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

CCT NO: _____
HIGH COURT CASE NO: 08/22689

In the matter between:

LEON JOSEPH	**First Applicant**
VALERIE MOSES	**Second Applicant**
VICTOR MOKETE MOKOENA	**Third Applicant**
LUCRICIA 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**

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the applicants apply to this Court for an order in the following terms:

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1 Granting leave to appeal against the judgment and order of His Lordship Mr Justice Jajbhay in the South Gauteng High Court, handed down on 3 April 2009;

2 Upholding the appeal with costs;

3 Setting aside the order of the High Court of 3 April 2009 under case number 08/22689 and replacing it with the following order:

3.1 It is declared that the disconnection of the electricity supply to Ennerdale Mansions, Stand 158 Percy Street, corner Sixth Avenue, Mid Ennerdale, Ennerdale, Johannesburg ("Ennerdale Mansions") on 8 July 2008 without adequate notice, without affording the affected parties an opportunity to make representations and without complying with the other requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 was unlawful and invalid.

3.2 It is declared that the disconnection of the electricity supply to Ennerdale Mansions on 8 July 2008 was unlawful and invalid to the extent that the first and second respondents failed to take the personal circumstances of those to be affected by the proposed electricity cut, and all other relevant circumstances, into account before making a decision to discontinue the electricity supply.

3.3 The disconnection of the electricity supply to Ennerdale Mansions on 8 July 2008 is set aside.

3.4 The second respondent is ordered immediately to reconnect the electricity supply to Ennerdale Mansions.

3.5 It is declared that it is unlawful to disconnect the supply of electricity to a building or residence without adequate notice, without affording the affected parties an opportunity to make representations and without complying with the requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

3.6 It is declared that the first and second 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.

3.7 In the alternative to paragraph 3.5 above, it is declared that section 15 of the 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 ("the Credit Control By-Laws") is unconstitutional and invalid to the extent that it allows the first and second respondents to disconnect an electricity supply to a building or residence without notice to the occupants, without affording them an opportunity to make representations, and without complying with the requirements of

procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

3.8 In the alternative to paragraphs 3.6 above, declaring that section 15 of the Credit Control By-Laws is unconstitutional and invalid to the extent that it allows the first and second respondents to discontinue the electricity supply to a building or residence without taking the personal circumstances of those to be affected by a proposed electricity cut, and all other relevant circumstances, into account before making the decision.

3.9 The first and second respondents are liable to pay the applicants' costs.

TAKE NOTICE FURTHER that within ten (10) days from the date upon which this application is served on them, the respondents may respond by affidavit, indicating whether or not they consent to leave to appeal being given and, if the application is opposed, the grounds for such opposition.

TAKEN NOTICE FURTHER that the accompanying affidavit of SHAHEDA HASSIM MAHOMED is annexed in support of the application.

TAKE NOTICE FURTHER that the applicants have appointed the offices of their attorneys of records set out below as the address at which they will accept notice and service of all documents in these proceedings.

DATED at JOHANNESBURG on this 30TH day of APRIL 2009

S

Wits Law Clinic
Applicants Attorneys
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University of the Witwatersrand
1 Jan Smuts Avenue
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Tel: 011 717 8619
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REFERENCE: Wits Law Clinic/CALS/S Wilson/T Mosikili

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
Johannesburg

AND TO: **THE FIRST RESPONDENT**
City of Johannesburg
C/O BHAM & DAHYA ATTORNEYS
Third Floor, Suite 1
30 Loveday Street
Johannesburg

AND TO: **THE SECOND RESPONDENT**
City Power (Pty) Ltd
C/O MOKHATLA ATTORNEYS
7th Floor, Surrey House
35 Rissik Street
Johannesburg

AND TO: **THE THIRD RESPONDENT**

b

Member of the Executive Council for Local Government, Gauteng
c/o the State Attorney
10th Floor, North State Building
95 Market Street, cnr Kruis Street
Johannesburg

AND TO: **THE FOURTH RESPONDENT**
2 Thor Street
Ennerdale
Extension 1

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
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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**

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

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SHAHEDA HASSIM MAHOMED

do hereby make oath and swear:

1 I am an adult, female attorney employed as an adjunct professor by the University of the Witwatersrand Law Clinic ("*the Wits Law Clinic*"). The Wits Law Clinic is the applicants' attorney of record in this matter.

2 The facts contained herein are, unless the contrary appears from the context, within my personal knowledge and are true and correct.

THE PARTIES

3 The first to sixth applicants are the only remaining parties to the High Court application that are still living in the building that is the subject of this application. They reside at Ennerdale Mansions, Stand 158 Percy Street, corner Sixth Avenue, Mid Ennerdale, Ennerdale, Johannesburg.

4 The first respondent is the City of Johannesburg, a Metropolitan Municipality duly established by law, having its principal place of business at the Metropolitan Centre Building, 158 Loveday Street, Marshalltown, Braamfontein.

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5 The second respondent is City Power (Pty) Ltd, a company with limited liability incorporated in terms of the Companies Act 61 of 1973, with its principal place of business at 40 Heronmere Road, Reuven.

6 In the High Court, the main *lis* was between the applicants and the second respondent, because the first respondent has delegated the responsibility to provide electricity to the second respondent in the area in which the applicants reside. However, because the first and second respondents made common cause with one another in the High Court and are both responsible for the provision of electricity within Johannesburg, I shall refer to them collectively as "*the respondents*", unless the context requires otherwise.

7 The third respondent is the Member of the Executive Council for Local Government, Gauteng, with the address for service being the State Attorney, 10th Floor, North State Building, 95 Market Street, cnr Kruis Street, Johannesburg. The third respondent is cited by virtue of the fact that, as part of this application, the constitutional validity of certain municipal by-laws is impugned. The third respondent did not participate in the proceedings in the High Court, despite having been joined as a party.

8 The fourth respondent is Thomas Nel, the owner of Ennerdale Mansions, whose address is 2 Thor Street, Ennerdale Extension 3. The fourth respondent is cited by virtue of his ownership of the affected building and no specific relief is sought against him. The fourth respondent was also a party to the proceedings in the High Court, although he did not participate in them.

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INTRODUCTION

9 This is an application for leave to appeal to this Court against the judgment of His Lordship Mr Justice Jajbhay ("*Jajbhay J*"), in the South Gauteng High Court, handed down on 3 April 2009.

10 This application concerns a number of poor families living in a building in Johannesburg called Ennerdale Mansions. The average income of the households in the building is R3000.00 to R4000.00 and some of the households have no income at all.

11 The applicants rent their flats from the fourth respondent, Mr Nel. The applicants pay their electricity bill to Mr Nel as part of their rent accounts (although electricity is charged separately and is not part of the rent) and all have kept up to date with their payments on rent and electricity.

12 Notwithstanding this, on 8 July 2008, the electricity supply to the building was cut off by employees of the second respondent, City Power. It has remained cut off ever since, meaning that the applicants have now been without electricity for almost ten months.

13 There were approximately 30 tenants and their families living in the building at the time of the cut off. Many of these have now left the building due to the

intolerable conditions that have resulted from the electricity cut-off. They have been replaced by new tenants who play no part in the present application.

14 There are six of the original applicants and their families who remain in the building, notwithstanding the absence of any electricity and the severe discomfort and prejudice they have suffered as a result. They remain there because they simply have no option - they cannot afford to find suitable alternative accommodation elsewhere. They are the applicants who seek leave to appeal to this Court.

15 When the electricity was cut off, the applicants did not know why this had occurred. They learnt subsequently that the disconnection was due to the fact that, despite the applicants and their fellow tenants being up to date with their rent and electricity payments to Mr Nel, he had not been paying the building's electricity accounts to City Power. Accordingly, a debt in excess of R400 000 had accumulated to City Power.

16 The applicants do not contend that they have a right to free or unlimited electricity. They also do not contend that City Power is precluded from cutting off electricity in appropriate circumstances and after following a fair procedure.

17 The crux of the applicants' case is that the cutting off of electricity to Ennerdale Mansions could only occur after City Power had followed a fair procedure in relation to them. That procedure required City Power to:

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17.1 Give notice to the applicants of the likely cut-off, perhaps by means of general notices posted in the foyer of the building;

17.2 Allow the applicants a period to make representations to City Power in this regard; and

17.3 Consider these representations before deciding to cut-off the electricity.

18 It is common cause that none of the above occurred. While notice was given to Mr Nel, no prior notice was given to the applicants. They were afforded no opportunity to make any representations to City Power.

19 This was no oversight by City Power. Rather, City Power and the City of Johannesburg contend vigorously that there is no duty on them at all to give persons such as the applicants any notice, to allow them to make any representations or to consider any such representations. This is despite the fact that the City of Johannesburg has constitutional duties to provide services at a local level and has delegated the responsibility of providing these services to City Power.

20 The lawfulness of the respondents' approach is what is at issue in the present proceedings. Accordingly, the issues raised by the present application are primarily:

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20.1 The extent to which the respondents are obliged to give notice to people living in a building before the electricity supply to that residence is disconnected;

20.2 The extent to which the respondents are obliged to give people living in a building an opportunity to make representations before the electricity supply to that residence is disconnected;

20.3 The extent to which the respondents are obliged to take into account the personal circumstances people living in a building and other relevant considerations into account before the electricity supply to that residence is disconnected.

21 The applicants contended before the High Court, and continue to contend before this Court, that their entitlement to a fair procedure in these circumstances arises from:

21.1 section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);

21.2 the right to procedurally fair administrative action contained in section 33(1) of the Constitution;

21.3 the right to human dignity contained in section 10 of the Constitution; and

21.4 the right of access to adequate housing contained in section 26(1) of the Constitution.

22 In the circumstances, I submit that there can be no question that the issues raised by the present application are all manifestly constitutional issues.

PROCEDURAL BACKGROUND TO THIS APPLICATION

23 The applicants' application to the High Court was in two parts:

23.1 Part A was an urgent application seeking to have the electricity supply to the building reconnected, pending the finalisation of Part B. That urgent application was dismissed with costs by his lordship Mr Justice Tsoka. A copy of the judgment is attached marked **Annexure A**.

23.2 Part B was the application for declaratory and ancillary relief that was ultimately dismissed by Jajbhay J and which is the subject of this application for leave to appeal. A copy of the judgment is annexed as **Annexure B**.

