

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

**CCT NO: 43/2009
HIGH COURT CASE NO: 08/22689 (WLD)**

In the matter between:

| | |
|------------------------------|-------------------------|
| LEON JOSEPH | First Applicant |
| VALERIE MOSES | Second Applicant |
| VICTOR MOKETE MOKOENA | Third Applicant |
| LURICIA VAN WYK | Fourth Applicant |
| SHANICE MAYEZA | Fifth Applicant |
| DIANA VAN ROOYEN | Sixth Applicant |

and

| | |
|--|--------------------------|
| CITY OF JOHANNESBURG | First Respondent |
| CITY POWER (PTY) LTD | Second Respondent |
| MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, GAUTENG | Third Respondent |
| THOMAS NEL | Fourth Respondent |

APPLICANTS' WRITTEN SUBMISSIONS

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A. INTRODUCTION

- 1 This is an application for leave to appeal against the judgment of the South Gauteng High Court in ***Darries and Others v City of Johannesburg and Others*** [2009] JOL 23372 (GSJ); 2009 JDR 0330 (GSJ) (“the High Court judgment”).

- 2 This matter concerns the disconnection of the electricity supply to the applicants’ place of residence on 8 July 2008. The crisp issue is this: *is it lawful for the respondents to disconnect the electricity supply to a residence without complying with the recognised components of the right to procedural fairness as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) and the Constitution in respect of the residents affected and without even considering their circumstances?* The applicants submit not.

- 3 The crux of the applicants’ arguments in this regard is as follows:
 - 3.1 PAJA and section 33 of the Constitution require that the respondents comply with procedural fairness in respect of the residents of a building before disconnecting electricity to that building.

 - 3.2 Procedural fairness in this regard is an inherently flexible standard. In the circumstances of the present case, it may well be that procedural fairness in respect of the residents would have been discharged by the respondents:

- 3.2.1 placing one prominent notice in the foyer of the affected building, indicating that the residents were entitled to make written representations; and
 - 3.2.2 if the residents elected to make such written representations, considering those representations and the circumstances set out therein, before deciding whether to disconnect.
- 3.3 Moreover, section 26 of the Constitution requires that the personal circumstances of persons must be taken into account before any measure is taken which impacts negatively on their right to housing. Electricity is an important component of that right.
- 3.4 The by-laws that empower the respondents to disconnect municipal services are the Credit Control By-Laws¹ (“the by-laws” or “the Credit Control By-Laws”). They must, if reasonably possible, be read subject to PAJA and sections 26 and 33 of the Constitution. If they cannot be so read, they are invalid and unconstitutional.
- 3.5 The relevant provisions of the by-laws can be read subject to PAJA and sections 26 and 33 of the Constitution in this regard in that:
 - 3.5.1 the provisions of the by-laws that deal with disconnections provide that disconnections have to be done subject to compliance with PAJA; or

3.5.2 at the very least, the by-laws do not preclude the respondents from adhering to the requirements of PAJA and considering the personal circumstances of residents when engaging in disconnections.

3.6 Alternatively, if on a proper interpretation the by-laws preclude adherence to the requirements of procedural fairness, they are then in conflict with PAJA and sections 26 and 33 of the Constitution and are invalid and unconstitutional to that extent.

4 One of the issues before the High Court was whether the Credit Control By-Laws or the Standardisation of Electricity By-Laws² are applicable to the disconnection in the present case. However, all parties contended before the High Court that the Credit Control By-Laws impliedly repeal the Standardisation of Electricity By-Laws, to the extent that the latter are inconsistent with the former. The High Court concurred in this regard and no party has sought to challenge this finding. This Court may accordingly proceed from the premise that the Credit Control By-Laws are applicable to the disconnection in the present case.

5 The electricity disconnection at issue in this case took place at the behest of the Second Respondent ("City Power"). This was because it is City Power that is

¹ City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-Laws, published in notice 1857 of 2005 in terms of section 13(a) of the Local Government: Municipal Systems Act 32 of 2000

responsible for the provision of electricity in the area in which the applicants live. However, the First Respondent, the City of Johannesburg (“the Council”), also opposes the relief sought. The remaining respondents abide. For the sake of convenience we refer to City Power and the City of Johannesburg as “*the respondents*”.

6 These heads of argument address:

- 6.1 The factual background to this application;
- 6.2 The judgment of the High Court;
- 6.3 The proper approach to interpreting and applying the relevant by-laws in the light of PAJA and the Constitution;
- 6.4 The effect of PAJA and the Constitution on the present matter;
- 6.5 The applicants’ primary submission that the by-laws can be read consistently with PAJA and the Constitution;
- 6.6 The applicants’ alternative submission that, to the extent that the by-laws cannot be read consistently with PAJA and the Constitution, they are invalid; and
- 6.7 The application for leave to appeal.

² Greater Johannesburg Metropolitan Council Standardisation of Electricity By-Laws, published in Notice 1610 of 1999 in terms of section 101 of the Local Government Ordinance, 1939

B. FACTUAL BACKGROUND

7 In the High Court, the following facts were common cause or not seriously disputed by the respondents:

7.1 At the time that this application was brought, the applicants all lived in Ennerdale Mansions in Johannesburg (“Ennerdale Mansions” or “the building”). (Certain of the applicants have since left the building as a result of the intolerable conditions. This will be dealt with below.) The average income of the households in Ennerdale Mansions is R3000.00 to R4000.00 and some of the households have no income at all.

