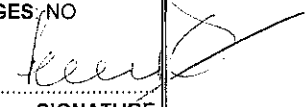


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE No. 40601/2009

10/8/2012

(1) REPORTABLE: NO
(2) INTEREST TO OTHER JUDGES: NO
10 August 2012 DATE
 SIGNATURE

In the matter between:-

CLAIRWOOD CHALETS CC

Applicant

and

ESKOM HOLDINGS SOC LTD

Respondent

JUDGMENT : APPLICATION FOR LEAVE TO APPEAL

Van der Byl, AJ:-

[1] On 27 July 2012 I, sitting in the urgent court, dismissed an application lodged by the Applicant.

[2] In the application the Applicant sought an interim interdict prohibiting Eskom

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from the commissioning of electricity reticulation over the transmission or distribution lattice structures or pylons of the Blanco-Knysna powerline falling within the registered servitude K409/19785 within a radius of one kilometre from the Applicant's property, pending the finalization of review proceedings to be instituted by the Applicant within 20 days from date of this order with a view to the setting aside of an environmental authority granted on 29 October 2009 in respect of the aforesaid electricity reticulation.

[3] The Applicant's objection was in effect that the trellis or lattice type structures erected, particularly, prejudicially affect the tourism and unspoilt nature and mountain views that its property possesses.

[4] I in effect held that, bearing in mind that the structures had already been completed, an interdict prohibiting Eskom from the commissioning of the electricity reticulation over the structures already erected, will not, at the very least as an interim measure, remove the Applicant's objection.

[5] As is apparent from the Notice of Application for Leave to Appeal (*"the Notice"*), the Applicant now seeks leave to appeal on the grounds thereof -

(a) that I erred in -

- (i) not holding that various misrepresentations were made to the Applicant and in the Respondent's Environmental Impact Report in relation to the size, height and nature of the structures and whether or not the

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structures would be covered by the forest canopy;

- (ii) not holding that the Respondent failed to inform all interested parties that a decision was made not to use monopole structures;
 - (iii) not finding that the balance of convenience favours the Applicant as the current electricity reticulation line is still fully operational;
 - (iv) not finding that if the electricity reticulation line over the new trellis or lattice type structures is commissioned and the current electricity reticulation is demolished, the Applicant will never be able to prove that the balance of convenience is in its favour;
- (b) that I should have held -
- (i) that the structures erected differ in height and size to the monopole structures that was proposed;
 - (ii) that the difference in size and height would have necessitated a Visual Impact Assessment study to be conducted on the surrounding environment;
 - (iii) that the first time the Applicant became aware that different structures were being erected was when the Respondent physically started to erect

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the structures;

- (iv) that the trellis or lattice type structures that have been erected infringes the Applicant's right to enjoy ownership of his property undisturbed;
- (v) that the Applicant has a reasonable prospect of success to review the Environmental Authorization granted to the Respondent.

[6] It needs to be pointed out that I was at the outset informed by the parties that the electricity reticulation in question was indeed energised on 5 August 2012 and sought guidance from me as to whether the Applicant can still proceed with its application for leave to appeal. There seems to be a dispute between the parties as to whether the filing of the Notice revived an interim order granted by agreement between the parties on Friday, 20 July 2012. In terms of that order Eskom was prohibited from commissioning or energising the electricity reticulation in question pending the *"finalization of the urgent application which has been set down for hearing on Tuesday, 24 July 2012"* which is the application which eventually served before me on 25 July 2012. On the one hand it is Eskom's contention that it agreed to the former order on the basis that the electricity reticulation will not be energised until judgment has been delivered in the urgent application. On the other hand it would appear to be the contention on behalf of the Applicant that the order is capable of an interpretation that the former is to stand until the urgent application is finalized, including any further processes on appeal is finalized. If the interpretation assigned to the order on behalf of Eskom is correct, the effect will be that any appeal against my judgment may not

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eventually have no practical effect, whilst, on the other hand, on the Applicant's interpretation of the order the former order may have been revived by the filing of the Notice. I indicated to the parties that I am unable to resolve the dispute between the parties in this regard, bearing in mind that the question whether or not the energising of the electricity can be reversed is a matter of evidence. I accordingly expressed the view that the parties should proceed with the application for leave to appeal whereafter the parties can, depending on the outcome of this application, take such steps as they may be advised.

