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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case Number: 017658/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. NO
DATE	SIGNATURE

CENTURY PROPERTY DEVELOPMENTS

(PTY) LTD

APPLICANT

AND

ESKOM HOLDINGS SOC LTD

RESPONDENT

FIRST

CITY OF JUHANNESBURG
RESPONDENT

SECOND

METROPOLITAN MUNICIPALITY

REGISTRAR OF DEEDS PRETORIA

RESPONDENT

THIRD

JUDGMENT

MAKUME J:

[1] This application was launched during February 2024, in which the applicant prayed that the following orders be granted in its favour, namely:

[1.1] Declaring that the First respondent's Powerlines and related infrastructure that bisects erven 5[...] and 5[...] Riverside, view Extension, 105 Township, established on portion 615 of the Farm Diepsloot, 386 JRS City of Johannesburg Metropolitan Municipality (the subject property) are unlawful.

[1.2] Compelling the first respondent to permanently remove the Powerlines and related infrastructure from the subject property within a period of 14 days of this order.

[1.3] Directing the first respondent and any other respondent opposing this application to pay the costs jointly and severally, the one paying the other

to be absolved, including the costs of two counsel, where so employed.

[2] The first respondent filed its answering affidavit, in which amongst others it raised the non-joinder of the Registrar of Deeds and the Surveyor-General. The first respondent further placed in dispute that the agreement it concluded with the City of Johannesburg was invalid and also denied that it failed to comply with section 65 of the *Deeds Registries Act*, no. 47 of 1937. Or regulation 73 (2) of the *Ordinance*

[3] As a result of the averments in the first respondent's answering affidavit, the applicant filed an application to join the Registrar of Deeds, as well as the Surveyor-General as third and fourth respondents. That application was not opposed. Simultaneously with the joinder application the applicant sought leave to amend its notice of motion by adding the following additional prayers, namely:

[3.1] Declaring that the underlying agreement entered into between the first and second respondents on 23 February 2013, attached E to ANNEXURE JDV26 to the applicant's founding affidavit (the underlying agreement) had lapsed due to non-fulfilment of the suspensive conditions contained therein, alternatively is void as a result of the second

respondent's failure to have complied with the relevant legislation applicable to the disposal and / or encumbrance of municipal immovable properties.

[3.2] Declaring the registration of notarial deed of servitude number K4664/213 as invalid.

[3.3] Ordering the cancellation of the notarial deed of servitude K4664/213 as in terms of section 6 (1) of the *Deeds Registries Act*, 47 of 1937.

[3.4] Granting the applicant further and / or alternative relief.

[4] In summary the applicant seeks the following orders:

[4.1] That the first respondent removes the power lines and other related infrastructure from the subject property.

[4.2] That the agreement concluded between the first and second respondents during 2013, which agreement resulted in the registration of the notarial deed of servitude, be declared null and void.

[4.3] Directing the Register of Deeds to cancel the said notarial deeds as being invalid.

[4.4] Costs.

Historical background

[5] It is perhaps appropriate that I set out the historical events that preceded the launching of this application, and as I believe that such information is relevant as far as it relates to questions to be decided in this application.

[6] It is common cause and not in dispute that the subject property was previously owned by the second respondent and only became the property of the applicant in December 2022. From as far back as the year 2003 the first respondent has set out details of various notarial deeds of servitude registered in favour of the first respondent over a wide range of properties on the Farm Diepsloot 388 JR, the subject properties are located on that farm.

[7] On 4 March 2013 Eskom and the City of Johannesburg concluded an agreement in terms of which a notarial servitude was to be registered against the remaining extent of portion 6 on the Farm Diepsloot 386 JR, that underlying agreement led to the registration of notarial deed of servitude with reference K4644/2013S.

[8] On 11 July 2013 after the City of Johannesburg had published the statutory notices in the newspaper, in terms of section 79 (18) of the *Local Governance Ordinance*, the

Registra of Deeds duly registered a notarial deeds servitude K4644/2013, which provides for a perpetual servitude of electrical power transmission over the subject property.

