THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE/NOT REPORTABLE
Case No: 464/13

In the matter between:

ESKOM HOLDINGS SOC LTD **APPELLANT**

and

LINDY NORTON **FIRST RESPONDENT**
REGISTRAR OF DEEDS **SECOND RESPONDENT**

Neutral citation: *Eskom Holdings Soc Ltd v Norton* (464/13) [2014] ZASCA 94 (26 June 2014)

Coram: Navsa, Lewis and Shongwe JJA and Hancke and Mocumie AJJA

Heard: **22 May 2014**

Delivered: **26 June 2014**

Summary: Interpretation of deed of servitude ─appellant not entitled to rely on a clause in the deed, inserted for its protection, to assert that cancellation of the servitude for failure to pay first respondent servitude rental, is not valid ─ appeal dismissed with costs.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoba J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Mocumie AJA (Navsa, Lewis and Shongwe JJA and Hancke AJA concurring):

[1] This appeal turns on the interpretation and application of a clause in a Deed of Servitude (the Deed). In terms of the Deed, the appellant, Eskom Holdings Limited (Eskom), a State owned company and the principal distributor of electricity in South Africa, has 'the right in perpetuity, to convey electricity across [the property owned by the first respondent, Ms Lindy Norton] by means of wires and/or cables or other appliances underground and/or along the route hereinafter described, together with the right to. . . erect, use or maintain, repair, relay, alter, inspect and remove all poles, towers, standards, wires, cables, pipes, strays, struts, arrester yards with the necessary fencing to protect such arrester yards, and all other appliances necessary or incidental to the conveyance of electricity.' The property in question is situated at 83 Blue Hills Extension 9 Township, Gauteng.

[2] During 2012 Ms Norton (Norton) applied to the North Gauteng High Court for an order declaring the servitude (344 of 1958) to have been duly cancelled by her. In addition, she sought an order directing the Registrar of Deeds to record the cancellation of the servitude and Eskom to remove all electricity cables and wires traversing the property within 30 days of the order. The high court (Makgoba J) granted an order in those terms and ordered Eskom to pay Norton's costs, including the costs of two counsel. The present appeal directed against that order is with the leave of the court a quo.

[3] The background is set out hereafter. As indicated by the servitude number, the property has, since 1958, more than five decades before Norton took transfer of the property, been subject to the servitude that entitled Eskom to install and maintain cables and wires over the property for the purposes of conveying electricity. The property constitutes a sub-divided part of the land described in the deed of servitude.[1]

[4] Clause 2 of the Deed states that 'in consideration of the rights granted to it [Eskom] shall . . . pay to the registered owner for the time being . . . annually the sum of £15.00 (fifteen pounds) payable yearly in advance on 24th October, in each and every year, beginning the first payment on 24th October, 1958.'

[5] Clause 3 of the deed provides for cancellation of the Notarial agreement in the following terms: 'If [Eskom] shall be in arrear with any such payment for a period of 1(one) month from the due date . . . the registered owner . . . will have the right to cancel this Notarial agreement, provided however, that 30 (thirty) days' notice in writing of intention to do so shall have been given to and received by [Eskom] and [Eskom] shall have failed to make payment within the said 30 (thirty) days.'

[6] Clause 9 of the Deed is central to this appeal and was clearly intended to protect Eskom and, indeed, even the public interest. It reads as follows:

'Upon the registration of transfer of the said property or any portion thereof after the registration of this Agreement, the transferee shall produce the title deed to [Eskom] in order that [Eskom] may register the change of ownership, and until such production [Eskom] shall be entitled to treat the transferor as being still the registered owner. [Eskom] may waive compliance with the provisions of this clause, but such waiver must be in writing.'

It is safe to say that this clause was designed to ensure that Eskom was not prejudiced by a change of ownership, of which it was unaware, and where in those circumstances it made payment to an erstwhile owner, its position was protected and continuation of the servitude was not thereby disrupted.

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[1] The relevant part of clause 8 dealing with subdivision and the consideration due in relation thereto reads as follows: 'Should the said property be subdivided, the consideration stipulated for in clause 2 . . . and the notices referred to in clauses 3 and 4 . . . shall be payable to or given to the registered owner of that portion of the said property . . .'

[7] That brings me to the change of ownership that did occur and which is material to the outcome of this appeal. Norton took transfer of the property from Mr Ronald King on 23 July 2010. She did not produce her title deed to Eskom as envisaged in clause 9. Nonetheless, on 8 October 2010 Eskom's attorneys, instructed by their client, wrote to Norton as follows:

'Dear Mrs Norton

CAPITALISATIONOFREGISTERED SERVITUDE: K344/1958S

L NORTON / ESKOM HOLDINGS LIMITED

ERF37 BLUE HILLS X8

We refer to the abovementioned transaction and confirm that a servitude for the purposes of conveying electricity in favour of Eskom Holdings Limited was registered over the property on 9th April 1958 by virtue of a Notarial Deed of Servitude K344/1858S, a copy of which is enclosed for information purposes

We have been instructed By Eskom Holdings Limited to make an offer to you on its behalf to capitalize the yearly lease amount of the abovementioned servitude, by means of a once-off consideration payment of R411.76 (Four Hundred and eleven rand and seventy six cents).

This amount will be paid to you on date of registration of the Capitalization Agreement in the Deeds Office and will be in full and final settlement of any moneys payable to you in respect of the abovementioned servitude.

In view of the above we enclose the following documents . . . .'