24 The relief sought in the court below was set out in the applicants' notice of motion, which is annexed as **Annexure C**.

24.1 It will be seen that the applicants' primary relief was to have the disconnection of electricity reviewed and set aside on the basis that it had not been procedurally fair.

24.2 In the alternative and to the extent necessary, the applicants sought to have the provisions of the relevant by-laws declared unconstitutional to the extent that they permitted City Power to engage in disconnections of electricity without following a fair procedure.

25 At the hearing of Part B of this application, the applicants' counsel applied for an amendment of the notice of motion to include a prayer that, should the application be upheld, the electricity supply to the building was to be reconnected. The application was not opposed by the respondents and was granted by Jajbhay J.

26 The record in this matter is relatively brief, consisting of just over 300 pages.

27 In the present application, the applicants seek leave to appeal directly to this Court, without the Supreme Court of Appeal first dealing with that matter. I deal below with why the applicants submit that this course is in the interests of justice. However, the applicants will also be delivering a notice of application for leave to appeal to the Supreme Court of Appeal. That application is conditional and will only be persisted with in the event that this Court refuses leave to appeal to it.

PRELIMINARY ISSUE – THE APPLICABLE BY-LAWS

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28 Before proceeding to discuss the judgment of the High Court, it is important to note that there are two sets of by-laws that ostensibly deal with the disconnection of municipal services in Johannesburg. These are:

28.1 The 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 ("*the Credit-Control By Laws*"); and

28.2 The 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 ("*the Electricity By-Laws*").

29 One of the issues in the High Court was which of these sets of by-laws governed the dispute between the parties. The doubt related to the fact that the Electricity By-Laws permit disconnections of municipal services without any notice whatsoever. The Credit-Control By-Laws, on the other hand, require disconnections to be subject to PAJA and provide that disconnections cannot be effected until notice has been given to a "*customer*", which the respondents interpret as meaning only the party with whom they have contracted for the provision of municipal services (in this case, the fourth respondent).

30 Ultimately, both parties were agreed that, to the extent that they were inconsistent, the Credit-Control By-Laws repealed the Electricity By-Laws. Jajbhay J held that this was indeed so and, in doing so, dismissed the

applicants' alternative prayer asking for the Electricity By-Laws to be declared unconstitutional to the extent of their inconsistency with section 33 of the Constitution (see prayer 7 of the applicants' notice of motion before the High Court and paras 34—38 of the judgment). The applicants do not appeal this aspect of the judgment and order.

THE JUDGMENT OF THE HIGH COURT

31 As appears from the notice of motion in the High Court, the applicants impugned the legality of the disconnection because:

31.1 The disconnection took place without notice to the occupiers of the building, whereas they ought to have been given notice.

31.2 The disconnection took place without affording the occupiers the opportunity to make representations as to why the electricity supply should not be disconnected.

31.3 The respondents, before deciding to disconnect the electricity supply, ought to have taken the personal circumstances of the occupiers of the building and other relevant considerations into account.

31.4 Since no notice was given, the applicants did not have the opportunity to make representations. Since the applicants did not have the opportunity to make representations, they were unable to bring relevant considerations, such as their personal circumstances, to the attention of

the respondents. The disconnection, therefore, was effected without these relevant circumstances being taken into account.

32 The applicants' contention that they were entitled to notice and the opportunity to make representations is based on their right to procedural fairness, as envisaged in section 3 of PAJA and section 33 of the Constitution. The need for the applicants' personal circumstances to be taken into account is based not only on the duty of administrators to take all relevant circumstances into account before taking administrative decisions, but on the right to human dignity and the contention that the right to housing, in the urban context, includes the right of access to electricity. The requirement to take the personal circumstances and other relevant considerations into account is based on this Court's judgment in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*** **2005 (2) SA 140 (CC).**

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

33.1 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).

33.2 The Credit-Control By-Laws provide for the disconnection of an electricity supply as a mechanism to collect arrears (at paras 27—31).

33.3 Much of the applicants' argument is based on their contention that the applicants 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 (at para 39).

33.4 This case is different to the position regarding water, where statute prohibits disconnection in certain circumstances. In the present case, there is not such statutory prohibition and, in any event, the applicants are not indigent persons who qualify for assistance in terms of the by-laws (at para 40). As the High Court put it: "*The applicants can pay. They are not indigent. If they were indigent they would apply for assistance in terms of chapter 4 of the Credit-Control By-Laws (which deals with indigent persons) for assistance and would be provided with electricity on that basis. They are not like Grootboom*" (at para 46).

33.5 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 (at paras 41—43).

33.6 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 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 (at paras 44—45 and 47—48).

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

GROUNDS OF APPEAL

34 The applicants contend that the High Court erred on the grounds set out below.

35 First, and most fundamentally, the High Court erred by focussing on the incorrect question:

35.1 The High Court approached this matter by considering whether the applicants were "*customers*", as envisaged by the Credit-Control By-Laws.

35.2 Having found that the applicants did not fall under that definition, the High Court held that the applicants were not entitled to any notice and any other component of procedural fairness.

35.3 However, this was, with respect, the incorrect way to approach this matter. Moreover, it resulted in the High Court failing to deal at all with the applicants' primary contention that they are entitled to procedural fairness in terms of PAJA.

35.4 The approach contended for by the applicants before the High Court, and persisted in before this Court, is that what must first be considered is whether the applicants are entitled to procedural fairness in terms of section 3 of PAJA prior to a disconnection being effected.

35.5 If the applicants are entitled to procedural fairness under PAJA, the next question to be asked is whether the Credit-Control By-Laws preclude compliance with procedural fairness in respect of the applicants. In that event, questions arise as to the status and constitutional validity of the Credit Control By-Laws.

35.6 However, in the present case, the Credit-Control By-Laws do not preclude compliance with procedural fairness in respect of the applicants. At the very most, they are silent on the issue. In the circumstances, the respondents must fulfil their procedural fairness obligations in terms of PAJA. This is made clear by this Court's decision in ***Zondi v MEC for Traditional & Local Govt Affairs* 2005 (3) SA 589 (CC) at para 101** which was to the effect that an administrator is bound

to apply the provisions of PAJA unless the relevant empowering legislation is inconsistent with PAJA.

35.7 The High Court failed to consider this issue at all.

36 Second, the High Court erred in finding that the applicants were not entitled to procedural fairness.

36.1 It is submitted that, had the High Court followed the correct approach, it would have found that the applicants were indeed entitled to procedural fairness prior to the disconnection of the electricity supply.

36.2 The disconnection of the electricity supply was clearly an administrative act, which adversely and materially affected the rights of the applicants. As such, they were entitled to procedural fairness as envisaged in sections 3(1) and 3(2) of PAJA.

36.3 Section 3(2)(b) of PAJA makes it clear that procedural fairness includes the right to receive adequate notice of administrative action and the opportunity to make representations. In this context, it is important to emphasise that section 3(2)(a) of PAJA makes clear that a fair administrative procedure depends on the facts of the case. The applicants repeatedly made clear before the High Court that procedural fairness in this case could be vindicated by the respondents simply putting up a clear, legible notice in the foyer of the building warning of the impending disconnection and the right to make representations and the applicants then being afforded the opportunity to make

representations in a letter to the respondents. The applicants have certainly never contended for an oral hearing or even notification for each tenant in the building.

36.4 Section 3(4) of PAJA permits an administrator to depart from the requirements of procedural fairness to the extent that it is reasonable and justifiable in the circumstances of the case. It is submitted that, if one has regard to the factors listed in section 3(4)(b) of PAJA, the departure from the requirements of procedural fairness contended for by the respondents is impermissible.

36.5 It is submitted that the High Court placed too much emphasis on the debt-collection obligations of the respondents. Given the relatively minor procedural obligations that the applicants contend for, the respondents were not able to explain why affording procedural fairness to the applicants would impede the debt-collection obligations of the respondents. Indeed, the applicants have never said that the respondents should be precluded from using disconnections as a debt-collection mechanism. The applicants simply contend that they should be heard before a decision to disconnect is made because it may be that, on the facts of a case, the respondents decide that it would be inappropriate to disconnect the electricity supply, taking into account relevant circumstances such as the occupants' personal circumstances. In fact, the only purpose advanced by the respondents to justify the failure to afford procedural fairness was that it would place too great an administrative burden on the respondents.

36.6 It is submitted that the High Court erred in accepting the contentions of the second respondent that because it has 13 000 large power users as customers and because many of them are in arrears, there are potentially thousands of people similarly situated to the applicants, who the respondents would need to notify prior to any disconnection. This is because the second respondent did not allege, anywhere in its papers before the High Court, that it performs a multitude of disconnections on a regular basis. The applicants accept that there are thousands of people in Johannesburg who are faced with the *possibility* of disconnections. The extent of the burden placed on the respondents must be assessed in the light of the amount of disconnections that are effected at a given time (or even within a given month) and not in the light of the potential disconnections that could take place at any time. The respondents failed to adduce any facts before the High Court that suggest that, if the applicants' submissions were to have been upheld, they would be required to give notice to so many people that they would be severely prejudiced.

36.7 Furthermore, organs of state are faced with various practical difficulties when it comes to discharging their constitutional and statutory duties. It is submitted that practical difficulties alone cannot justify non-compliance with constitutional and statutory duties.

36.8 In the light of the complete obliteration of the rights to procedural fairness contended for by the respondents in this case, the relatively minor procedural burdens contended for by the applicants, and the

failure of the respondents to advance a proper purpose for the limitation, it is submitted that the High Court ought to have held that the respondents had failed to justify a departure from the requirements of procedural fairness in terms of section 3(4) of PAJA.

36.9 Had the High Court adopted this approach, it would have found that the disconnection of the electricity supply on 8 July 2008 was indeed unlawful, as contended by the applicants, because it was effected without affording the applicants the relevant components of procedural fairness. To the extent that it did not, it is submitted that it erred.

37 Third, the High Court erred in the manner it dealt with question of a right of access to electricity.

37.1 The applicants' case has always been that, regardless whether the right to housing includes the right of access to electricity, they are entitled to the components of procedural fairness contended for. This is by virtue of PAJA, the right to fair administrative action in terms of section 33 of the Constitution and the right to human dignity in terms of section 10 of the Constitution.

