IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: AR 380/2017

In the matter between:

ESKOM HOLDINGS LIMITED **Appellant**

and

DEAN JONATHEN GRUNDY **Respondent**

ORDER

The appeal is dismissed with costs.

JUDGMENT

Delivered on: 16 February 2018

Ploos van Amstel J (Jappie JP and Nkosi AJ concurring)

[1] The appellant ('Eskom') appeals against an order made by Marks AJ, directing it to remove certain overhead power lines and ancillary equipment from a particular portion of a farm owned by Mr D J Grundy in the Kokstad area. Eskom also applied for condonation of its failure to make written application for a date for the hearing of the appeal timeously. Its attorney provided a satisfactory explanation, the application was not opposed and condonation was granted at the hearing of the appeal.

[2] The farm is described in the title deed as Portion 1 (Fernill Annex) of the Farm Kruis-Fontein no 215, Registration Division ES, Province of KwaZulu-Natal; in extent 143, 4691 hectares. Mr Grundy bought the farm from Mr MC Mackenzie on 14 October 2009 and it was transferred to him on 24 March 2010. I refer to it herein, where appropriate, as 'the farm'.

[3] The case made by Mr Grundy is that a number of overhead power lines, supported by wooden poles, run over a particular portion of the farm, which he identifies by means of co-ordinates, a satellite image and a topographical map. It is common cause on the papers that the power lines were erected there by Eskom, who owns them. Mr Grundy wants the power lines to be moved from that portion of the farm as he cannot operate a centre pivot irrigation scheme under or near them. He asked Eskom in 2009 (when he was renting the farm) to move them, but it wanted him to pay the cost of doing so. An Eskom employee told him that Eskom had the right to conduct electricity over the farm in terms of a so-called 'wayleave' agreement. When Mr Grundy later asked Eskom for a copy of the wayleave agreement he was told that Eskom could not find it. He says Eskom nevertheless persisted in its stance that it had erected the lines with the agreement of the owner at the time and would only move the lines if he paid for it.

[4] Mr Grundy's case is simply that he owns the farm over which the power lines run; that Eskom has no permission to have its equipment on his land; and that he wants Eskom to remove it from the area which he wants to irrigate. It was undisputed before us that this is a natural incidence of his ownership of the land, and that it was up to Eskom to establish its entitlement to have its equipment there.

[5] The first basis on which Eskom claims the right to have the power lines on the farm is a servitude. It claimed that it acquired a servitude by acquisitive prescription on the basis that it had openly and as though it was entitled to do so, exercised the rights and powers which a person who has a right to such servitude is entitled to exercise, for an uninterrupted period of thirty years. It relied in this regard on s 6 of the Prescription Act 68 of 1969.

[6] The question therefore arose as to when the power lines were erected. The deponent to Eskom's answering affidavit is Ms Liza Brown, a chief legal adviser employed by it. She referred to a written 'Agreement to Grant Wayleave', which she said was concluded on or about 21 June 1979 between Eskom and a Mr AMC MacKenzie, in terms of which Eskom was granted the right to erect an overhead power line on a farm referred to as Remainder of Kruisfontein A134, which is adjacent to Mr Grundy's farm. She claims that the power line which Eskom was granted the right to construct on the adjacent farm is highlighted in pink on a copy of the first page of the agreement and that the power line which Mr Grundy wants to be moved is highlighted in blue. She then states that it is important to note (presumably from the sketch) that in 1979, when Eskom was granted the right to erect a power line on the adjacent farm, the power line which Mr Grundy wants to be moved had already been erected on what is now his farm.

[7] Ms Brown's statement that the power lines on Mr Grundy's farm had already been erected by 1979 elicited an objection in the replying affidavit that this was hearsay evidence and inadmissible. The point was also made that the sketch on the 1979 agreement reflected power lines which Eskom intended to erect in the future, and that it did not purport to reflect existing power lines.

[8] Marks AJ approached the matter on the basis that there was no evidence on the papers as to when the power lines on Mr Grundy's farm were erected, and that therefore Eskom failed to establish a servitude acquired by prescription. I am not persuaded that she erred in this regard. I do not agree with counsel's submission that the available evidence justifies the inference, as a matter of probability, that the power lines in question had already been erected when the 1979 agreement was concluded. Eskom only has itself to blame for not providing admissible and reliable

evidence as to when the lines were erected. It is not entitled to expect that such an inference, which is tenuous at best, should be drawn as a matter of probability when it failed to put up evidence which may reasonably be expected to be available.

[9] The finding of the court below that the acquisition of a servitude was not established can therefore not be disturbed. It is not necessary therefore to consider whether the use by Eskom of the land on which the power lines were erected was *nec precario*. See in this regard *Pezula Private Estate (Pty) Ltd v Metelerkamp*.[1]

[10] The second basis on which Eskom claimed a right to have its lines on the farm is a so-called retrospective wayleave agreement. The facts here are briefly as follows. In January 2011 Mr Grundy asked Eskom to provide electricity to his new dwelling house on the farm. Eskom agreed to do so and on 14 February 2011 he signed a written electricity supply agreement on what appears to be a standard Eskom document. Eskom's case was that in terms of clause 1 of the supply agreement its standard conditions were incorporated as part of the agreement, and that clause 8.1 of the standard conditions provides for all existing lines on the farm to be regarded as part of the servitude granted in connection with the new line. Therefore, so the argument went, even if Eskom did not have either a servitude or a wayleave agreement pertaining to the lines which Mr Grundy wanted moved, by signing the supply agreement pertaining to his home he granted Eskom a servitude pertaining to all the existing lines on the farm.