- [9] On 15 May 2017 a subsidiary company of the applicant, namely Riverside Affordable Apartments (Pty) Ltd (RAA), became the owner of portion 615 of the Farm Diepsloot number 388 in terms of a sale of agreement RAA had concluded with the City on 6 June 2015.
- [10] Shortly after concluding the sale agreement with the City, the company RAA had filed an application to establish a township over the subject property and after receiving no objections, including approval from Eskom, the township was registered by the Surveyor-General on 2 January 2020.
- [11] During December 2021 Eskom took access over the subject properties and commenced construction of the transmission lines, it did so empowered by clause 1.2 of the notarial deed of servitude which reads as follows:

“Enter and be upon the property at any time in order to construct, erect, operate, use, maintain, repair, re-erect, also 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.”

[12] On 20 December 2022 the applicant Century procured ownership of a portion of land described as portion 615 of the Farm Diepsloot number 388, measuring 448181 hectares, from its subsidiary Riverside Affordable Apartments.

[13] On 13 January 2023 Riverside View was declared a township ready for development in terms of the documents submitted by the applicant to the Municipality, as well as to the Surveyor-General and also to Eskom. It is however significant to note that the approval was made subject to certain conditions, specifically clause 2, that expressly provides that all erven shall be made subject to existing conditions, servitudes and entitlements.

[14] During August 2023 a meeting was held between the developer and Eskom. Resulting from that meeting a letter was addressed to Eskom on 12 September 2023, which amongst others read as follows:

“It is common cause that Eskom was part of those of the town planning process from its inception in 2016. During which it notified the developer that the proposed development of the township Riverside View, Extension 105, would

not in any way be affected and / or sterilized by way of construction of major electrical pylons. The recently constructed pylons on the subject property and expansions thereof will significantly affect the development of approximately 821 SHRA housing units, which are desperately needed in the area.”

[15] Eskom responded to that letter on 10 October 2023 in the following words:

“Notwithstanding the above, we place on record that Eskom is currently engaged in the construction of Kusile-Lulamisa 400 kv transmission power lines within the servitude (K4644/213S) registered in its favour over the subject property. The construction of the power lines is scheduled to be completed in December 2023 and will be commissioned thereafter.”

[16] The applicant on receipt of the above response sent another letter to Eskom and said the following:

“Subject to paragraph 2 *supra* we reject Eskom’s contention that the current construction of the Kusile-Lulamisa 400 kv transmission power lines is within the jurisdictional ambit of (K4644/213S)

over the subject matter. It is common cause that Eskom failed to *inter alia* register a route determination and subsequently acts beyond the scope of any legal protection which may stem from K4644/2013S, and in this regard our rights remain fully reserved.”

[17] Messrs Ivan Pauw Attorneys for the applicant followed up with a letter dated 18 January 2024, in which amongst others they said the following:

“As you may or may not be aware, neither the applicable title deeds, nor the applicable Deeds of servitude have been endorsed with the route determination of the said power lines. Furthermore, no diagram pertaining to the alignment of the said power line appears to have been approved by the Surveyor-General.”

[18] The following day being 19 January 2024 Eskom’s attorneys, Messrs Haasbroek & Boezaart responded as follows:

“We enclose a title deed of Erf 5[...] Riverside View Extension 105 (T[...]) as annexure A. Condition 4 brings forward a notarial servitude of

power transmission in Eskom's favour registered against the instant property under K4644213S.

We also refer to the endorsement on page 5 of the said deed, that records a perpetual servitude in Eskom's favour to construct a substation on the property, indicated as figure A, B, C, DA on SG diagram 2181/2022, in terms of a deed of servitude K1388/2023S.

We enclose a copy of SG diagram, annexure B. We enclose the title deed of Erf 5[...] Riverside View 105 (T[...]) as annexure C. Condition E, page 3, brings forward a notarial servitude of power transmission in Eskom's favour registered against the instant property under K4644/213S. Both properties are bound to the rights conferred to Eskom under notarial servitude KS4644/213.

We enclose a copy of notarial servitude KS4644/2013S as annexure D. The City of Johannesburg Metropolitan Municipality granted Eskom perepetual servitude of power lines and telecommunication transmission over the properties.

The servitude was registered in general terms,

therefore Eskom was entitled to implement the rights acquired under this agreement, although the precise route is not described.”