Applicants’ Founding Affidavit (High Court) at paras 11-15; Record at 18-19

7.2 When the application was brought, four of the flats were occupied by elderly people and there were 38 children residing in the building.

Applicants’ Founding Affidavit (High Court) at para 15; Record at 19

7.3 The tenants paid their electricity bill to the landlord as part of their rent accounts (although electricity was charged separately and was not part of the rent) and all had kept up with their payments by the time of the disconnection.

Applicants’ Founding Affidavit (High Court) at para 17; Record at 19

7.4 The fourth respondent in this matter, Mr Nel, is the owner of Ennerdale Mansions and is the applicants' landlord. He did not file papers in the High Court.

7.5 On 8 July 2008, at approximately 10h30, the electricity supply to Ennerdale Mansions was cut off by employees of City Power.

Applicants' Founding Affidavit (High Court) at para 18; Record at 20

Second Respondent's Answering Affidavit (High Court) at para 36.1, Record at 196

7.6 The applicants had received no prior notice of this disconnection.

Applicants' Founding Affidavit (High Court) at paras 18 and 19; Record at 20

7.7 The son of the fourth respondent circulated notices informing the residents that the electricity would be disconnected for a few days owing to "unforeseen circumstances", which was a dishonest statement of the situation. When the electricity was not restored by Friday 11 July, the residents elected a committee to deal with the problem.

Applicants' Founding Affidavit (High Court) at para 22; Record at 20

7.8 An official employed by the Council informed the first applicant that City Power had disconnected the electricity supply because the fourth respondent, the owner of the block, was in arrears to the tune of R400 000.00.

Applicants' Founding Affidavit (High Court) at para 23; Record at 21

Answering Affidavit at 39.1; Record at 198

7.9 It took some time for the applicants to obtain legal assistance. Once they did so, they were advised by their legal representatives that a disconnection of an electricity supply, being administrative action as contemplated in PAJA, must be procedurally fair. A letter of demand was therefore written to the respondents demanding that the electricity supply be reconnected. This did not occur.

Applicants' Founding Affidavit (High Court) at para 32.5; Record at 24

8 All of the above facts were accepted by the High Court.

See High Court Judgment at paras 11—14; Record at 320-1

9 On 21 July 2008, the applicants brought an application in two parts.

10 Part A, which was brought on an urgent basis to operate as interim relief pending the resolution of Part B, sought:

10.1 An order requiring the respondents to reconnect the electricity supply to the building.

10.2 An order requiring City Power to conclude temporary electricity use agreements with the applicants to govern the contractual relationship between the parties pending the finalisation of Part B.

- 11 In Part B, the applicants sought the following relief:
- 11.1 A declaration that, before disconnecting the electricity supply to a building or residence, the respondents are required to ensure that the disconnection is procedurally fair as envisaged in PAJA, including that: .
- 11.1.1 Affected persons receive adequate notice;
- 11.1.2 Affected persons are afforded the right to make representations; and
- 11.1.3 All relevant circumstances are taken into account, including the personal circumstances of those to be affected.
- 11.2 A declaration that the electricity disconnection in this case was unlawful and invalid.
- 11.3 A declaration that, to the extent that the existing by-laws do not impose the duty of procedural fairness described above, those by-laws are unconstitutional and invalid.

Applicant's Notice of Motion (High Court); Record at 2-8

- 12 Part A of the application was dismissed by Tsoka J on the basis that, in his view, the applicants did not have a prima facie right to the relief sought in Part B.

Judgment of Tsoka J, Record at 230

13 When this matter came before the High Court for Part B of the application, the electricity disconnection had taken place more than 8 months earlier. In the time between Part A and Part B, the following had transpired:

13.1 Various people had left the building because the living conditions had become unbearable.

First Applicant's Supplementary Affidavit (High Court) at paras 4-6; Record at 138-9

Applicants' Supplementary Affidavit (High Court) at para 4; Record at 239-240

Applicants' Supplementary Affidavit (High Court) at para 10.7; Record at 243

13.2 The residents that had remained had been prejudiced severely, in particular:

13.2.1 They had been made to incur additional expenses to secure paraffin for cooking and to buy fresh food on a daily basis because of the lack of refrigeration. The applicants are all poor and the additional expenses that had arisen as a result of the disconnection have been particularly prejudicial as a result.

13.2.2 Preparation for the examinations that certain of the children wrote in November was disrupted as a result of the lack of electricity at night with which to study.

13.2.3 The health of certain children has been affected. In particular, a child who requires regular use of a nebulizer to treat her asthma has been particularly prejudiced.

Applicants' Supplementary Affidavit at paras 10-12; Record at 242-5

Second Respondent's Answering Affidavit to Applicants' Supplementary Affidavit at para 14.1; Record at 284

- 14 It should be noted that, at the hearing of Part B of the application, the applicants sought an amendment of Part B of the Notice of Motion to include prayers requiring the respondents to reconnect the electricity supply to the building. This amendment was not opposed by the respondents and was granted by the High Court.
- 15 Ultimately, though, Jajbhay J dismissed part B of the application for reasons that are detailed below.
- 16 Before this Court the applicants have made clear that they remain in the building and are suffering as a result. In particular they have explained that,
- 16.1 their living conditions are practically intolerable.
- 16.2 they have all looked for alternative accommodation in the area, but have been unable to find anything that they can afford which is, at the same time, suitable for them and their families.
- 16.3 they have remained in the building, despite the lack of electricity, because they simply have no choice.

