to the applicant's reply, setting out the nuisance factor of the substation and that

was weighed up against the public interest. Not only Eskom's case was considered as suggested. The first respondent weighed up the interests of the public against the applicant's rights.

80. The applicant's complaints regarding correspondence and communications between Eskom officials and officials of the first respondent's department do not support an inference of bias or "institutional pressure" placed on the first respondent by Eskom.

81. Mr Smith, Eskom's attorney indeed corresponded with Mr Meyering of the first respondent's department. Mr Smith wanted to know when Eskom could expect the decision. Much has been said about delays in the matter. At that Eskom had to bring an application to compel the first respondent to take a decision. Eskom had to apply for an extension in time lodge its expropriation application in the High Court. Roberson J granted the extension, but in her judgment criticised the delays in no uncertain terms. In these circumstances it is understandable that Eskom would wish to exert some pressure on the first respondent to take a decision and that was what the correspondence was about.

82. Ms Brown, to which reference was made earlier, insisted that Mr Govender of the first respondent contact her in writing and not

telephonically. Eskom's attorney notified all parties that all future communications must be through their attorneys. That is a clear indication that there was an attempt to dispel the perception of bias and that in itself makes it difficult to find bias.

83. It is correct that the internal memorandum and the recommendations to the first respondent echo the wording of each other and deal mostly with many of the points raised by Eskom, However as said before, this application was brought after litigation in which the main issues were fully ventilated on oath. The allegations made and the respective arguments of Eskom and the applicant had been well traversed before. Therefore, the wording of these documents, in my view, is not an indication of bias.

84. In the circumstances, and for all the considerations set out herein, the applicant's application to review and set aside the first respondent's cannot succeed.

85. In so far as the description of the rights sought be expropriated are concerned the following is significant. Annexure 1 to the expropriation application accords with the photograph (referred to earlier) relied up the applicant to reflect the power lines, substation and the road. That photograph was attached to the

founding affidavit. However, the rights that were to be expropriated set out in the letter conveying the first respondent's decision to expropriate and which was sent to Eskom, cited earlier herein, does not limit the amount of power lines that can be erected.

86. The applicant has set out facts, referred to earlier which indicate that there are reasons to expect that Eskom will encroach on the applicant's farm beyond the parameters of the portion it currently occupies. Eskom applied for eight power lines. Currently there are five. More power lines will run over areas of the farm beyond the substation area borders on areas of Nooitgedacht not covered by the expropriation decision. In that regard the first respondent erred and his decision ought to have been more specific about what was sought to be appropriated and restrict the use of the land by Eskom to the area expropriated which is one hectare. Eskom has no legal entitlement to or history of occupation of such areas. The *Bartsch* case does not assist Eskom or the first respondent in this regard. *Bartsch* dealt with an entire property. The expropriation in the present case is in respect of a portion of a property and extending the expropriation beyond that would amount to a gross infringement of the applicant's property

rights. Eskom was also given the right to bush clearing and other activities which could encroach on the applicant's property. The first respondent's decision ought to be augmented accordingly, and I deem it appropriate that the order I make herein reflect that. It is not necessary to refer the matter back to the first respondent for that purpose. Not an insignificant part of the applicant's case concerned Eskom's propensity to expand the area it occupies. Since the applicant has achieved some success with its application, that must be reflected in the costs order I make.

Compensation

87. No determination regarding just and equitable compensation payable to the applicant has been made and no formal Notice of Expropriation has been served on the affected parties by virtue of the present application.
88. According to the first respondent, the assessment of the compensation payable will shortly serve before the Land Affairs Act, 1987, to advise the state on the value of immovable property and the rights therein. Mr Barnes stated he had never spoken to Boshoff about what proper compensation would be. The applicant submitted that in consequence of the fact that no