- [19] The correspondence exchanged between the applicants and the respondent’s attorneys clearly places in dispute the validity of the agreement concluded between the City of Johannesburg and Eskom in 2013. It is in my view necessary to first deal with that agreement, as in my view its validity or otherwise is dispositive of the issue of this application. The second issue to deal with is whether the servitude was described in general or perpetual terms, or it should have specified a determined route.

The agreement

- [20] On 4 March 2013 Eskom and the City of Johannesburg Metropolitan Municipality concluded a memorandum of agreement in terms whereof the Municipality granted Eskom a perpetual servitude of electric power transmission to be registered against title deed of the remainder of portion 6, and remainder of portion 1. The MOA are incorporated by reference in both notarial deeds of servitude, being K4036/2013S and K4644/212013S.
- [21] The two notarial deeds of servitude were registered by the Register of Deeds on 11 July 2013, after the Municipality had caused a notice to be published in the Daily newspaper

in terms of section 79 (18) of the 1986 *Ordinance*. It is common cause that no objection was received from the public against registration of the notarial deed of servitude.

[22] It is common cause that both notarial deeds granted Eskom the rights to:

[22.1] Erect such structures and works on the properties or to erect or lead such conductors, cables, or appliances or other equipment on or over the properties as will be necessary or convenient in the executing the right of servitude.

[22.2] To erect such supporting mechanisms for structures and works with the possibility that it may reasonably extend beyond servitude and area as may be necessary or convenient to safely secure the structure of work.

[22.3] Enter upon the properties 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 properties, or in order to gain access to any adjacent property in the exercise of similar right.

[23] The applicant Century Property acquired both properties subject to all servitudes raised up against the title deed

thereof. The learned Judge Hoexter JA in the matter of *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) concluded as follows:

“If a servient tenement is sold, the buyer is bound by the servitude registered in favour of the owner of the dominant tenement, and it is immaterial whether he did or did not know of the existence of the servitude. Knowledge of the servitude on the part of a buyer is material only when the servitude has not been registered. If it has not been registered the buyer of the servient tenement is not bound by the servitude unless he had knowledge of it when he bought.”

[24] The applicant argues that the underlying agreement contemplated in Deed of servitude K4644/2013S lapsed due to non-fulfilment of the suspensive conditions. Secondly, that the sketch plan referred to in that underlying agreement was never attached, thus rendering such underlying agreement void due to vagueness.

[25] Firstly, this attack as to the validity of the underlying agreement is without merit and falls to be dismissed. The fact that the applicant maintains that because the suspensive conditions were not complied with, means that there is an agreement that was concluded by two statutory

bodies in the absence of the applicant. It is only the parties to that agreement who can challenge its validity, not a third party.

[26] It is common cause that during March 2013, and prior to the registration of the notarial deed of the servitude, the Municipality caused a notice to be published in the Beeld newspaper in compliance with section 79 (18) of the 1986 *Ordinance*, this was to call on the public to indicate if anyone has an objection to the registration of such notarial deed of servitude.

[27] No objections were received, hence registration thereof took place on 11 July 2013, in which Eskom was granted perepetual servitude of power transmission over the subject properties. Eskom's rights became vested before any township establishment, or any approval of a subdivision.

[28] All the servitudes registered even on other erven which are not the subject matter of this application, all granted such right to Eskom, the purpose of either transmission or distribution of electricity. It therefore makes sense that the townships were established on condition that Eskom's vested servitudes are preserved. Such servitude rights became vested because the underlying agreement between Eskom and the City was and remain valid.

Were the intended servitudes defined or general?

[29] The next issue is whether the servitudes were registered, indicating defined service routes where the Eskom power lines are to be located, or whether registration of the servitudes is in general terms. The applicant makes an issue about the aspect, saying that initially Eskom maintained that the servitudes were registered as general, and have now in the supplementary answering affidavit changed their stance and advocate that the route was determined or agreed upon.

[30] The argument by Century Property is once again without merit. Eskom has at all times maintained that the servitudes are registered in general terms. It must be remembered that when the servitudes were granted it was on vacant land owned by the City of Johannesburg and at that time no township had been planned for establishment. The establishment of a township with housing units only came up in the year 2016 and it is for the developer to have ascertained for themselves about the existence of any restrictive conditions pertaining to the land on which they sought to build houses.