Applicants' Reply Affidavit (CC) at para 7.4; Record at 437

- 17 It is against the backdrop described above that this application must be assessed. Those of the applicants who have chosen to remain living in Ennerdale Mansions have spent many months without access to electricity in circumstances where:
- 17.1 Prior to the disconnection, they had paid their accounts in full;
- 17.2 The disconnection was as a result of the non-payment by their landlord of his account;
- 17.3 The applicants, as poor people, have been particularly prejudiced by the disconnection.
- 18 There are two miscellaneous issues that should be dealt with briefly.
- 19 The first relates to the suggestion by City Power that that the applicants were aware of the reasons for the disconnection of electricity, particularly the alleged illegal connections, and therefore ought to have approached City Power of their own accord to make representations. However, there is no merit in this contention.
- 19.1 The present disconnection occurred on 8 July 2008. City Power relies on an incident where electricity was cut off and residents approached City Power and were told of the reason for the disconnection. That event occurred in 2004, some four years before the present disconnection.

Second Respondent's Answering Affidavit (High Court) at paras 10-14; Record at 187-8

19.2 In any event, the affidavits of the applicants before this Court make clear that four of the applicants only came to live at the building after that event occurred in 2004 and the remaining two had no prior knowledge of illegal electricity connections on the property.

Applicants' Replying Affidavit (CC) at paras 7.1 and 7.2; Record at 436-7

19.3 Nor is there any merit in the suggestion of City Power and the High Court that because the disconnection was purportedly owing to illegal re-connections, it had to be done without notice.

Second Respondent's Answering Affidavit (High Court) at para 64.3; Record at 214

19.4 Implicit in these suggestions by City Power is the premise that illegal connections may cause safety risks that must be dealt with speedily. However, the disconnection notice sent to the landlord makes no reference to illegal connections. It refers only to outstanding arrears. Moreover, the disconnection was performed some 3 months after the notice. This is hardly the hallmark of an urgent disconnection.

Record at 220

20 The second relates to the suggestion by City Power that the applicants have an alternative remedy available – that they can seek the fourth respondent's consent to engage in direct billing arrangements with City Power.

- 20.1 Even leaving aside the question of whether the owner would provide the required consent for such arrangement, this remedy is entirely illusory. This is because before direct billing arrangements could be concluded and electricity restored, the existing arrears owed by the fourth respondent to City Power would have to be paid off.
- 20.2 This is made clear by by-laws 16(1) and (2) of the Credit Control By-Laws, which make clear that electricity may not be reconnected until *“the full amount of arrears has been paid”* or an agreement for the payment of arrears has been concluded.
- 20.3 In the circumstances, the suggestion of direct billing is entirely academic. Neither the applicants nor City Power have been able to get the fourth respondent to pay off the arrears. Until that occurs, direct billing arrangements for the purpose of electricity would be impossible.

C. THE JUDGMENT OF THE HIGH COURT

21 In dismissing the application, the High Court reasoned as follows:

21.1 Municipalities have an important obligation to ensure the provision of services in a sustainable manner and, in doing so, to ensure proper debt collection in relation to the provision of municipal services.

High Court Judgment at paras 18–26; Record at 323-7

21.2 The Credit-Control By-Laws envisage that the disconnection of an electricity supply is a mechanism to collect arrears.

High Court Judgment at paras 27—31; Record at 327-330

21.3 Much of the applicants' argument is based on their contention that they have a socio-economic right to electricity that flows from the right to housing. The right under section 26 of the Constitution is a right of access to adequate housing and it is not a foregone conclusion, in a particular case, that anything at all needs to be provided to a claimant. There is no absolute right of access to electricity, and certainly not a right to an uninterrupted supply of electricity when the municipality is not being paid and the consumers are not indigent.

High Court Judgment at para 39; Record at 333-1

21.4 To the extent that the applicants have been deprived of electricity it is by the fourth respondent, against whom they have a right of recourse.

The applicants have not been deprived of access to electricity by the respondents because they may either enforce their rights against the fourth respondent, arrange for direct billing with the fourth respondent's consent or move to other premises where electricity is supplied.

High Court Judgment at paras 41—43; Record at 334-6

21.5 The applicants are not “customers” as envisaged by the Credit-Control By-Laws. There is no requirement in the Credit-Control By-Laws that persons similarly situated to the applicants be afforded notice and the right to make representations. This is because the respondents would not be able to require the tenants to make arrangements to pay any arrears. The requirement that notification be given only to customers, does not infringe any of the rights of the applicants as they are not customers of the respondents.

High Court Judgment at paras 44—45 and 47—48; Record at 336—8

21.6 Even if the Credit-Control By-Laws do limit any rights of the applicants, the limitation is justified by section 36 of the Constitution.