37.2 However, the High Court correctly pointed out that a significant component of the applicants' case was that the right to housing does indeed contain the right of access to electricity. This argument is based both on the position in international law and on this Court's remarks in *Grootboom* (supra) at para 37.

37.3 The High Court judgment is not altogether clear on whether it upheld the applicants' argument based on paragraph 37 of *Grootboom*. It is submitted that, on a proper approach to this question, it would be necessary to enquire first whether the right of access to housing includes the right of access to electricity.

37.4 It would then be necessary to consider whether, if the answer to the first question was positive, that access is limited by the impugned measure. The approach of the High Court in paras 39—43 seems to focus on the second question only, and finds that the respondents are not responsible for inhibiting the applicants' access to electricity. However, to the extent that the High Court rejected the applicants' argument that electricity forms part of the right to housing, at least in the urban setting, or did not make a finding in this regard, it is submitted that the High Court erred. Should leave to appeal be granted, the applicants will argue that the right to housing does indeed have this interpretation.

37.5 It is, in any event, submitted that the High Court was wrong to find that the respondents are not responsible for impeding the applicants' access to electricity. This is because:

37.5.1 In the first place, it is clear that it is the respondents who disconnected the electricity supply, acting pursuant to legislation. This is analogous to the position in the decision of this Court in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*** **2005 (2) SA 140 (CC).** In that case, it could be argued that the proximate cause of the debtors

losing their homes was the decision of their creditors to execute against their immovable property. Even so, this Court had no difficulty in finding that the Magistrates' Court Act 32 of 1944, which is the legislation that permitted execution against immovable property, limited the right of access to housing. By the same token, even if the proximate cause of the disconnection was the fourth respondent's failure to pay his arrears, there is no doubt that, to the extent that legislation permits the disconnection of electricity, that legislation permits limitations to access to electricity.

37.5.2 Secondly, the High Court was wrong to hold that there is no nexus between the applicants and the respondents. It may be that there is no contractual nexus. However, the respondents were providing electricity to the building in which the applicants lived and then, acting pursuant to the relevant legislation, disconnected that supply. It is clear, therefore, that the disconnection limited the applicants' access to electricity.

37.5.3 Thirdly, the respondents have constitutional and statutory obligations to fulfil the socio-economic rights of those in their jurisdiction. At the very least, these obligations preclude the respondents from limiting pre-existing access to socio-economic rights without sufficient justification. Therefore, if one accepts the proposition that the right of access to housing includes the right of access to electricity (which, it is at least

possible to argue, the High Court accepted), then it is clear that the respondents deprived the applicants of pre-existing access to a socio-economic right.

37.6 If it is accepted that the right to housing includes the right to electricity, then it is submitted that the by-laws, as interpreted by the respondents and the High Court, facilitate a limitation of the right of access to electricity by permitting disconnections. As such, it was incumbent on the High Court to apply the approach of this Court as established in *Jaftha* (supra) to deal with limitations of the negative component of the right to housing. As this Court held in *Jaftha*, sometimes a limitation of access to housing will be justified and sometimes it will not. In *Jaftha*, the Court held that an appropriate remedy would be to require judicial oversight of the execution process to ensure that there was an adequate enquiry in each case as to whether execution would be justified. In this case, the applicants did not go so far. The applicants argued that the respondents themselves are simply obliged to take the personal circumstances of those in the position of the applicants, and all other relevant considerations, into account before disconnecting the electricity supply. That would allow the respondents to decide whether, taking all relevant circumstances into account, it would be justifiable for the occupiers of the building to be deprived of their access to electricity.

37.7 If this approach were to have been adopted, it would have been clear that the question whether the respondents are under a positive duty to supply electricity to poor persons living within Johannesburg does not

arise in this case. All that is relevant here is how the relevant legislation ought to be read to ensure that deprivations of pre-existing access to electricity are justifiable, which includes that they must be procedurally fair.

38 Finally, it is not clear why the High Court embarked on a limitations analysis in terms of section 36 of the Constitution, given that it did not find that any rights were limited by any legislation. Nevertheless, it is submitted that, to the extent that section 36 of the Constitution was relevant to any limitations of the right of access to housing or the right to administrative justice, the High Court erred in finding that any limitations were reasonable and justifiable.

39 It is further necessary to address a number of issues on which the High Court made findings in the course of its judgment.

39.1 The High Court erred in over-emphasising the constitutional obligation to collect debt, as established in this Court's judgment in ***Mkontwana v Nelson Mandela Metropolitan Municipality*** **2005 (1) SA 530 (CC)** and the notion that civil remedies are ineffective for the respondents.

39.1.1 The applicants have never suggested that the respondents should be denied the use of disconnections as a debt-collection mechanism. They simply argue that the right to disconnect ought to be subject to certain safeguards, aimed at protecting constitutional rights.

39.1.2 In addition, the applicants submit that the respondents cannot be heard to rely on their duty to collect arrears when, in the period of 10 months since the disconnection took place, they have failed to pursue a civil remedy against the fourth respondent. I invite the respondents to set out, in their answer to the present application for leave to appeal, what steps (if any) they have taken to recover the debt said to be owing by the fourth respondent.

39.2 The High Court erred in finding that the need to prevent illegal electricity connections was relevant in the present case.

39.2.1 The applicants do not dispute that, in certain contexts, it might be necessary for a municipal authority to disconnect an electricity supply without notice. As the applicants argued before the High Court, this would be in circumstances where the danger inherent in the situation requires urgent action.

39.2.2 In the present case, however, there was insufficient evidence on the record to support the respondents' belated contention that they had disconnected the electricity supply as a result of illegal connections.

39.2.3 Indeed, in the notice of the disconnection that had been sent by the second respondent to the fourth respondent. In that notice, the sole justification for the disconnection was the non-

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payment of arrears and there was no reference to any alleged illegal connections.

39.2.4 Moreover, there was a three-month delay between the notification of the impending disconnection and the actual disconnection. This is hardly indicative of an urgent need to disconnect, justifying non-compliance with procedural fairness.

39.2.5 So, while the applicants accept that an illegal and dangerous electricity supply might warrant urgent action in certain cases, they submit that the High Court erred in finding that this was such a case.

39.3 The High Court erred in placing reliance on the supposed alternative remedies that the applicants had.

39.3.1 Even if this were relevant to the question of procedural fairness (which is denied) none of the remedies suggested by the High Court judgment are, with respect, remotely practical for the applicants to pursue.

39.3.2 The applicants pursued their remedies via the Human Rights Commission and Rental Housing Tribunal before approaching the courts. These efforts were entirely unsuccessful. The Rental Housing Tribunal, for example, has ruled that it cannot take this matter any further and has removed the matter from its roll. A copy of its order is annexed as **Annexure D.**

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39.3.3 Quite obviously, the applicants want electricity restored and would take all practical available measures to achieve this. There are none available.

39.4 The High Court erred in placing significant emphasis on the ability of the applicants to pay for electricity.

39.4.1 It is not entirely clear how the High Court saw this as relevant. However, if one has regard to para 46 read with para 39 of the judgment, it seems as if the High Court was of the view that the applicants would not have qualified for free electricity under the respondents' indigency policy.

39.4.2 However, this misconstrues the applicants' case. They have never suggested that they are entitled to any government assistance when it comes to the provision of electricity. Their reliance has always been on the negative component of the right to housing, as set out by this Court in ***Jaftha***.

40 For all of these reasons, it is submitted that the judgment of the High Court ought to be set aside and replaced with an order upholding the application with costs.

LEAVE TO APPEAL

41 Having set out the applicants' grounds of appeal, I now proceed to set out the basis upon which it is contended that it would be in the interests of justice for this Court to grant leave to appeal.

Constitutional Matter

42 It is submitted that this application clearly raises a constitutional matter. It concerns the constitutional duties on the part of the respondents when they disconnect the electricity supply to a residence.

43 In particular, the application concerns the extent of the procedural duties on the part of the respondents before an electricity supply is disconnected, which concerns the proper interpretation of PAJA. This Court has held that, since PAJA is legislation that had to be passed in order to give effect to section 33 of the Constitution, its proper interpretation is a constitutional matter. In any event, the applicants have challenged the constitutionality of the by-laws as part of their application, which clearly raises a constitutional matter.

44 Furthermore, the applicants base certain of their arguments on the contention that the right of access to housing includes, at least in the urban setting, a right of access to electricity as well as the right to human dignity. These aspects of the application clearly raise constitutional matters.

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45 It should be noted that the High Court rejected an argument of the first respondent to the effect that, because the applicants had contractual remedies, the applicants enjoyed a "*non constitutional*" remedy (at para 63 of the judgment). The High Court held, further, that the application raised important constitutional issues.

Interests of Justice

46 It is submitted that it is in the interests of justice for this Court to grant leave to appeal directly to it in view of the following considerations:

46.1 This matter does not concern the development of the common law. Rather it involves issues of constitutional and statutory interpretation. As far as the latter is concerned, the case concerns the correct interpretation of a statute that was enacted to give effect to constitutional rights. This is patently an area in respect of which this Court is less likely to require the views of the SCA.

46.2 The applicants continue to live, 10 months down the line, without electricity. They are unable to afford suitable alternative accommodation. It is submitted that this operates strongly in favour of this matter being resolved once and for all by this Court, rather than requiring the applicants to approach the Supreme Court of Appeal first.

46.3 The applicants have, all along, been represented by the Wits Law Clinic. The litigation has been pursued at significant cost to the Clinic,

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which is a public-interest, non-profit organisation that litigates free of charge. It is submitted that it would not be in the interests of justice for the applicants to be required first to approach the SCA, with the attendant additional costs involved, when the matter raises issues that will inevitably require the attention of this Court.

46.4 This application raises important constitutional matters, which have the potential to affect many poor people living in Johannesburg. In particular, there is a stark contrast between the approaches contended for by the applicants and the respondents. The applicants contend that a disconnection of an electricity supply is an administrative act that affects them. As such, they argue that PAJA is applicable to electricity disconnections and that they, as the persons affected by the disconnection, are entitled to procedural fairness before a disconnection is effected. By contrast, the respondents focus on their contractual relationships with their customers and take the view that only those with whom they have contracted are entitled to the protections of PAJA. It would be in the interests of justice for the issues raised by this application to be dealt with authoritatively by this Court.