[31] The servitudes were registered in general terms with reference to the underlying agreement. Eskom's right to amend the Deeds of servitude by registering a diagram

once the construction of the transmission line was completed is strictly reserved and is incorporated in the Register's notarial deed of servitude. This means that on registration of a general servitude it is strictly not necessary to file a diagram depicting the agreed or chosen route.

[32] It is significant to also note that the City of Johannesburg Metropolitan Municipality has not filed an affidavit wherein they agree with the applicant's contention. The applicant has no personal or firsthand knowledge of the intentions of both Eskom and the City of Johannesburg Municipality as the applicant was not a party when the two statutory bodies concluded the agreement. Eskom in its initial correspondence dated 19 January 2024, recorded as follows:

"The servitude was registered in general terms, therefore Eskom was entitled to implement the right acquired under this agreement, although the precise route is not described."

[33] It needs to be recorded also that if it was a strict requirement that approved SG diagrams should be presented, it is significant that the Register did not reject the application due to no diagrams being submitted.

[34] In the matter of *Tshwane City v Link Africa and Others* 2015

(6) SA 440 (CC), a matter wherein the Constitutional Court found that installation of fibre optic cables in the City's existing underground infrastructure, such as storm water and sewer system, did not require the permission of the landowner. The Constitutional Court found that such installations create a public servitude meant to serve the public interest and does not constitute an arbitrary deprivation of property. This is precisely what applicant seems to argue, namely that Eskom is acting arbitrarily by encroaching on its land earmarked for housing purposes. The Court in *Tshwane supra* defined a general servitude to be a servitude that allows the dominant owner to select the essentials, incidental rights of necessary premises, and to take access to them as needed for the exercise of the servitude.

[35] His Lordship Hefer JA in the matter of *Nach Investments Ltd v Yaldai Investments (Pty) Ltd and Another* 1987 (2) SA 820 (A) held as follows:

“The second observation is that where the formulation does not contain such a reference and the route is set to be determinable by agreement, the servitude may or may not be valid, depending on the intention of the parties. If the intention is to constitute a specific right of way, i.e. one which may only be exercised along

a specifically defined route, the agreement is inchoate at least as to a material term and for that reason it is unenforceable until the route is agreed upon, but the agreement is perfectly valid and enforceable if a general servitude is intended and there is reference to a future agreement merely because the parties contemplate that the route will eventually be agreed upon. What is envisaged in such a case is an initial general right, which may be converted to a specific one by subsequent agreement. Accordingly, while there is a dispute about the nature of the right conferred on the grantee in any given case, the intention of the parties is decisive, it is to be determined of course by interpreting the agreement according to the normal rules of construction.”

[36] Eskom as a statutory body is saddled with a duty to generate and provide electricity to the citizens of South Africa, including businesses for purposes of generating income, and provide much needed employment to the South African population

Did Eskom abandon or waive its rights?

[37] The next aspect in this matter is whether or not it is correct

for the applicants to maintain that Eskom waived or abandoned its right in the servitude. Applicants say that Eskom failed to notify Century Property about the existence of the servitude; secondly, that Eskom failed to assert its right in and to the servitude; and lastly, that Eskom agreed to the opening of a township register and the proclamation of a township.

[38] The servitude in favour of Eskom was registered a long time ago, even before the applicant acquired ownership of the servient land. The Court in *Pickard v Stein* [2015] 3 All SA 631 (GJ) held that a servitude may be cancelled if it has been abandoned, whether expressly or tacitly, which can be inferred by conduct of the relevant owner. The applicant contends that Eskom had a duty to inform it of the existence of the servitude, and having failed to do so, thus abandoned or waived its existence. This argument does not make sense, every purchaser of a property has a duty to satisfy himself of the existence of any abrogation or encumbrances that may exist over the property. Century Property purchased the property from its subsidiary, it is that company as seller that had a duty to inform Century, the purchaser, of the existence of the servitudes. The Court in *Frye's (Pty) Ltd v Ries* 1957 (3) SA held as follows:

“Registration in the Deeds Registration Office

gives notice to all the world that the facts recorded in that registration and it fixes all the world with knowledge of those facts. The plaintiff therefore who was an intending lessee and purchaser was duly fixed with knowledge that the defendant was only the co-owner of the property in question. The authorities make it clear that a lessee or a purchaser who had knowledge, actual or constructive of facts, which limit the rights of the owner of the property by means of limitation in the title, cannot be if he enters into a contract which the owner is unable to perform because of the limitation claims, claims damages from the lessor or seller.”