High Court Judgment at paras 49—60; Record at 338—344

22 As these submissions make clear, we submit that the High Court erred in making a number of the findings above.

23 However, we submit that the High Court also erred at a more fundamental level. The High Court failed to have regard to the well-accepted principle that administrators are bound to apply the provisions of PAJA unless specifically precluded from doing so in terms of empowering legislation.

24 We deal with that issue too in what follows.

D. THE PROPER APPROACH TO INTERPRETING AND APPLYING THE RELEVANT BY-LAWS IN THE LIGHT OF THE CONSTITUTION AND PAJA

25 In interpreting and applying by-laws in the light of the Constitution and PAJA, it is necessary to emphasise certain well-established principles.

26 First, all administrators must comply with PAJA unless the statutes (or by-laws) that govern them are inconsistent with PAJA. As this Court has explained:

“PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.”

Zondi v MEC for Traditional & Local Govt Affairs 2005 (3) SA 589 (CC) at para 101 (emphasis added)

27 Second, notwithstanding the enactment of PAJA, it remains permissible for a litigant to challenge a statute (or by-law) on the grounds that it does not comply with the right to administrative justice under section 33 of the Constitution.

Zondi (supra) at paras 99-103

28 Third, if there are two possible interpretations of the by-laws, one of which would render them unconstitutional, the courts are obliged to adopt the

interpretation that would render them compatible with the Constitution. This principle has been repeatedly enunciated and applied by this Court.

Eg: *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) at para 25

29 Fourth, and in any event, this Court has made clear that if a law is reasonably capable of two interpretations, section 39(2) requires the adoption of the interpretation that “**better**” promotes the spirit, purport and objects of the Bill of Rights. This is so even if neither interpretation would render the statute unconstitutional. As this Court has explained:

“Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights.”

Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC) at para 47

See also: *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107

30 None of these principles is in any way controversial. Nevertheless, they are of considerable importance for the present matter. They make clear that the by-laws cannot be interpreted or applied in isolation. On the contrary, the correct starting point is to understand the effect of PAJA and the Constitution and then

to see whether the by-laws can be read in a manner that is consistent with the requirements of PAJA and the Constitution.

31 As already indicated, the High Court erred in failing to follow this approach. It began by considering the terms of the by-laws. It then proceeded to reason that, because the by-laws do not (on the High Court's interpretation) require procedural fairness to be extended to non-customers, procedural fairness does not need to be extended to non-customers. It did so without ever assessing the role to be played by PAJA in this regard.

32 This, we submit, is improperly to invert the enquiry and to obscure the importance of PAJA and the Constitution in the present dispute.

33 It is accordingly with PAJA and the Constitution that we begin.

E. THE EFFECT OF PAJA AND THE CONSTITUTION

Is the impugned conduct “administrative action”?

- 34 The thrust of the respondents’ case, which was apparently accepted by the High Court, is that they only owed a duty of procedural fairness to the owner of the building. They contend that they did not owe such a duty to the residents of the building because they are not “customers” of City Power.
- 35 Thus, while the respondents appear to accept that a disconnection of electricity amounts to administrative action under PAJA and requires compliance with procedural fairness in respect of the relevant customer, they contend that this does not apply to residents in a building that is to suffer an electricity disconnection.
- 36 It is difficult to understand what the precise legal basis for this argument is in the context of PAJA. While interesting and difficult debates may arise in other contexts concerning interests falling short of rights, they do not arise here.

Cf: the discussion in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 31

37 In the present case, it is the applicants' rights (including constitutional rights) that are adversely affected by the decision to disconnect. In particular, the following rights were adversely affected by the disconnection:

37.1 The right of access to adequate housing in terms of section 26 of the Constitution.

37.2 The right to human dignity in terms of section 10 of the Constitution.

37.3 The right to receive electricity in terms of their contract with the fourth respondent.

38 The Right of Access to Adequate Housing

38.1 In **Grootboom**, this Court said as follows in respect of the right of access to adequate housing:

*“The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; **some may need access to services such as water, sewage, electricity and roads.** What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.” (emphasis added)*

Government of Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 37

38.2 We submit that for residents of an apartment building, living in an urban environment, the right of access to adequate housing includes the right of access to electricity.

38.3 This is also the position in international law. In General Comment 4, the UN Committee on Economic, Social and Cultural Rights stated as follows:

“[T]he reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

*Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless **possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context.** They include the following:*

...

*(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, **energy for cooking, heating and lighting**, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services”*

...”

United Nations Committee on Economic, Social and Cultural Rights, General Comment 4 (1991) at paras 7 and 8(b)

- 38.4 We submit that the clear import of the dictum in **Grootboom** and the UN General comment cited above is that the concept of adequate housing, as protected in section 26 of the Constitution, does not simply refer to a roof over one's head. Depending on the setting, there may be other services and elements that are relevant to an assessment of the question whether someone could be said to be properly housed.
- 38.5 Of course, the fact that electricity forms part of the right of access to adequate housing in the present context does not mean that the residents are constitutionally entitled to free electricity. Nor does it entail an absolute prohibition on electricity disconnections.
- 38.6 What it does mean is that an electricity disconnection to an apartment block results in the residents' right of access to adequate housing being adversely affected for purposes of PAJA.

39 The Right to Dignity

- 39.1 Moreover, and in any event, we submit that the electricity disconnection affected the right to dignity of the applicants.
- 39.2 This Court has emphasised the link between the right to dignity and the socio-economic rights in the Constitution.