46.5 The applicants have reasonable prospects of success on appeal. It is submitted that, if regard is had to the grounds of appeal set out above, there are various conclusions reached by the High Court that could be overturned on appeal. In particular, the applicants submit that there are strong prospects that this Court will find that they were entitled to procedural fairness before the disconnections were effected.

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CONCLUSION

47 In the light of the above, the applicants submit that it would be in the interests of justice for this Court to grant leave to appeal.

SHAHEDA HASSIM MAHOMED

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Houghton this 30 day of April 2009 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

DALENE WOODGETT
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
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Lom Business Solutions t/a Set LK Transcribers/LAD

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

DATE: 28/07/2008

CASE NO: 22689/08

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 3/9/2008 SIGNATURE

In the matter between

DEIDRE DANVES AND OTHERS Applicants

and

CITY POWER AND OTHERS Respondents

JUDGMENT

TSOKA J: The applicant and 30 others referred to as Occupiers of Ennerdale Mansions, Stand 158 Percy Street, Ennerdale ("Ennerdale Mansions") brought an application consisting of Part A and B. In terms of Part A, which is brought on urgent basis, the applicants seek the following order-

1. An order requiring the first and second respondent to reconnect

electricity supply to Ennerdale Mansions.

2. An order requiring the second respondent to conclude temporary electricity use agreement with the applicants to govern the contractual relationship between the parties pending finalisation of Part B.

In Part B the applicants seek an order that before disconnecting electricity supply to a building or a residence the first and second respondent are required in terms of the by-laws and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") to give the affected persons adequate notice and afford them an opportunity to make representations. Failure to do so, renders the first and second respondents' actions unconstitutional and unlawful.

The applicants seek further a declaratory order that the first and second respondents' disconnection of electricity supply, on 8 July 2000 to Ennerdale Mansions is invalid and unlawful. Furthermore that the by-laws, to the extent that they do not impose a duty of procedural fairness, be declared unconstitutional and invalid.

Initially only the first and second respondents were opposing the application. At the commencement of the proceedings the applicants abandoned their application against the first respondent. As no relief is sought in Part A against the third respondent, the third respondent has not filed papers.

The fourth respondent is the owner of Ennerdale Mansions. No relief is however sought against him. He has, as a result, filed no papers.

The second respondent opposes the application and filed an

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answering Affidavit. It denies that Part A of the application is urgent.

I deal with urgency. I approach the resolution of the question of urgency on the assumption that the applicants have a *prima facie* right to challenge the second respondent's actions in disconnecting the electricity supply to Ennerdale Mansions.

It is common cause that the second respondent disconnected electricity supply to Ennerdale Mansions on 8 July 2008, where all the applicants and their dependants are resident. It is further common cause that the fourth respondent knew on 8 July 2008 of the reasons of the disconnection but gave false information to the applicants.

The fourth respondent informed the applicants that the disconnection was due to unforeseen circumstances and that he is busy sorting out the problem. On 11 July 2008 the electricity supply, not having been reconnected, the residents of Ennerdale Mansions, including the applicants formed a committee to investigate the disconnection of the electricity and to seek resolution of this problem.

On 14 July 2008 the disconnection not having been resolved, the applicants approached the first respondent for assistance. The first respondent advised the applicants to approach the Human Rights Commission. It, in turn, referred the applicants to the Housing Tribunal. This was on 15 July 2008. The Housing Tribunal attempted to set up a meeting between the applicants and the fourth respondent to resolve the electricity problem. On 17 July 2008, having received no joy from the Housing Tribunal, the applicants approached the Wits Law Clinic. A consultation was arranged for 18 July 2008 on which date a letter of demand was sent to the

first and second respondents demanding reconnection of electricity.

The first and second respondents, having not complied with the letter of demand, the applicants, on 21 July 2008, launched the application.

Having regard to the steps taken by the applicants to resolve the question of the disconnection of electricity on 8 July 2008, and the wrong information given by the fourth respondent to the applicants, the prompt and professional way in which Wits Law Clinic handled this matter, it cannot be said that there is an undue delay on the part of the applicants.

If, as I pointed out earlier, the applicants have a *prima facie* right to the reconnection of electricity, this matter is urgent. The forms, service and ordinary time periods prescribed in terms of Rule 6 should be dispensed with.

The following facts are common cause: Stand Number 158 Percy Street, Ennerdale Mansions consists of a block of flats. The block of flats consists of four freestanding buildings. The applicants, their dependants and members of their families live in the four buildings. The ground floor of the buildings is occupied by business entities. The buildings are owned by the fourth respondent. About five households have no income, while the average income for those who are employed is between R3 000 and R4 000 per month.

The applicants and all the residents of Ennerdale Mansion entered into lease agreements with the fourth respondent. The applicants and all other tenants paid to the fourth respondent rental, water and electricity charges. They are all up to date with their rental and all other charges including electricity. The fourth respondent neither paid electricity nor the

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water charges to the second respondent. The fourth respondent's arrear charges in respect of electricity and other charges amount to over R400 000. The second respondent requested the fourth respondent to settle the arrears or make arrangements to settle same. The fourth respondent failed to settle the arrears.

On 8 July 2008 at about 10h30 the second respondent disconnected electricity to the Ennerdale Mansions. The arrears arose during 2003/2004. On 8 July 2008 it was not for the first time that the second respondent disconnected electricity supply for non-payment of electricity by the fourth respondent.

The applicants have not entered into any agreement with the second respondent regarding supply of municipal services, including electricity.

The fourth respondent knew the reason why the second respondent disconnected electricity on 8 July 2008. However, on the same day late in the afternoon, he furnished the tenants with wrong information as to why the second respondent disconnected electricity.

As Part A is an interim relief it is incumbent upon the applicants to prove the requirements for such relief. The requirements are as follows: *Prima facie* right; irreparable harm; balance of convenience and alternative relief.

As this matter revolves around the *prima facie* right the resolution of this requirement will dispose of the entire Part A. This being the case, and the fact that this matter came before me in urgent court requiring urgent resolution, it will be unnecessary to examine whether the applicants have satisfied the other three requirements for interim relief.

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I deal with the question whether the applicants have a *prima facie* right to the reconnection of electricity to Ennerdale Mansions. The municipal services are available to all residents of the City of Johannesburg, the first respondent. The rendering of these services by the first respondent has been delegated to the second respondent. It is the duty of the second respondent to render these services including electricity supply. However, the provision of these services is governed by the by-laws published in terms of Section 13(a) of the Local Government Municipal Systems Act 32 of 2000.

The by-laws are called Credit Control and Debt Collection By-laws. In terms of Section 3(1) of the By-laws no municipal services may be provided to any applicant unless and until such an applicant has submitted an application in writing, furnish the second respondent with information and documentation required by the second respondent, has entered into a service agreement and has paid a deposit for the services so required.

In the present matter the applicants have not applied for electricity services or any other services from the second respondent. They have not entered into an agreement with the second respondent for the provision of electricity. Neither have they paid deposits to the second respondent for electricity supply. In short they do not fall within the provisions of Section 3(1) as outlined above.

In this context, they are not the second respondent's customers. They need not be given notice or be heard when the second respondent, having complied with the by-laws, disconnect the electricity supply to its customer, the fourth respondent.

The applicants have a contractual relationship with the fourth

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respondent. It is against the fourth respondent that they have a *prima facie* right to demand performance in terms of the rental agreement and in particular the supply of electricity.

Counsel for applicants argued that the applicants are second respondent's customers as defined in the by-laws. I disagree. The definitions of a customer and all other definitions in the by-laws, including reference to procedural fairness in terms of PAJA refer to all the applicants that complied with the provisions of Section 3(1) of the by-laws referred to above.

In this context, any constitutional attack of the by-laws, in my view, is only available to the fourth respondent, being the second respondent's customer as defined in the by-laws.

The applicants, as an afterthought, appear to appreciate that they must fall within the provisions of Section 3(1) before claiming any entitlement to municipal services such as electricity. In prayer 2.3 of the Notice of Motion, the applicants state that pending the finalisation of the application in terms of Part B, the second respondent is directed to conclude forthwith a temporary electricity use agreement with the applicants.

It seems to me that the applicants' *prima facie* right lies with the fourth respondent. It is against the fourth respondent that Part A of the application should have been directed to, not to the second respondent. It is against the fourth respondent that in my view all the four requirements for an interim relief should be proved. It is inexplicable why the applicants elected not to pursue their relief against the fourth respondent.

In the absence of a *prima facie* right the applicants are unable to

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succeed with Part A of the application. The application stands to be dismissed.

Regarding costs, counsel for the applicants argued the applicants raised a constitutional issue and that in the circumstances it is just and equitable that each party pays its own costs. I disagree. In the absence of a *prima facie* right no constitutional issue arise. The costs order should therefore follow the result.

Both parties engaged the services of two counsel. There is no justifiable reason why the cost order should not include costs consequent upon engaging the services of two counsel. The application is dismissed with costs, which costs include costs consequent upon engaging the services of two counsel.

"B" 45

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO CASE NO: 08/22689

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE 3 APRIL 2009. SIGNATURE Mahomed Jajbhay

In the matter between:

DEIDRE LEANDA DARRIES	First Applicant
OCCUPIERS OF ENNERDALE MANSIONS, STAND 158 PERCY STREET, ENNERDALE	Second to Thirtieth Applicants

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

JUDGMENT

JAJBHAY, J:

A. INTRODUCTION

[1] This application concerns the disconnection of electricity supply to the applicants' places of residence since 8 July 2008. An urgent application was initially brought in which the applicants sought urgent relief under Part A of the notice of motion. The urgent application was dismissed with costs.

[2] The second respondent is utilised by the first respondent to provide electricity to residents such as the applicants. Electricity is one of the municipal services that the first respondent is required to provide by the Constitution[1] and relevant legislation.

[3] The relief sought under Part B of the notice of motion is in essence that the Court should declare that it is unlawful, in terms of the applicable legislation, for the second respondent to disconnect electricity to a building without first giving the occupants (i.e. the applicants in this case) an opportunity to make representations and without taking the occupants' personal circumstances into account. This is in circumstances where the second respondent does not have any contractual relationship with the occupants such as the applicants, for the supply of electricity. Here, the second respondent has a contractual relationship with the owner of the building in question. In turn, the occupants have a contractual relationship with the owner of the building, who is their landlord, for the provision of electricity.