notice of expropriation was given no compensation was determined as part of the first respondent's decision, the latter's decision was not a final decision. This submission is in conflict with the decisions of the Constitutional Court in *Haffejee N.O. and Others v eThekweni Municipality and Others*⁸ where it was held that although the obligation to pay compensation is a condition of expropriation, as envisaged in section 2(1) of the Expropriation Act, but it is not a prerequisite for its operation. It was also held that 'the time and manner of payment need not be determined before expropriation takes effect.' Consequently the fact that no determination has been made does not affect the validity of the applicant. What is of concern and ought to have been dealt with more equitably by the first respondent, is the increased volume in human and vehicle traffic, its concomitant security risks and general inconvenience cause by Eskom's occupation by the substation site which is incompatible with the applicant's farming activities. In my view this aspect could be appropriately addressed in the determination of compensation as the first respondent mentioned in his reasons.

89. Section 25(3) of the Constitution provides that the amount of compensation and the time and manner may be just and

⁸ 2011 (12) BCLR 1225 at paragraph [4]

equitable and should reflect “equitable balance between the public interest and the interest of those affected.” Relevant circumstances in this regard include the current use of the property, the history of the acquisition, the extent of direct investment by an organ of state and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation⁹.

Reserved Costs

90. The first respondent filed its answering affidavit in opposition to the review applicant out of time. On 19 September 2017 the applicant brought an application to strike out the first respondent’s opposition. The applicant did not succeed in obtaining such an order and the costs of that application was reserved.. Rule 6(5)(f)(i) makes provision for the correct procedure to be followed by an applicant in the position of the present applicant. The applicant was at liberty to set the matter down on the unopposed roll if the first respondent did not comply with the prescripts of Rule 6(5)(f)¹⁰ which has within it specified mechanisms set out to deal with its non-compliance. Where no answering affidavit is delivered within the period

⁹ Section 25(3)(a)-(e); see also Hafejee at paragraph [35].

¹⁰ Nordberg Inc v AQTN Services CC and several other matters 1996(2) TPD SA 531 at 532 D-F; IBR Fire Protection CC t/a IBR Fire v Minister of Labour and Another Case No 70285/13 (GP) 7/8/2015

referred to in subparagraph (ii) of paragraph 6(5)(d) "... the applicant may within five days of the expiry thereof apply to the Registrar to allocate a date for the hearing of the application." The aforesaid rule has been held to be in mandatory terms in the *Nordberg* decision¹¹.

91. Accordingly the applicant, even though its frustrations with previous delays by the first respondent and Eskom were well founded, on application to strike out the answering affidavit was not competent and it is liable to pay the costs of that application.
92. Finally I wish to apologise for the delay in delivering this judgment. It was a rather complex matter argued over two days and in addition, I suffered physical injuries in two separate incidents (a month apart) which required surgery and was followed by a slow recovery. For many weeks I was not in a condition to write judgments.
93. The following order will issue:
 1. The application to review the first respondent's decision to expropriate the substation area on the farm Nooitgedacht, one hectare in extent, is dismissed.

¹¹ See footnote 10

2. The first respondent's expropriation decision aforesaid is amended by the addition of the following to its decision as conveyed to the second respondent (Eskom):

“(4) The right to convey electricity over the property by means of 132 kv and 22 kv. overhead power lines is limited to the existing power lines and no power lines may be erected in addition thereto, if such power lines will traverse the applicant's property beyond the parameters of the electrical substation area, 10000 square meters in extent.

(5) The electrical substation area may not expanded upon beyond the parameters of the existing 10 000 square meter area .”

3. The applicant is to pay 80% of the costs of the application, including the costs of two counsel;
4. The applicant is to pay the reserved costs of 19 September 2017, including the costs of two counsel.

E REVELAS

Judge of the High Court

Appearances:

For the Applicant: Adv Ford SC and Adv Richards, instructed by
Schoeman Oosthuizen Inc., Port Elizabeth

For the First Respondent: Adv Buchanan SC and Adv Gajjar,
instructed by State Attorney, Port Elizabeth

For the Second Respondent: Adv Rorke SC and Adv Williams,
instructed by Smith Tabata Inc., Port Elizabeth

Date heard: 16 March 2018

Date delivered: 25 September 2018