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others
2005 (2) SA 140 (CC) at para 21

Grootboom (supra) at para 83

39.3 The logic underpinning these dicta is that the dignity and self-worth of people who are forced to live in conditions of poverty may be impacted negatively by the conditions in which they live. Indeed, the facts of this case demonstrate that this is so.

See, in particular, paragraph 13 above

39.4 It is clear, therefore, from the judgments of this Court and the facts of this particular case, that the deprivation of an essential ingredient of satisfactory urban living necessarily affects the right to dignity of those affected.

39.5 Again, this is not to suggest that no disconnection of electricity is permissible. Rather the point made is a narrower one – that for purposes of PAJA it is beyond doubt that the right to dignity of the applicants was materially and adversely affected by the disconnection in question.

40 The Right to Receive Electricity in Terms of the Contract with the Fourth Respondent

40.1 In addition to the arguments set out above, we submit that the disconnections materially and adversely affected the rights of the applicants to receive electricity in terms of their contract with the fourth respondent:

- 40.2 It is common cause in these proceedings (and was before the High Court) that the applicants have a contractual right as against the fourth respondent to receive electricity.

Applicants' Founding Affidavit (High Court) at para 17; Record at 19

Second Respondent's Answering Affidavit (High Court) at para 34.1; Record at 195

Affidavit in Support of Application for Leave to Appeal at para 11; Record at 356

Second Respondent's Answering Affidavit (CC) at para 12.1; Record at 388-9

- 40.3 The exercise of the applicants' rights in this regard against the fourth respondent is dependent on the continued supply of electricity to the building by City Power.
- 40.4 It is clear, therefore, that the rights of the applicants were adversely affected by the disconnection – the conduct of City Power prevented the applicants from the continued enjoyment of their contractual rights vis-à-vis the fourth respondent.

Procedural fairness

- 41 As we have already submitted, the mere fact that the applicants' constitutional and contractual rights were adversely affected by the electricity disconnection does not, without more, render that disconnection unlawful.

42 However, what it does mean is that:

42.1 The disconnection amounts to administrative action that adversely affected the applicants' rights; and

42.2 Consequently, the applicants were entitled to be afforded procedural fairness in terms of PAJA prior to that electricity disconnection being carried out.

43 The content of the notion of procedural fairness is set out in section 3(2)(b) of PAJA:

"In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person [whose rights are materially and adversely affected by administrative action] –

*(a) **adequate notice of the nature and purpose of the proposed administrative action;***

*(b) **a reasonable opportunity to make representations;***

*(c) **a clear statement of the administrative action;***

*(d) **adequate notice of any right of review or internal appeal, where applicable; and***

*(e) **adequate notice of the right to request reasons in terms of section 5.**" (emphasis added)*

44 It is clear from the text of section 3(2)(b) that these are requirements of procedurally fair administrative action that must be complied with by an administrator.

45 This is subject to section 3(4) of PAJA, which provides that

“(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2)”.

“(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;

(ii) the nature, purpose and likely effect of the administrative action concerned;

(iii) the nature and extent of the departure;

(iv) the relation between the departure and the purpose;

(v) the importance of the purpose of the departure; and

(vi) the need to promote an efficient administration and good governance.”

46 The respondents do not rely on section 3(4) of PAJA to justify their failure to give the applicants notice of the impending disconnection. They did not do so in the High Court. Nor do they do so before this Court. Instead, the respondents' argument is that they are under no duty whatsoever to comply with the procedural fairness requirements of section 3 of PAJA in respect of the applicants. We submit that this approach is unsustainable.

See Second Respondent's Answering Affidavit (CC) at para 27.10; Record at 406

47 In any event, we submit that the evidence does not justify a conclusion that the failure to afford the applicants procedural fairness was reasonable and justifiable.

47.1 City Power has contended that it would be impractical to impose a requirement of notice when it comes to non-contracting parties (such as the applicants in this case); in particular, because there are too many potentially affected people to enable City Power to comply with this requirement.

Second Respondent's Answering Affidavit (High Court) at para 47.2; Record at 200

Id at para 47.4.2; Record at 202

Second Respondent's Answering Affidavit to Applicants' Supplementary Affidavit (High Court) at paras 12.2-12.4; Record at 282-3

47.2 But section 3(2)(a) of PAJA makes clear that a fair administrative procedure depends on the circumstances of each case. This Court and the SCA have likewise stressed that the requirements of procedural fairness are context specific.

***President of the Republic of SA v SA Rugby Football Union* 2000 (1) SA 1 (CC) at para 219**

***Zondi* (supra) at para 113**

***Chairman, Board on Tariffs and Trade and Others v Brenco Inc* 2001 (4) SA 511 (SCA) at paras 13-14**

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 45

- 47.3 Thus, in the present context, in order to achieve “*adequate notice*” the respondents need not have distributed individual invitations to make submissions to each of the residents in the building. Nor did they have to hold oral hearings in order to offer a “*reasonable opportunity to make representations*”.
- 47.4 All that was required was, for example, for the respondents to place one prominent notice in the foyer of the affected building, indicating that the residents were entitled to make written representations. There is no evidence justifying a conclusion that this would have been in any way impractical or impossible.
- 47.5 In addition, such evidence would have to be extraordinarily persuasive to justify the upholding of a complete, general, permanent departure from the procedural fairness obligations in section 3(2) in all electricity disconnections. Such an approach would appear to be at odds with at least section 3(4)(b)(ii) which appears to envisage a case-by-case analysis of the potential impact of the administrative action on its subject. It is not open to the respondents to disavow any obligation to conduct proper investigations into the potential impact of administrative action and simply to adopt a one-size-fits-all approach to procedural fairness in respect of electricity disconnections

48 We therefore submit that PAJA requires that the respondents afford procedural fairness to persons in the position of the applicants.