[4] The relief sought in Part B of the notice of motion is divided into various parts. The crisp issue, however, is this: *is it lawful and constitutional for the respondents to disconnect the electricity supply to a residence without complying with the recognised components of the right to procedural fairness*

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[1] Constitution of the Republic of South Africa, 1996.

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as envisaged by the PAJA[2] *and the Constitution and without considering the circumstances of the residents affected?*

THE APPLICANTS' CONTENTIONS

[5] The essence of the applicants' arguments in this regard may be summarised as follows. 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. 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 placing one prominent notice in the foyer of the affected building, indicating that the residents were entitled to make written representations, and if the residents elected to make such written representations, considering those representations and the circumstances set out therein, before deciding whether to disconnect the electricity. Moreover, it was argued that section 26 of the Constitution[3] 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. The applicants contended that Electricity is an important component of that right.

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[2] Promotion of Administrative Justice Act 3 of 2000.
[3] Everyone has the right to have access to adequate housing.
No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances.

[6] They further contended that the relevant provisions of the Credit Control By-Laws[4] and the Electricity By-Laws[5] must, if reasonably possible, be read subject to PAJA and sections 26 and 33 of the Constitution in this regard. If they cannot be so read, they are invalid and unconstitutional.

[7] Alternatively, they argued that 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.

THE SECOND RESPONDENT'S CONTENTIONS

[8] The second respondent argued that its obligation to give notice and to permit representations before disconnecting electricity supply is to the party with whom it has contracted to supply electricity and not the occupants of such a person's building, i.e. his tenants. Where the second respondent has not contracted with individual occupants of a building, it does not obtain or keep such occupants' details, it simply does not know them.

[9] The second respondent stated that it always, as in this case, gives adequate notice to the contracted party and affords an opportunity to make arrangements to pay or to make representations why the supply of electricity should not be disconnected. In any event where, as in this case, the

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[4] 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.

[5] 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

occupants were aware from time to time of the reasons for the disconnections of electricity supply, they were free to approach the second respondent and make any representations, which would be taken into account.

[10] The occupants were also at liberty, with the consent of their landlord,[6] to make arrangements to open electricity accounts in their own name, in which event they would acquire the right to be notified and afforded an opportunity to make any representations prior to the termination of electricity supply. The second respondent contended that the conduct of the second respondent to give notice only to the contracted party is not in conflict with its governing legislation or with the Constitution.

THE MATERIAL FACTS

[11] The following facts are either common cause or have not been seriously disputed by any of the respondents. At the time that this application was brought, the applicants all lived in Ennerdale Mansions in Johannesburg. Certain of the applicants have since left the building as a result of the intolerable conditions. 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. Four of the flats are occupied by elderly people and there are 38 children residing in the block of flats. The tenants pay their electricity bill as part of their rent accounts (although electricity is charged separately and is not part of the rent) and all have kept up with their payments.

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[6] The consent is required because it would be illegal for the second respondent to install meters on the premises without the landlord's permission.

[12] The fourth respondent in this matter, Mr Nel, is the owner of Ennerdale Mansions and is the applicants' landlord. He has not filed any papers in this matter. On 8 July 2008, at approximately 10h30, the electricity supply to Ennerdale Mansions was cut off by employees of City Power. The applicants received no prior notice of this disconnection. 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 in the situation. When the electricity was not restored by Friday 11 July, the residents elected a committee to deal with the problem.

[13] The steps that the applicants, as lay persons, took in an attempt to restore the electricity were to approach the Council, to attempt to understand why the disconnection took place. The Council referred them to the Human Rights Commission ("the HRC"), for assistance. The HRC referred them to the Rental Housing Tribunal, for relief.

[14] An official employed at 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 in the amount of R400 000.00. 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 Council and City Power on Friday, 18 July 2008 demanding that the electricity supply be reconnected by 10h00 on Monday 21 July, failing which this application would be launched. When the power was not reconnected, this application was instituted.

[15] The electricity disconnection took place some 8 months ago. Since then, the following has transpired. Various people have left the building because the living conditions have become unbearable. The residents that have remained have been prejudiced. They have had 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 have arisen as a result of the disconnection have been prejudicial to them.

[16] 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.

[17] Those of the applicants who have chosen to remain living in Ennerdale Mansions have spent 8 months without access to electricity in circumstances where prior to the disconnection, they had paid their accounts in full. The disconnection was as a result of the non-payment by their landlord of his account. The applicants, as poor people, have been particularly prejudiced by the disconnection.

THE CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

[18] Municipalities form an important component of our constitutional scheme of government. They constitute the first line for the delivery of services. One of the objects of local government is to ensure the provision of services to communities in a sustainable manner.[7] This is provided for in section 152 of the Constitution. Section 152(b) and (d) of the Constitution provides that the objects of local government are *inter alia*:

- to ensure the provision of services to communities in a sustainable manner; and
- to promote a safe and healthy environment.

[19] A safe and healthy environment includes one that is free from dangerous illegal connections for the supply of electricity, which often cause dangerous power surges. Electricity is one of the services that local government is required by the Constitution to provide in a sustainable manner. The Constitutional Court has emphasised that the collection of charges for electricity is an imperative for local government to ensure that it can provide services in a sustainable manner. Services may be disconnected to ensure the collection of arrears.

[20] In the *Mkontwana* case,[8] Yacoob J said *inter alia* the following:

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[7] *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* 2008 (5) SA 171 (CC) para 267.
[8] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC).

"[52] The importance of the purpose of the provision has been discussed earlier. It is emphasised that municipalities are obliged to provide water and electricity and that it is therefore important for unpaid municipal debt to be reduced by all legitimate means. It bears repeating that the purpose [of s 118 of the Municipal Systems Act, requiring settlement of municipal arrears before property may be transferred] is laudable, has the potential to encourage regular payments of consumption charges, contributes to the effective discharge by municipalities of their obligations and encourages owners of property to fulfil their civic responsibility. ...

[62] Section 118(1) does not relieve the municipality of its duty. It must continue to do everything reasonable to ensure appropriate collection of its debt. That municipal debt as a whole has accumulated to devastating proportions is of considerable concern. So too is the evidence to the effect that, in relation to many of the applicants before this Court, large amounts due in relation to consumption charges have remained outstanding for a considerable period. There is disputed evidence before us concerning the degree of inefficiency of the municipalities that have been cited. No more should be said about this aspect than that if the inefficiency of the municipality degenerates to the extent where it can be proved to be negligence that occasioned damage to the owner of the property concerned, owners may have a delictual claim for damages against the municipality. It must be emphasised that it is imperative for municipalities to do everything reasonable to reduce amounts owing. Otherwise, the sustainability of the delivery of municipal services is likely to be in real jeopardy."(My Emphasis)

[21] In a separate concurring judgment in *Mkontwana*[9] O'Regan J said :

> There can be no doubt that municipalities bear an important constitutional obligation and a statutory responsibility to take appropriate steps to ensure the efficient recovery of debt."

[22] In *Geyser and Another v Mzunduzi Municipality and Others* [10] Kondile J stated:

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[9] *supra* para 124
[10] 2003 (5) SA 18 (N) at 37 H – I

"The purpose to be achieved by the deprivation in s 118 of the Act is debt recovery. The total national debt was R22 billion and first respondent's debt was R392 million, a few months ago, in respect of municipal service fees for electricity, water etc. Outstanding debts of this magnitude seriously threaten the continued supply of basic municipal services and demonstrate a need for effective security being put in place in respect of such service. This is a legitimate and important legislative purpose, which is essential for the economic viability and sustainability of municipalities in the country and in the interest of all the inhabitants. There is therefore a rational connection between the means employed and the legitimate legislative purpose designed to be achieved."

[23] The following provisions of the Municipal Systems Act[11] underscore what the Court said in the *Mkontwana* case. Sections 4(2) (d) and 73(2) (c) provide that municipal services must be financially sustainable. Section 96 deals with the debt collection responsibility of municipalities and provides as follows:

"**96 Debt collection responsibility of municipalities**

A municipality-

(a) must collect all money that is due and payable to it, subject to this Act and any other applicable legislation; and

(b) for this purpose, must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies and complies with the provisions of this Act."

[24] Section 97 prescribes what a credit control and debt collection policy must provide for. It states as follows:

[11] Local Government: Municipal Systems Act, 32 of 2000.

"97 **Contents of policy**

(1) A credit control and debt collection policy must provide for-

(a) credit control procedures and mechanisms;

(b) debt collection procedures and mechanisms;

(c) provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents;

(d) realistic targets consistent with-

(i) general recognised accounting practices and collection ratios; and

(ii) the estimates of income set in the budget less an acceptable provision for bad debts;

(e) interest on arrears, where appropriate;

(f) extensions of time for payment of accounts;

(g) termination of services or the restriction of the provision of services when payments are in arrears;

(h) matters relating to unauthorised consumption of services, theft and damages; and

(i) any other matters that may be prescribed by regulation in terms of section 104.

(2) A credit control and debt collection policy may differentiate between different categories of ratepayers, users of services, debtors, taxes, services, service standards and other matters as long as the differentiation does not amount to unfair discrimination." (my emphasis)

[25] Section 98 requires a municipality to adopt by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement.

[26] The obligation imposed on a municipality, under s 96(a) of the Municipal Systems Act, to collect all money that is due and payable to it, accords with the same requirement in terms of the common law, which

stresses the fiduciary obligations of local government.[12] The first respondent has adopted by-laws to give effect to its credit control and debt collection policy, its implementation and enforcement ("*the credit control by-laws*"). The following provisions of the credit control by-laws are relevant. Section 2 provides that the by-laws apply in respect of amounts of money due and payable to the Council for *inter alia* electricity consumption and the availability thereof. Section 3(1) provides that no municipal service may be provided, unless and until application for the service has been made in writing on a form substantially similar to the form prescribed; any information and documentation required by the Council have been furnished; a service agreement, in a form substantially similar to the form of agreement prescribed, has been entered into between the customer and the Council; and an amount equal to the amount prescribed, in cash or a bank cheque, has been deposited as security or other acceptable security, as prescribed, has been furnished.[13]

[27] Section 7(b)(ii) deals with the termination of service agreements. It provides *inter alia* that the Council may, subject to compliance with the provisions of the by-laws and any other applicable law, by notice in writing of not less than 14 working days, to a customer, terminate his or her agreement for the provision of the municipal service concerned, if the

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[12] *Kempton Park /Thembisa Metropolitan Substructure v Kelder* 2000 (2) SA 980 (SCA) paras 14 and 15; *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W) paras 25 and 26; *Mercian Investments (Pty) Ltd v Johannesburg City Council* 1990 (1) SA 560 (W) at 566 F – 568 G; *Namex (Edms) BPK v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A) at 284 C – 286 H; *Peri-Urban Areas Health Board v Administrator, Transvaal* 1954 (1) SA 169 (T) at 171 H – 172 C

[13] Section (1)(a) to (d) of Chapter 2.

customer has failed to pay any prescribed fee or arrears due and payable in respect of the municipal service concerned.