[7] Returning to the application of for leave to appeal, it would appear that the only ground which may touch on my finding that the commissioning or energising of the electricity reticulation over the structures have at the time already been erected, will not remove the Applicant's objection in the interim, is the one referred to in paragraph [5](a)(iv) (**para 10 of the Notice**). As indicated, the contention seems to be that if the electricity reticulation line is allowed to be commissioned or energised, the Applicant will never be able to prove that the balance of convenience is in its favour. I fail to see the significance or relevance of this contention. The requirement of the balance of convenience is a requirement to be established for purposes of interim relief (*Harms, Civil Procedure in the Supreme Court, para A5.7, p. A-40*). That is the relief that was claimed in this application, pending review proceedings envisaged to be instituted seeking the review of the environmental authorization granted on 29 October 2009. As I understand the papers the review application will apparently be based on the alleged misrepresentations made in the Respondent's environment impact report submitted to the Department of the then Department of of Environmental Affairs and Tourism. The

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question of balance can in my view clearly play no roll in such review proceedings. It accordingly follows that my finding is not really challenged in the Notice. In so far as that finding stands the Applicant has no prospects of success on appeal and the application for leave to appeal stands to be dismissed for this reason alone.

[8] In view of the foregoing there was, bearing in mind, particularly, that I was sitting in the urgent court swamped with many other urgent applications, no need to deal with the other requirements for an interim interdict or the other submissions made in support and opposition of the application.

[9] As far as it is now contended that I erred in not finding that the Respondent made certain misrepresentations to the Applicant and in its Environmental Impact Report, those are issues which are to be considered by the Judge who will be called upon to consider the review proceedings. This seems to be conceded if regard is had to the ground of appeal referred to in paragraph [5](b)(v) above (see: **paragraph 15 of the Notice**). In that regard the evidence shows that in a notice published on 31 December 2008 the Respondent indicated that it proposed *"to replace the existing 66kv wooden pole powerline from Blanco to Knysna Substation with a new 132 kV powerline"* and that a *"combination of steel monopoles, concrete monopoles, lattice towers and cigar (double tapered stayed steel) poles, depending on the topography of the study area will be used"* (my underlining). This description, read together with, *inter alia*, paragraph 3.3.2 of Eskom's Environmental Impact Report (**Annexure GS 12, record p. 61**) does not in my view justify an inference on a *prima facie* basis that the Respondent made any misrepresentations as to the size, height or type of structures

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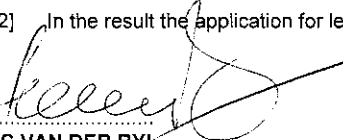
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to be used.

[10] As far as the balance of convenience is concerned, it is an indisputable fact that, on the one hand, a delay in the project may result in load shedding affecting the municipal areas of Knysna, Sedgfield, Wilderness and Bitou proving electricity to thousands of households and hundreds of industries whilst, on the other hand, the Applicant's only objection is that the structures prejudicially affect the tourism and unspoilt nature and mountain views that its property possesses in circumstances where the structures had already been erected and the interim relief claimed was not aimed at removing the structures. The balance of convenience accordingly by far favours the Respondent.

[11] I am for the reasons already indicated unpersuaded that the Applicant has reasonable prospects of success on appeal.

[12] In the result the application for leave to appeal is dismissed with costs.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

ADV J POTGIETER

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ADV. M MAJOZI

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DATE OF HEARING

8 August 2012

JUDGMENT DELIVERED

10 August 2012