Personal Circumstances of Affected Persons

49 In addition, we submit that the respondents are required to take the personal circumstances of those to be affected by a proposed electricity cut, and all other relevant circumstances, into account before making a decision to discontinue the electricity supply to a building or residence.

50 In short, the basis of this submission is that the by-laws must be read to require all relevant circumstances, including the personal circumstances of affected persons, to be taken into account because this is the only constitutionally compliant reading of them.

51 We have submitted above that for residents of an apartment block in an urban setting, access to electricity forms part of the right of access to adequate housing in section 26 of the Constitution.

52 This Court has held that any measure that has the effect of depriving a person of pre-existing access to a socio-economic right, will limit that right and will require justification in terms of section 36 of the Constitution.

***Jaftha (supra)* at para 34**

See also: *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W)

53 In this regard, we submit that the case of ***Jaftha*** (supra) is instructive:

53.1 In that case, certain provisions of the Magistrates' Courts Act 32 of 1944 were challenged – these provisions allowed the immovable property of a debtor to be sold in execution without a court order and on the strength of a nulla bona return.

53.2 This Court, having established the principle that any measure that deprives a person of existing access to adequate housing would limit section 26(1) of the Constitution, sought to determine whether the measures were justified in terms of section 36 of the Constitution.

53.3 The Court emphasised that, while many sales of immovable property in execution would be justifiable limitations of the right of access to adequate housing, there would be cases in which such sales would not be justifiable in the light of the particular facts of the matter.

***Jaftha (supra)* at para 43**

53.4 The Court held, therefore, that the impugned provisions were overbroad and unconstitutional to the extent that that they allowed execution to take place regardless of the personal circumstances of the debtor and other circumstances that might render execution unconstitutional.

***Jaftha (supra)* at paras 43-44**

53.5 In so far as remedy was concerned, the Court held that court supervision over the execution process would cure the constitutional defect – this would allow a court to consider the facts of each peculiar case and determine whether, on those facts, it would be justifiable to permit execution.

***Jaftha* (supra) at paras 54-5**

54 We submit that what ***Jaftha*** demonstrates is that whether an act which deprives a person of access to a socio-economic right will be justifiable, depends on the relevant circumstances of the case and the person affected. This Court held in ***Jaftha*** that the appropriate constitutional response is to require those empowered to make the determinations whether to permit such deprivations to take into account all relevant circumstances before making such a decision – this will ensure that a decision of this nature is constitutionally permissible.

55 In the light of these contentions, we submit that the only permissible reading of the Credit Control By-Laws is to include a requirement that administrators, when deciding whether to disconnect an electricity supply, take into account the personal circumstances of those who will be affected by the decision and all other relevant circumstances.

56 If such a reading is not adopted, the possibility will exist that disconnections will take place at the instance of the State in circumstances in which they are not

constitutionally permissible in the light of the right to housing in section 26 of the Constitution, and indeed the right to human dignity in section 10 of the Constitution.

57 Yet state officials are

“constitutionally bound, in the daily operation of their role and functions, to observe the rule of law and promote the spirit, purport and objects of the Bill of Rights. The public administration must always and in every sphere be governed by the democratic values and principles enshrined in the Constitution, and services must be provided impartially, fairly, equitably, and without bias.”

***Armbruster and Another v Minister of Finance and Others*
2007 (6) SA 550 (CC) at para 81**

58 In the circumstances, we submit that the personal circumstances of those affected by an electricity disconnection are relevant considerations that must be considered before the decision is made.

Cf: Section 6(2)(e)(iii) of PAJA

59 The question that must now be considered is whether the Credit-Control By-Laws can be interpreted in a manner that accommodates these requirements of PAJA and the Constitution.

F. THE BY-LAWS CAN BE READ CONSISTENTLY WITH PAJA AND THE CONSTITUTION

60 The Credit Control By-Laws were made in terms of the Local Government: Municipal Systems Act 32 of 2000. The following aspects of the by-laws bear emphasis:

60.1 The Credit Control By-Laws contain detailed provisions governing the relationship between the Council (and hence City Power) and the consumers of electricity.

60.2 Section 3(1) of the by-laws provides that no municipal service may be provided to an applicant unless certain conditions have been fulfilled. These relate to the conclusion of a service agreement. It is common cause in this application that the applicants have not concluded a service agreement with City Power.

60.3 The Credit Control By-Laws contain various provisions governing issues such as deposits, the conclusion of new service agreements by existing customers, the termination of service agreements and the like. They also have, in section 11, a detailed mechanism for customers to dispute the amounts claimed in accounts.