[28] Section 7(2) provides that a customer to whom notice has been given in terms of subsection (1)(b), may within the period of 14 working days referred to in the subsection, make written representations to the Council why the agreement concerned should not be terminated and if such representations are unsuccessful, either wholly or in part, the agreement concerned may only be terminated if the decision on such representations justifies it.

[29] Section 13 deals with how a municipality may deal with arrear accounts. In terms of subsection (1), if a customer fails to pay an amount due and payable for any municipal service rates on or before the due date for payment specified in the account concerned, final demand notice may be sent to the customer. Subsection (2)(a) to (e) provides that a final demand notice referred to in subsection (1) must contain *inter alia* the following: the amount in arrears and any interest payable, and a statement that payment must be made within 14 days of the date of the final demand notice; that the customer may in terms of section 21, within the period concerned in paragraph (a), conclude a written agreement with the Council for payment of the arrears in instalments; that if no such agreement is entered into within the period stipulated in paragraph (b), the municipal service concerned may be terminated or restricted and that legal action may be instituted for the recovery of any amount in arrear without further notice; that the customer's name may be made public, and may be listed with a credit bureau in terms

of section 20(1)(a); and that the account may be handed over to a debt collector or attorney or collection.

[30] Section 15 (which the applicants challenge) provides as follows:

> "**Power to terminate or restrict provision of municipal services**
>
> 15
>
> (1) For the purposes of subsection (2), a final demand notice means a noticed contemplated in sections 11(5)(b), 11(7), 12(6) and 13(1).
>
> (2) Subject to the provisions of subsection (4), the Council may terminate or restrict the provision of water or electricity, or both, whichever 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 –
>
> (a) fails to make full payment of arrears specified in a final demand notice sent to the customer concerned, before or on the date for payment contemplated in sections 11(5)(b), 11(7), 12(6) or 13(1), whichever is applicable, and no circumstances have arisen which require the Council to send a further final demand notice to that customer in terms of any of those sections, and the customer –
>
> (i) fails to enter into an agreement in terms of section 21, in respect of the arrears concerned before termination or restriction of the service concerned; or
>
> (ii) fails to submit written proof of registration as an indigent person in terms of section 23, before such termination or restriction; ...
>
> (e) provides electricity or water to a person who is not entitled thereto or permits such provision to continue;
>
> (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;
>
> (g) in any way reinstates the provision of a previously terminated or restricted electricity or water service; ...
>
> (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 terminated or restricted on the date specified in such notice; and

(b) of the steps which 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)

[31] It is clear from the provisions of section 15 that disconnection of electricity supply is a legitimate method for the collection of arrears and may be followed by legal action to recover payment. It does not have to be preceded by such legal action. It is also clear from the provisions of section 7(2) read with those of section 15 that notice is given to a customer (i.e. the one contracted to the second respondent for the provision of electricity) and such a customer is afforded adequate opportunity to make arrangements to pay or to make representations why electricity supply should not be terminated. The notice to the customer complies with the provisions of PAJA as far as they are applicable in respect of procedural fairness.

[32] Other relevant by-laws are the Electricity By-Laws adopted in terms of section 101 of the Local Government Ordinance.[14] Relevant provisions of the Local Government Ordinance include the following. Section 3(1) provides that no supply shall be given to an electrical installation unless and until the owner or occupier of the premises or any duly authorised person acting on their behalf has concluded a consumer's agreement in a form prescribed by the council. Section 5 deals with direct billing. This applies

[14] Local Government Ordinance, 17 of 1939.

where an owner wants his tenants to be billed directly. It sets out requirements to be met. Of significance is that the owner bears the costs of modifications, etc., such as metering that are required to introduce direct billing. It follows that direct billing requires the consent and cooperation of the owner.

[33] Section 14 deals with disconnection of supply. It entitles the municipality to disconnect the supply of electricity without notice where there are amounts in arrears or where there are illegal and unsafe connections. This provision appears on the face of it to conflict with the provisions of sections 7(2) and 15 of the credit control by-laws as the latter provisions require prior notice.

[34] To the extent that there is a conflict between the relevant provisions of the credit control by-laws and the provisions of section 14 of the Electricity by-laws, the general rule is that "an earlier enactment is to be regarded as impliedly repealed by a later one if there is an irreconcilable conflict between the provisions of the two enactments".[15] This is sometimes expressed by the maxim *lex posterior priori derogat*. The underlying principle is that a statutory provision which is inconsistent and irreconcilable with an earlier statute *in pari materia*, revokes it to the extent of their inconsistency and irreconcilability. The test for an implied repeal is as follows:

> "The books tell us that repeal by implication of an earlier statute by a later one is neither presumed nor favoured. It is only when language used in the subsequent measure is so manifestly inconsistent with that

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[15] *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 164C.

> employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one."[16]

[35] It follows that an attempt must be made to read two enactments together before concluding that the later enactment has impliedly repealed the former one:

> "Now it seems to me that the Act and the Proclamation are in pari materia and in terms of R v Palmer (1748) 1 Leach 355, should therefore be read 'as forming one system and as interpreting and enforcing each other'. Unless and until they are clearly repugnant they will therefore be read together."[17]

[36] There is an exception to the general rule. The exception applies when the earlier enactment is a special one and the later enactment is a general one. In this case, the prior legislation is preserved in accordance with the maxim *generalia specialibus non derogant*. The Appellate Division has explained the exception as follows:

> "The true import of the exception therefore appears to be that, in the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the legislature nonetheless intended to repeal the earlier enactment. This is the case when it is evidence [sic] that the later enactment was meant to cover, without exception, the whole field or subject to which it relates."[18] (Emphasis added)

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[16] *New Modderfontein Gold Mining Co v TPA* 1919 AD 367 at 400, quoted with approval in *Government of the RSA v Government of Kwazulu* 1983 (1) SA 164 (A).
[17] *R v Maseti* 1958 (4) SA 52 (E) at 53H.
[18] *Khumalo v Director-General of Co-operation and Development* 1991 (1) SA 158 (A) at 165E.

[37] The credit control by-laws were intended by the legislature to cover the field as far as concerns the collection of arrear payments for municipal services, including the supply of electricity by the second respondent. That this is the case is clear from sections 96 and 97 of the Municipal Systems Act. Therefore, the credit control by-laws should be interpreted to have impliedly repealed section 14 of the Electricity By-Laws to the extent that the latter provision permits the disconnection of electricity without prior notification to a customer. This interpretation of the provisions of the credit control by-laws and the Electricity By-Laws is also required by section 39(2) of the Constitution in order to protect the rights of customers of the second respondent to procedural fairness in the event of intended terminations of electricity supply on account of outstanding payments.

[38] To the extent that the applicants seek declarations of invalidity of section 14 of the Electricity By-Laws (in prayer 7 of their notice of motion) for permitting the termination of electricity supply where there are arrears, without any notice, I believe that such declaratory relief ought not to be granted. The provisions of section 14 have been impliedly repealed by the provisions of the credit control by-laws as far as the issue of notification is concerned.

THE CONCEPTUAL DIFFICULTIES IN THE APPLICANTS' ARGUMENT

[39] Much of the argument contained in the applicant's case is based on the premise that the applicants have a socio-economic right to electricity, and that this is part of the right to adequate housing. Reliance is placed by the

applicants on paragraph 37 of the judgment in *Grootboom.*[19] All of these authorities make it clear that the right under s 26 of the Constitution is a right of *access* to adequate housing, which will depend on the circumstances of each case. In a particular case, it is not a foregone conclusion that anything at all is required to be provided to a claimant. In some cases it may be required that a claimant is provided with a piece of land, in others with the means to erect a structure, while in others it may require access to services, electricity, facilities and the like. There is no absolute right of access to electricity let alone a right to an uninterrupted supply of electricity where the municipal provider is not being paid and where the consumers are not indigent persons.

[40] This is to be contrasted with the right of access to water – which itself is guaranteed as a fundamental right in s 27(1)(b) of the Constitution. There is no similar provision in relation to electricity. In terms of the Water Services Act,[20] disconnection is not permitted if this would endanger the health of the residents, and if they are unable to pay for the service. In the present matter, there is no statutory protection against disconnection as in the Water Services Act, nor are the present applicants persons who are indigent and who qualify for assistance in terms of the relevant by-laws.

[41] By disconnecting electricity, City Power is not denying the applicants' right of access to adequate housing or, indeed, to municipal services. City

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[19] Government of Republic of South Africa v Grootboom and Others 2001(1) sa 46 (CC) ; I was also referred to "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living"; and The right to adequate housing (Art 11.1) 13/12/91 CESCR General comment 4.
[20] Act 108 of 1997.

Power says that it will restore the supply of electricity, provided that suitable arrangements are made for payment of the arrears. To the extent that the applicants have allegedly paid for electricity to their landlord (fourth respondent) and he has not paid this over to City Power, the applicants have rights of recourse against the fourth respondent. Nothing that has been done by City Power has deprived the applicants of their rights in terms of their contracts with the fourth respondent. They are able to enforce those rights against him (and not against City Power).

[42] City Power has taken action against the fourth respondent, not against the occupiers. This is because the fourth respondent is in breach of his obligations under his contract with City Power and under the relevant by-laws. The fourth respondent (Nel) – and not the occupiers – has the right, in terms of the contract and the by-laws, to electricity supply being restored, provided that he pays. If he does not, City Power is entitled to take action against him (as it has done), provided that it does so lawfully and fairly. The occupiers' rights are against Nel, and not City Power. There is no nexus between them and City Power. If the applicants have their electricity supply terminated because of Nel's default, they can enforce their rights against Nel, or arrange for direct billing (with Nel's consent) or move elsewhere to premises where electricity is supplied. They are therefore not deprived of *access* to electricity supply services.