[8] I pause to state that there is parallel litigation between Eskom and a number of homeowners, including Norton, concerning the legality of Eskom's power lines in the neighbourhood and the challenge appears to be related to health and safety issues. Although not directly related to the legal issues in the present case it does serve to explain subsequent events, including Norton's reaction to the offer of capitalization.

[9] Norton did not respond to the offer for more than a year. During that time the consideration due in terms of the deed of servitude was in arrears. On 30 April 2012, purportedly acting in terms of the notice clause referred to above, Norton gave notice of her intention to cancel the notarial agreement. Notwithstanding this demand, Eskom failed to pay Norton the rental which it did not dispute was due. On 5 June 2012, after the expiry of the 30 day period referred to in clause 3 of the Deed,

Norton's attorneys of record sent a letter to Eskom's attorneys stating: 'notwithstanding receipt of the registered letter on 3 May 2012, Eskom has failed to pay the consideration owing to our client within the specified 30 days referred to in para 3 of the deed of servitude and the notarial agreement is therefore cancelled with immediate effect from the date hereof.' This letter also called upon Eskom to remove all the cables and wires traversing Norton's property.

[10] In response, Eskom's attorneys sent a letter to Norton on 7 June 2012 requesting 'banking details, alternatively your trust account details in order for Eskom to effect payment to your client and tender payment of the arrears'. Later that day, when the attorneys did not receive any response to Eskom's tender, they sent another letter which now informed Norton that payment of R5,63 in respect of the arrear rentals due to her had been made. Norton rejected that payment and sent the R5,63 back on the basis that the agreement had already been cancelled. Eskom refused to accept the cancellation. This prompted the proceedings in the court a quo.

[11] In opposing Norton's application Eskom adopted the view that Norton's failure to present to it a copy of her title deed, as required by clause 9, was fatal to her case. It was contended on behalf of Eskom that presentation of a copy of the title deed was required to enable the transfer of ownership to be recorded in its register for payment of the consideration due in terms of the Deed. Before us and in the court below, it was submitted that the acknowledgment of Norton's ownership of the property by Eskom's attorneys in the letter referred to above was not one that could be construed as an acknowledgment for the purposes of clause 9 but rather for capitalization purposes only.

[12] It is necessary to record that on 20 July 2011, long after acknowledging Norton's ownership in the letter referred to earlier, Eskom nevertheless paid the consideration for the right to convey electricity, not to her predecessor in title, Mr King, but to the original owners, the Krause Family Trust. In so doing, it claimed it had discharged its obligations in terms of the Deed and contended that Norton was precluded from relying on its failure to pay the consideration to her.

[13] In her founding affidavit Norton relied not just on the letter in which the capitalization offer was made but also on the fact that she had registered with Eskom as a consumer in respect of the property and also that she had received other correspondence from Eskom addressed to her and her husband as homeowners informing them of the upgrading of power lines.

[14] Significantly, Eskom stated in the answering affidavit filed on its behalf that whilst Norton's title deed 'came to the attention of various officials within the first respondent, they (the officials) were concerned with other issues and were not alive to clause 9 of the Notarial Agreement. The consequence was that the object of the clause was never achieved.'

[15] The court a quo found in Norton's favour on the following basis: 'Clause 9 allows for a fiction to operate to Eskom's advantage namely, it allows Eskom to act as though the previous owner of the property continues to own it, despite the fact that he or she no longer does. Eskom cannot avail itself of the fiction when it in fact knows the identity of the new owner of the property and has that owner's details at its disposal.' Makgoba J went on to state that Eskom was bound by an election it had made to treat Norton as the owner.

[16] As stated above the clear purpose of clause 9 is to protect Eskom from being prejudiced by a change of ownership of which it is unaware. It places the burden of ensuring certainty on the new owner by way of the production of a title deed. I agree with the court below that when Eskom became aware, with certainty, of the identity of the new owner then the object of clause 9 was met. What is more, on Eskom's own version it had a copy of the title deed in its possession. Beyond that it addressed Norton as the property owner when it made an offer to capitalize the consideration. Eskom cannot be heard to say that the acknowledgment of ownership was one that can be simply regarded as an acknowledgment purely for the sake of the offer of capitalization. It cannot regard Norton as owner for one purpose but not another, especially when both relate to the servitude. Startlingly, even during the 30 day notice period Eskom adopted a supine attitude.

[17] Norton's reliance on her registration with Eskom, as a consumer of electricity, is, however, unhelpful to her cause and counsel on her behalf did not contend that it could be said to strengthen her case nor could any correspondence addressed merely to the homeowner be of any assistance. But, as pointed out above, the letter from Eskom's attorneys is pivotal as is the assertion that Eskom was in possession of a copy of the title deed. Whereas it might be said that Norton was opportunistic, she acted well within her legal rights and Eskom, on the other hand, did little to protect itself. The cancellation was proper and Norton was entitled to the relief granted by the court below.

[18] It is common cause that the electrical power lines in question have not yet been electrified. Furthermore, we were informed by counsel on behalf of Eskom that the power lines were intended to be back-up lines. There is thus no question that the local or national electrical grid is at risk.

[19] For the reasons stated above the following order is made:
The appeal is dismissed with costs including the costs of two counsel.

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B C MOCUMIE

ACTING JUDGE OF APPEAL

Appearances

For the Appellant:	F H Odendaal SC (with him G I Hulley) Instructed by: Cliffe Dekker Hofmeyer, Pretoria Symington & De Kok, Bloemfontein
For the Respondent:	D Unterhalter SC (with him I Goodman) Instructed by: Nortons Incorporated, Pretoria McIntyre & Van der Post, Bloemfontein