60.4 The important provisions of the Credit Control By-Laws, for the purposes of this application, are sections 13, 14 and 15.

60.5 Section 13 provides for the issuing of a final demand notice to a customer that has not paid an amount that is due and payable. The

provision prescribes certain details that must be included in the notice. One of the requirements of the notice is that it must inform the customer that he or she has an opportunity to make representations in respect of any aspect of the final demand notice.

See section 13(2) and, in particular, section 13(2)(h)

- 60.6 Section 14 provides that, in addition to the ordinary debt-collection mechanisms available to the respondents, they may terminate any services in respect of which there has been non-payment.
- 60.7 Section 15 of the by-laws, which is the provision that is central to this application, reads as follows:

“(1) . . .

(2) Subject to the provisions of subsection (4), the council may terminate or restrict the provision of water or electricity, or both, whichever service is relevant, in terms of the termination and restriction procedures prescribed or contained in any law, to any premises if the customer in respect of the municipal service concerned

. . .

(c) fails to comply with any condition or provision in respect of the supply of electricity or water, as the case may be, imposed by the Council;

. . .

(f) causes a situation relating to electricity or water which, in the opinion of the Council, is dangerous or constitutes a contravention of any applicable law, including the common law;

. . .

(3) The Council may send a termination notice or a restriction notice to a customer informing him or her –

(a) that the provision of the municipal service concerned will be, or has been restricted or terminated on the date indicated on the notice; and

(b) of the steps that can be taken to have the municipal service concerned reinstated.

(4) Any action taken in terms of subsections (2) and (3) is subject to compliance with

...

(d) The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) in so far as it is applicable.”

(emphasis added)

60.8 City Power, in its papers before this Court, accepts, as it must, the procedural duties imposed on it by the Credit Control By-Laws. It denies, however, that it owes these duties to those in the position of the applicants. Rather, it insists that, in terms of the by-laws, it owes the duties of procedural fairness only to those with whom it has concluded a service agreement.

Second Respondent’s Answering Affidavit (High Court) at para 25; Record at 192

Id at para 47.4; Record at 201-2

60.9 It is true that the Credit Control By-Laws deal mainly with the regularisation of the relationship between the respondents and consumers of municipal services in terms of an agreement.

- 60.10 Crucially, however, the word “*customer*” is defined in the Credit-Control By-Laws as “*any occupier of premises to which the council has agreed to provide **or is actually providing any municipal service**, or if there is no occupier, the owner of the premises concerned.*” (emphasis added)
- 60.11 We submit that the clear intention of this provision is to retain for the respondents the right to terminate a municipal service to a consumer of that service, even though the consumer has not concluded a service agreement with the respondents. It is based on an acceptance that, although the by-laws require electricity only to be supplied pursuant to an agreement, this might not always be the case. There will often be a need to disconnect a supply, even where no agreement exists.
- 60.12 However, with this entitlement comes certain responsibilities. By defining customers in this way, the Credit Control By-Laws not only entitle the respondents to disconnect a person or entity who is consuming a service without a contractual nexus with the respondents but also impose the requirements of procedural fairness on the respondents when they choose to disconnect.
- 61 It is submitted that, in the light of the above, the Credit Control By-Laws require that disconnections, even in respect of parties with whom City Power has no contract, must be procedurally fair. This interpretation is consistent with PAJA and is the interpretation that best promotes the spirit, purport and objects of the Bill of Rights, including the rights to dignity, adequate housing and

administrative justice. As the authorities cited earlier make clear, this interpretation is accordingly the one that must be adopted provided that it is not unduly strained.

62 In any event, at worst for the applicants, we submit that the Credit Control By-Laws are silent on the question of procedural fairness for tenants. If that is so, they can certainly be read together with the duties imposed on the respondents by PAJA, particularly given that section 15(4) of the By-Laws requires compliance with PAJA "*in so far as it is applicable.*"

63 The same approach applies to the question of taking the personal circumstances of the applicants into account, before taking the decision to disconnect the electricity supply. The by-laws are silent on this score and accordingly, there is nothing to preclude such an interpretation in conformity with the constitutional obligations discussed above.

64 In the present case it is common cause that the respondents did not adhere to the requirements of procedural fairness in respect of the applicants, nor did they take their circumstances into account. Accordingly, the disconnection was unlawful.

G. ALTERNATIVELY, THE BY-LAWS ARE UNCONSTITUTIONAL AND INVALID

65 We have submitted above that, at minimum, the by-laws do not preclude an interpretation that accommodates the requirements of the Constitution and PAJA by:

65.1 Requiring adherence to the requirement of procedural fairness in respect of residents being subjected to an electricity disconnection; and

65.2 Requiring the respondents to take the personal circumstances of the residents into account before disconnecting the electricity.

66 In the event that we are wrong and the by-laws preclude this interpretation, we submit that they are unconstitutional and invalid on three bases. We deal with these briefly given that the substance of the relevant issues has already been canvassed above.

67 First, to the extent that the by-laws preclude adherence to the requirement of procedural fairness, they violate section 33(1) of the Constitution.

67.1 This Court has made clear that while all legislation must be read in conformity with PAJA wherever possible, this does not mean that individual provisions of other legislation cannot be tested against section 33(1) of the Constitution itself.