[43] In the present case, I do not believe that the action taken by City Power affects the rights of the applicants of access to adequate housing or to municipal services. Even if it were to be found that the applicants' rights of

access to housing and to services have been prejudicially affected, the cause of this is the failure by Nel to comply with his contractual obligations to the applicants – and not because of the action taken by City Power. In any event, even if it were to be correct that City Power's actions do limit the rights of access to adequate housing and services of the applicants, such limitation is reasonable and justifiable.

FAIRNESS IN TERMS OF PAJA

[44] I now turn to the argument that the applicants are customers and therefore entitled to procedural fairness in terms of PAJA as required by section 15 of the by-laws. This argument relies entirely on the definition of customer in the Credit Control By-Laws. It ignores the substantive provisions of the by-laws. A person becomes a customer under chapter 2, section 3 (i.e. by concluding an agreement). See also sections 4, 6, 7, 8(2)(b), 11(1), 13(1) and 15(2).

[45] Notices contemplated in section 7 (terminating the agreement) and section 15 (terminating supply) are to be issued to the customer (with whom an agreement has been concluded). The obligation to comply with PAJA to the extent that it applies is in respect of the customer (with whom a contract has been concluded). On the above interpretation of "customer" the obligation to comply with PAJA (to the extent applicable) is not towards the applicants but a customer. If the applicants are correct that they are entitled to fair administrative action in terms of PAJA (which gives effect to section 33 of the Constitution), then the Credit Control By-Laws limit that right. Their right to fair administrative action would arise on the basis that the decision to

terminate supply constitutes administrative action under PAJA. The limitation must be justified under section 36 of the Constitution and not under section 3(4) of PAJA.

[46] There is a proper basis to justify limitation under section 36 on the facts of this case. The applicants can pay. They are not indigent. If they were indigent they would apply for assistance in terms of chapter 4 (indigent persons) of the Credit Control by-laws for assistance and would be provided with electricity on that basis. They are not like Grootboom. Another important factor under justification is that in terms of section 21 of the by-laws they could obtain authorisation from Nel to enter into an agreement with City Power to pay for the arrears. The applicants have not attempted to exhaust these alternatives.

DOES THE CREDIT CONTROL BY-LAWS REQUIRE NOTICE TO THE APPLICANTS PRIOR TO TERMINATION?

[47] On a proper interpretation of the provisions of sections 7(2), 13 and 15 of the Credit Control By-Laws, it is clear that notice prior to termination must be given to a customer. A customer is a person who has entered into a written agreement with the second respondent for the provision of electricity as is required by section 3(1) of the credit control by-laws. It is such a customer who should be afforded an opportunity to make arrangements to pay or to make representations as to why (despite failure to pay) electricity supply should nevertheless not be terminated.

[48] There is no requirement in the Credit Control By-Laws for the second respondent to give notice to tenants of a building owned by a customer and

to afford such tenants an opportunity to make representations. Evidently, and unlike in the case of a customer, the second respondent would not be able to require the tenants, with whom it is not contracted to supply electricity, to make arrangements to pay any outstanding arrears. Generally, it will not even know who those tenants are not only because there are no contractual (or other) arrangements between them but also because tenants come and go. The requirement that notification be given to a customer does not infringe any of the rights of the applicants as they are not customers of the second respondent.

JUSTIFICATION IN TERMS OF SECTION 36 OF THE CONSTITUTION

[49] The only question that remains is whether the failure to provide for prior notification to tenants such as the applicants, makes the provisions of the Credit Control By-Laws unconstitutional. This raises the issue of justification under section 36 of the Constitution. The Credit Control By-Laws are a law of general application as contemplated in section 36(1) of the Constitution.[21] To the extent that it may be correct that the by-laws limit any right of the applicants I believe that the limitation is justified under section 36[22] of the Constitution.

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[21] See the discussion in Currie and De Waal *The Bill of Rights Handbook* (2005) at 169.

[22] Section 36 provides:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Legitimate governmental purpose

[50] The purpose served by the provisions of the Municipal Systems Act and the Credit Control By-Laws which permit the termination of electricity supply is to ensure that municipal services are provided in a sustainable manner. If customers of the second respondent are permitted to run up substantial arrears without the termination of services, the first respondent would fail in its constitutional duty to provide sustainable municipal services as emphasised in the *Mkontwana* case.

[51] The obligation of the second respondent to collect payments for services rendered is in relation to its customers, i.e. those that have contracted with it for the provision of electricity. The obligation does not arise in relation to tenants of buildings with whom the second respondent is not contracted to provide electricity. The instrument of termination can never be aimed at them in order for them to rectify any arrears accumulated by their landlord. Where they make payment to the landlord for electricity in terms of a contract entered into between them, the second respondent is not involved. This is an internal matter. When the landlord, as is the position of the fourth respondent breaches the contractual obligations between him and the tenants by failing to maintain payments with the second respondent, and thereby to ensure uninterrupted electricity supply, the remedy that the tenants have (in this case the applicants), is to proceed against their landlord and enforce their contractual rights.

[52] In the present matter, the fourth respondent and his Company accumulated substantial arrears and showed no serious intention to correct the position. Tenants at the premises have, over a period of time, been made aware that the terminations of electricity supply that happened were in part due to the substantial arrears that the fourth respondent and his Company had accumulated.

[53] The terminations were also due to illegal and unsafe reconnections of electricity supply. As at 28 November 2008, when the second respondent filed an answering affidavit to the applicants' supplementary founding affidavit, it was owed substantial amounts of monies by customers – more than R171 million, of which more than R60 million had then been outstanding for a period of not less than 121 days.

[54] It is clear from the amounts outstanding from customers that if the second respondent did not terminate the supply of electricity where customers do not pay it could run the risk of breaching its constitutional obligations to supply electricity to the residents of the first respondent. This would work hardship on the residents. As the Court emphasised in the *Mkontwana* case, the second respondent cannot permit the accumulation of arrears without enforcing collection. It is not an answer for the applicants to say that the second respondent should first institute legal action to recover arrears before terminating supply. The by-laws themselves recognise the need to terminate supply, which may be followed by the institution of legal proceedings. The institution of legal proceedings without the termination of

supply would permit the accumulation of further arrears. Legal proceedings cost money, which ought to be utilised for the provision of services. Litigation will also cause unnecessary delays.

The nature and extent of the limitation

[55] The applicants (like any other tenants) would be notified of intended terminations of electricity supply if they were to apply for and conclude direct billing arrangements with the second respondent. In that event they would be contracted to the second respondent directly for the provision of electricity. Electricity would be provided to them on a pre-payment basis. In order to put in place direct billing arrangements, the applicants require the consent of the fourth respondent to make application to the second respondent. This is dealt with in section 5 of the Electricity By-Laws. The requirement for consent by the landlord (in this case the fourth respondent) is imperative. The second respondent cannot lawfully enter the premises to effect the modifications required, such as the installation of meters, for purposes of direct billing without such consent. It is also the landlord who is ultimately responsible for charges run up for services provided to his premises. He must consent to this risk and be prepared to monitor it.

[56] The significance of direct billing is that the applicants are provided with an avenue to help themselves. If they contend that the fourth respondent refuses to give them the required consent (whilst simultaneously pocketing their payments for electricity consumed), their remedies include approaching this Court to compel the fourth respondent to either comply with his obligations to pay the second respondent for electricity supplied, or

afford them consent to approach the second respondent for direct billing – subject to suitable arrangements being made regarding the payment of the arrears outstanding on the Company's account.

[57] In contrast to the position of the applicants, it would be impractical and onerous for the second respondent to have to give notice to each and every tenant of a building to which it supplies electricity, and to afford such tenants an opportunity to be heard, prior to terminating supply of electricity on account of non-payment and the accumulation of arrears and unsafe illegal connections (or reconnections) of electricity supply.

[58] It is important to highlight a concession made by the applicants in paragraph 47.3 of their founding affidavit with regard to alleged illegal connections. They say in this paragraph that:

> "It is conceded that there may be circumstances, such as when it is alleged that the electricity supply to a particular building constitutes a hazard, when it would be inappropriate to afford residents of a building the right to make representations prior to a disconnection. However, it is submitted that when the basis for the disconnection is the alleged failure of the owner of a building to keep up with the required payments, there is no basis to deprive affected parties the right to make representations."

The concession is significant as the reason for the disconnection on 8 July 2008, included illegal connections. That is the reason why the feeder cable was completely cut to avoid further illegal reconnections. When this unlawful conduct (illegal connections) is accompanied by non-payment over a long period of time and the accumulation of significant arrears, there is no basis for the supply of electricity to be continued. This is particularly the case when the applicants themselves have known over a long period of time of the illegal

connections and then the non-payment by the Company and the fourth respondent. To permit the continued supply of electricity in these circumstances would significantly, undermine the first respondent's constitutional obligations to deliver electricity services (through the second respondent) to residents in its jurisdiction in a sustainable manner.

[59] The second respondent has set out sufficient facts to show the impractical nature of the obligation that the applicants contend for, as well as the justification for any limitation of their rights.[23] It explains that it supplies electricity to about 13 192 large power users. Large power users are customers who consume 100 kva (kilo volt amperes) of electricity and above. These include buildings occupied by tenants such as the applicants, shopping centres, filling stations, workshops, etc. Out of the number of 13 192, a significant number of the large power users are buildings occupied by tenants. These include large and small buildings. Ennerdale Mansions fall under the category of large power users.

[60] The second respondent does not have the details of the tenants who occupy these buildings. These tenants are also not constant – they move in and out of buildings. The reason the second respondent does not have the

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[23] In *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) at para 37 the Court said:
"Ultimately what is involved in a limitation analysis is the balancing of means and ends. This entails an analysis of all relevant considerations
'to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose'.
In this process, different and sometimes conflicting interests and values may have to be taken into account".

details of the tenants is because the tenants are contracted to their landlords (and not the second respondent) for accommodation and the provision of services such as electricity. The second respondent does not interfere with or have any involvement in the contractual relationship between the tenants and their landlords.