[11] The electricity supply agreement provides in clause 1 that Eskom's standard conditions of supply 'which is annexed hereto as annexure A' shall constitute part of the agreement. Counsel for Eskom accepted that if the conditions were in fact not annexed to the agreement then they were not incorporated and did not form part of it. See, by way of comparison, *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom.*[2] I turn to the evidence in this regard.

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[1] *Pezula Private Estate (Pty) Ltd v Metelerkamp & another* 2014 (5) SA 37 (SCA) paras 10 and15.
[2] *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom 2003 (5) SA 180 (SCA).*

[12] The document put up by Eskom, which contains the standard conditions, does not bear Mr Grundy's signature or initial. There is no evidence from Eskom that it was attached to or accompanied the agreement. Nor is there any evidence that it was the invariable practice at the time to attach the conditions to every supply agreement.

[13] Mr Grundy says he has no recollection of the conditions being shown to him, discussed with him or signed by him. He says to the best of his recollection the only document that was shown to him was the supply agreement which he signed. Counsel for Eskom sought to counter this by submitting that the wording of the document which Mr Grundy signed provides the evidence that he received the standard conditions. Clause 1 of that agreement recorded that the standard conditions which were annexed to the agreement would form part of it. And above Mr Grundy's signature appear the words 'Signed by Customer' and below that, in a smaller font, 'I acknowledge receipt of Annexures A & B'.

[14] Counsel submitted, relying on the *caveat subscriptor* rule, that a party to an agreement cannot escape provisions in it by claiming that he signed the document without reading it. That is generally correct. See the discussion in this regard in *Christie's Law of Contract in South Africa.*[3] The learned authors say that the true basis of the principle is the doctrine of *quasi-mutual* assent. The party concerned signifies his intention to be bound by the terms of the agreement whether or not he read them. In *George v Fairmead (Pty) Ltd*[4] Fagan CJ said 'When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature'. But this applies to the terms of the contract. It does not apply to matters of fact stated in the agreement, such as a recordal that another document was attached to it. If in fact it was not so attached, then it cannot be deemed or agreed to have been so attached. This does not mean that an acknowledgment in a written agreement that a particular document was received by a party or attached to the agreement has no evidential value. All it means is that if the party concerned was not aware of the acknowledgment in the agreement, then he cannot be held to it in the way that a

[3] Christie's *Law of Contract in South Africa*, 7th ed, (2016) at 205-210.
[4] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A.

party can be held to a contractual term which he had not bothered to read. Whether or not the document was attached to the agreement remains a question of fact. If it is found that the document was in fact not attached, then a printed acknowledgment above a party's signature that it was attached has no further value. Conceivably an estoppel may arise, but not on the facts of this case.

[15] Eskom is the party who sought to rely on its standard conditions. It did not put up an affidavit from the person who signed the agreement on its behalf, nor did it produce a copy of the conditions which was signed or initialled by Mr Grundy. It relied solely on the printed words in the agreement to the effect that the conditions were annexed to it, and that Mr Grundy acknowledged having received them. In the light of Mr Grundy's evidence that he has no recollection of such conditions and that to the best of his recollection he was only given the supply agreement itself, I do not consider that Eskom established that its standard conditions formed part of the supply agreement.

[16] Even if the standard conditions were incorporated in the supply agreement, then it seems doubtful that Eskom could rely on clause 8.1.1 as constituting agreement by Mr Grundy for it to retain the existing lines on the farm. The supply agreement was signed in February 2011, some time after Mr Grundy had been communicating with Eskom with regard to the removal of the power lines which restricted his farming operations. The agreement describes the premises where the supply of electricity was required as the house and borehole on the farm. It allows in clause 3 for its termination on one month's notice by either party, except in the first five years. The conditions are headed 'Standard conditions of supply for small supplies with conventional metering'. Clause 8 is headed 'Right(s) of way'. It provides for a right of way along a route mutually agreed to by the parties. Tucked away at the end of clause 8.1.1 is a provision that the 'customer shall also grant to Eskom the right to retain any existing line(s) and/or cable(s) on the property'. It may well be said that Mr Grundy could not reasonably have expected a clause in the conditions in which he gave permission to Eskom to retain the power lines on the farm, which he had been asking it to remove. In the context of the case such a clause would have been unusual and unexpected. If Eskom wanted to include such a clause in the agreement it may well have been obliged to draw Mr Grundy's

attention to it. In the light of the conclusion to which we have come on the other issues we need not express a firm view on this aspect of the matter.

[17] The appeal is dismissed with costs.

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Ploos van Amstel J

Appearances:

For the Appellant	:	A J Dickson SC (with him W J Pietersen)
Instructed by	:	Mcleod & Associates c/o Redfern & Findlay Attorneys Pietermaritzburg
For the Respondent	:	A R Duminy
Instructed by	:	Venns Attorneys Pietermaritzburg
Date Judgment Reserved	:	31 January 2018
Date of Judgment	:	February 2018