[39] It is trite law having regard to what is said in *Frye’s* that Eskom was under no obligation considering that the servitudes are registered to bring the existence thereof to the knowledge of the country and the municipalities, who is the party that granted Eskom the servitude.

[40] The applicant’s second contention is that Eskom failed to assert its right into the perceived servitude by agreeing to the opening of the register on transformation of township. Century maintain that by so doing, by so failing, Eskom waived or abandoned its right in and to the servitude. This

argument also has no merit. When the Municipality called for comments on the township establishment, Eskom responded positively and expressly stated that it would raise no objection to the application, provided that its rights and servitudes are acknowledged and respected at all times. That is not an attitude of waiver, instead Eskom at all times asserted its right in the servitude, calling others to take cognisance and respect such right. It was for Century to at that stage enquire precisely as to what right was Eskom referring to at that stage.

[41] Between 1 December 2021 up until February 2023 Eskom proceeded with the erection and building of the different foundations for the towers on which the power lines are to be mounted, during all that period Century and / or its predecessor in the title RAA, were aware as to the location and raised no objection. This can never be a case of waiver or abandonment

[42] The next issue raised by Century is that Eskom is exercising its right in terms of a servitude, did not do so *civiliter modo*. *Civiliter modo* is a Latin phrase which means in a civil manner, or with due consideration. In property and contract law it means a person exercising the rights such as a servitude or right of way, must do so reasonably, causing the least possible inconvenience and damage to the affected properties.

[43] The learned writer *AJ Van Der Walt* in *The Law of Servitudes* page 249, describes the civiliter principle as follows:

“The servitude holder must exercise the servitude so as to impose the least possible burden on the servient owner. This implies that the balance must be struck between the rights of the servitude holder to do anything that is necessary for the proper and effective exercise of the servitude. The right of the servitude holder to exercise those entitlements that are clearly granted in the servitude as a procedural right of the servitude owner to use her servient property insofar as that does not interfere with the legitimate exercise and enjoyment of the servitude entitlements.”

[44] I fail to understand why applicants argue these principles on the basis of Eskom’s participation in the establishment of the township. It must be recorded that Eskom’s access of the servient property, Erven 5[...] and 5[...], before the township was approved and proclaimed, this argument does not make sense and falls to be dismissed.

[45] Eskom took possession and accessed the servient

properties for construction purposes as detailed in the notarial deed registered against the servient property. Eskom requires no permission from Century to access the property and contract the workers necessary provided for in the notarial deed of servitude. In my view Century Property has not established any grounds justifying a finding that Eskom's rights were not exercised civiliter.

The abstract system of transfer of ownership in respect of a servitude

[46] It is trite law that when the City of Johannesburg Metropolitan Municipality concluded the memorandum of agreement with Eskom it had the intention to transfer servitude rights to Eskom, nothing else. There is no evidence that it did not do so. The fact that diagrams depicting the route of the power lines may not have been attached, takes the matter no further, as long as the intention to transfer existed at the time. There is nowhere in these papers where Century alleges that the Municipality intended otherwise.

Conclusion

[47] In my view, I agree with the respondents that cancellation of the servitude and removal of infrastructure already constructed will not only cause severe financial loss and prejudice to Eskom, but will also affect the public in

circumstances where Eskom has a duty to supply electricity, not only to the Diepsloot area, but to the other areas.

[48] In the result, I find that the applicant has failed to make out a case for the relief it seeks, and the application should be dismissed.

Order

[1] The application is dismissed.

[2] The applicant is ordered to pay the first respondent's costs, including costs consequent upon the employment of two counsel, on scale C.

MAKUME J

JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearance

For the Applicant:

Nic Maritz SC

M Majola

For the Respondent:

JP Van Den Berg SC

L Kotze