See *Zondi* (supra) at paras 99-103

67.2 The principle that adequate notice must be given of proposed administrative action is a bedrock of administrative law and adequate notice is one of the essential ingredients of fair administrative action.

Hoexter *Administrative Law in South Africa* (2006) at 332

***Kadali v Hemsworth* NO 1928 TPD 495 at 506**

67.3 One of the main reasons for the insistence of notice is to give effect to the entitlement of affected people to make representations before administrative action is taken that might adversely affect their rights. The administrative act of disconnecting an electricity supply specifically requires that the opportunity to make representations be afforded, given the rights and interests at stake.

67.4 In the event that the by-laws preclude adherence to the requirement of adequate notice, to that extent they unjustifiably limit the right to administrative action that is “*procedurally fair*” in terms of section 33(1) of the Constitution.

68 Second, to the extent that the by-laws preclude adherence to the requirement of procedural fairness in section 3 of PAJA, they are inconsistent with PAJA.

68.1 In that event they are invalid by virtue of section 156(3) of the Constitution, which provides as follows:

“Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a by-law and national or provincial legislation that is

inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.”

- 68.2 Section 151(4) of the Constitution provides that “[t]he national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.”
- 68.3 PAJA is clearly not a piece of legislation that falls foul of section 151(4). It was enacted to give effect to the constitutional right in section 33(1) of the Constitution. Neither its purpose nor effect is to compromise the capacity of municipalities to exercise their powers and functions.
- 69 Third, to the extent that the by-laws preclude the respondents from considering the circumstances of residents affected before embarking on an electricity disconnection, they are inconsistent with sections 10 and 26 of the Constitution, for the reasons given earlier.

See paras 38—40 above

H. LEAVE TO APPEAL

70 Finally, we deal with the question of leave to appeal. There is, we submit, no dispute that the present matter raises constitutional issues, nor that it has reasonable prospects of success.

71 The real question, as we see it, is whether this Court should grant leave to appeal without requiring the applicants first to go to the SCA.

72 This Court has described the way to approach such a question as follows:

“Relevant factors to be considered in such cases will, on the one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the SCA is bypassed.”

Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC) at para 32

73 In ***Islamic Unity***, this Court held that “[w]hen a case concerns the direct application of the Constitution and does not involve the common law, and the interests of justice require its early resolution, direct access to this Court may be granted with less reluctance.” In that case, the Court remarked that “the benefit of first obtaining the views of the SCA may readily be outweighed by other considerations”, including the public interest in the issues involved, and their implication for people beyond the parties to the case. The Court also

pointed out that protracted procedures and unnecessary costs would be avoided if the SCA were bypassed.

Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at paras 16—19

74 The present matter involves both the indirect and direct application of the Bill of Rights to the by-laws. However, it does not involve issues of common law. It is common cause that the issues are of immediate and considerable importance to all of the parties, particularly the applicants who have been living without electricity for over a year. In addition, the applicants are represented by a public interest law clinic which has a duty to conserve costs as best it can.

75 In all the circumstances, we submit that it is in the interests of justice for leave to appeal to be granted.

I. CONCLUSION

76 In the light of the above, the applicants submit that a proper case has been made out for the relief sought in prayers 3.1—3.6 of the notice of motion in the application for leave to appeal to this Court:

76.1 Those prayers are based on an interpretation of the by-laws in terms of which City Power was required to:

76.1.1 Give the applicants adequate notice of the disconnection;

76.1.2 Give the applicants the right to make representations; and

76.1.3 Consider the personal circumstances of the applicants before disconnecting the electricity.

76.2 Since it is common cause that none of the above was satisfied in the present case, the disconnection fell foul of the by-laws and was thus unlawful.

77 In the alternative, to the extent that this Court finds that the by-laws cannot accommodate the requirements of PAJA and the Constitution, it is then submitted that the applicants are entitled to the constitutional relief set out in prayers 3.7 and 3.8.

78 On the question of costs, we submit that if the applicants succeed, they are entitled to their costs, including the costs in the High Court and including the

costs of two counsel. In the event that the applicants fail, no costs award should be made in view of the fact that this application plainly involves a good faith attempt to vindicate constitutional rights.

***Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paras 138-139**

***Trustees for the time being of the Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14 at paras 21 - 25**

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APPLICANTS' LIST OF AUTHORITIES

1. *Zondi v MEC for Traditional & Local Govt Affairs* 2005 (3) SA 589 (CC).....19, 30, 43
2. *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC).....20
3. *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC).....20
4. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC).....20
5. *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).....22
6. *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).....23, 25
7. *United Nations Committee on Economic, Social and Cultural Rights, General Comment 4 (1991)*.....24
8. *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).....25, 33, 34
9. *President of the Republic of SA v SA Rugby Football Union* 2000 (1) SA 1 (CC).....30
10. *Chairman, Board on Tariffs and Trade and Others v Brenco Inc* 2001 (4) SA 511 (SCA).....30
11. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).....31

12. *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).....33
13. *Armbruster and Another v Minister of Finance and Others* 2007 (6) SA 550 (CC).....35
14. *Hoexter Administrative Law in South Africa* (2006).....43
15. *Kadalie v Hemsworth* NO 1928 TPD 495.....43
16. *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC).....45
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19. *Trustees for the time being of the Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14.....48