[61] In the circumstances, it would be impractical for the second respondent to fulfil the obligations sought to be imposed on it by the applicants, i.e. to give notices to each and every tenant of a building in respect of which the landlord is in arrears with electricity, and to afford such tenants individually an opportunity to be heard before electricity is disconnected. It is the obligation of the tenants to ensure that payments made for electricity consumed are paid over to the second respondent to ensure the continued supply of electricity. Where this is not done, the tenants have recourse against the landlord.

[62] Therefore any limitation of the applicants' rights as they contend is minimal given the options open to them under the applicable law. For the same reason this constitutes a less restrictive means to achieve the purpose of providing services in a sustainable manner.

The First Respondent's contention

[63] Here it is contended that the applicants enjoy a "non constitutional" remedy. The remedy is to be founded in the common law of contract and therefore, it was argued that the point raised by the applicants was

'premature'.[24] This argument loses sight of the fact that this is not a dispute between the applicants and the fourth respondent. The applicants specifically approached this court to test whether they are entitled to the benefit of PAJA, within the facts of the present matter. This is not a simple contractual matter. PAJA gives effect to the constitutional rights. Here, it is not possible to simply sidestep the Legislative enactments alluded to by resorting to the common law.

Costs

This is not a case where an order for costs should be made. The applicants have raised important constitutional issues relating to the proper approach to constitutional challenges to their right to electricity in the circumstances of the present case. The determination of these issues is beneficial to all persons who find themselves the position of the applicants. In these circumstances justice and fairness require the applicants should not be burdened with an order for costs. To order costs in the circumstances of this case may have an adverse effect on litigants who may intend raising constitutional issues.

CONCLUSION

For the reasons set out above, I determine that the application is dismissed. Each party is ordered to pay their own costs.

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[24] S v Bequinot 1997 (2) SA 887 CC

M JAJBHAY

JUDGE OF THE HIGH COURT

Date of hearing: 26th March 2009

Date of Judgment: 3rd April 2009

On behalf of the Applicants: Adv S Budlender, Adv A Friedman instructed by Wits
Law Clinic

On behalf of the First Respondent: Adv Z Khan instructed by State Attorney

On behalf of the Second Respondent: Adv PM Kennedy SC, Adv NH Maenetje, Adv TB Hutamo instructed by Mokhatla Attorneys

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"C"

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 08/22689

In the matter between:

DEIDRE LEANDA DARRIES First Applicant

OCCUPIERS OF ENNERDALE MANSIONS, STAND 158 PERCY STREET, ENNERDALE Second to Thirtieth Applicants

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

GRIFFIER VAN DIE HOOGGEREGSHOF (WITWATERSRAND PLAASLIKE AFDELING) PRIVAATSAK/PRIVATE BAG X7 2008 -07- 21 JOHANNESBURG 2000 (WITWATERSRAND LOCAL DIVISION) REGISTRAR OF THE HIGH COURT

NOTICE OF MOTION

PART A

KINDLY TAKE NOTICE that the applicants intend to make application to this Honourable Court on **24 July 2008** at 10.00, or as soon thereafter as counsel may be heard, for an order in the following terms:

1 Dispensing with the forms and service and ordinary time periods provided in the rules and disposing of the application as one of urgency in terms of Rule 6(12);

2 Pending finalisation of this application in terms of Part B below:

2.1 The second respondent is directed to reconnect the electricity supply to Ennerdale Mansions, Stand 158 Percy Street, corner Sixth Avenue, Mid Ennerdale, Ennerdale. Johannesburg ("Ennerdale Mansions").

2.2 The first respondent is directed to take such steps as are necessary to facilitate the direction in paragraphs 2.1 of this order.

2.3 The second respondent is directed to conclude forthwith a temporary electricity use agreement with applicants forthwith.

3 The first and second respondents are to pay the costs of Part A of the application jointly and severally, the one paying the other to be absolved.

4 Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **DEIDRE LEANDA DARRIES** and documents annexed thereto will be used in support of Part A of this application.

TAKE NOTICE FURTHER that that in view of the urgency of this matter, the ordinary time-periods have been shortened. If you intend opposing Part A of this application:

(a) You are requested to notify the applicant's attorney of record in writing at the Wits Law Clinic, 1 Jan Smuts Avenue, Braamfontein, Johannesburg or by facsimile on (011) 717 1702 (marked for the attention of Stuart Wilson/Teboho Mosikili) on or before 14h00 on **22 July 2008** that you intend opposing;

(b) You are required to appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings;

(c) You are required, on or before 14h00 on **23 July 2008**, to file answering affidavits, if any, in respect of your opposition to Part A of this application.

Kindly place the matter on the roll accordingly.

PART B

KINDLY TAKE NOTICE that the above-named applicants intend to make application to this Court on a date to be determined by the Registrar for an order in the following terms:

1. Declaring that, in terms of the 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 ("the Credit Control By-Laws"), it is unlawful to disconnect the supply of electricity to a building or residence without adequate notice, without affording the affected parties an opportunity to make representations and without complying with the requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

2. Declaring that, in terms of the Credit Control By-Laws, the first and second 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.

3. Declaring that the disconnection of the electricity supply to Ennerdale Mansions, Stand 158 Percy Street, corner Sixth Avenue, Mid Ennerdale, Ennerdale, Johannesburg ("Ennerdale Mansions") on 8 July 2008 without adequate notice, without affording the affected parties an opportunity to make representations and without complying with the other requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 was unlawful and invalid and is set aside.

4. Declaring that the disconnection of the electricity supply to Ennerdale Mansions on 8 July 2008 was unlawful and invalid to the extent that the first and second respondents failed to take the personal circumstances of those to be affected by the proposed electricity cut, and all other relevant circumstances, into account before making a decision to discontinue the electricity supply.

5. In the alternative to paragraphs 1 and 2 above, declaring that section 15 of Credit Control By-Laws is unconstitutional and invalid to the extent that it allows the first and second respondents to disconnect an electricity supply to a building or residence without notice to the occupants, without affording them an opportunity to make representations, without taking their personal circumstances and all other relevant circumstances into account and without complying with the requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000.

6. In the alternative to paragraphs 1 and 2 above, declaring that section 15 of the Credit Control By-Laws is unconstitutional and invalid to the extent that it allows the first and second respondents to discontinue the electricity supply to a building or residence without taking the personal circumstances of those to be affected by a proposed electricity cut, and all other relevant circumstances, into account before making the decision.

7. In the alternative to paragraphs 1, 2 and 5 and 6 above:

7.1 Declaring that, to the extent that it permits the disconnection of an electricity supply without notice, section 14(1) of the 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 ("Electricity By-Laws), is:

7.1.1 invalid by virtue of section 156(3) of the Constitution of the Republic of South Africa, 1996; alternatively

7.1.2 inconsistent with the Constitution of the Republic of South Africa, 1996 and therefore unconstitutional and invalid.

7.2 Declaring that section 14 of Electricity By-Laws, is to be read so as to include:

7.2.1 all of the requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 including the right of adequate notice to those to be affected by the administrative action and the opportunity to make representations; and

7.2.2 the requirement that the first and second respondents must, before exercising its power to disconnect the electricity supply to a building or residence, take into account the personal circumstances of the occupants and all other relevant circumstances.

7.3 In the alternative to paragraph 7.2 above, declaring that section 14 of Electricity By-Laws, is unconstitutional and invalid to the extent that it:

7.3.1 fails to include all of the requirements of procedural fairness set out in section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 including the right to adequate notice to those to be affected by the administrative action and the opportunity to make representations;

7.3.2 fails to include the requirement that the first and second respondents must, before exercising their power to disconnect the electricity supply to a building or residence, take into account the personal circumstances of the occupants and all other relevant circumstances.

8. Ordering that the first and second respondents, and the third and fourth respondents only should they oppose the relief sought, are liable to pay the costs of Part B of the application jointly and severally, the one paying the others to be absolved.

9. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **DEIDRE LEANDA DARRIES** and documents attached thereto will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed the Wits Law Clinic, West Campus, Wits University, 1 Jan Smuts Avenue, Braamfontein, Johannesburg

as the address referred to in rule 6(5)(b) at which they will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application you are required:

(a) To notify the applicants' attorneys of record in writing on or before **30 July 2008** that you intend opposing this application;

(b) Within fifteen (15) days after you have given such notice of your intention to oppose the application, to file your answering affidavits, if any; and

(c) To appoint in such notification an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

TAKE NOTICE FURTHER that if no such intention to oppose is given, the application will be made on **5 August 2008**.

SIGNED DATED AT JOHANNESBURG ON THIS 21st DAY OF JULY 2008

Wits Law Clinic
Applicants' Attorneys
West Campus
University of the Witwatersrand
1 Jan Smuts Avenue
Braamfontein
Johannesburg
Tel: 011 717 8619
Fax: 011 717 1702
REFERENCE: Wits Law Clinic/CALS/S Wilson/T Mosikili

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
Johannesburg

AND TO: **THE FIRST RESPONDENT**
City of Johannesburg
Metropolitan Centre Building
158 Loveday Street
Marshalltown
Braamfontein
Johannesburg

Lavaga 21/7/2008 15:08pm
RECEIVED - ONTVANG
DESIGNATION - AMPSBENAMING
ACCEPTED WITHOUT PREJUDICE
CITY OF JOHANNESBURG

AND TO: **THE SECOND RESPONDENT**
City Power (Pty) Ltd.
40 Heronmere Road
Reuven
Booysens
Johannesburg

CITY POWER
City Power
2008 -07- 21
LEGAL SERVICES

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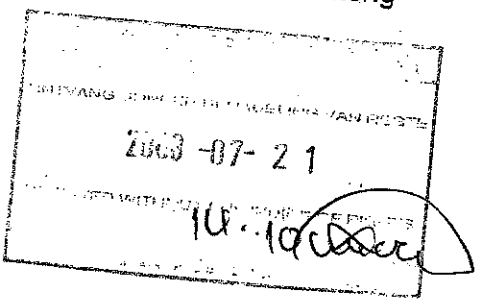
AND TO: **THE THIRD RESPONDENT**

Member of the Executive Council for Local Government, Gauteng
c/o the State Attorney
10th Floor, North State Building
95 Market Street, cnr Kruis Street
Johannesburg



AND TO: **THE FOURTH RESPONDENT**

2 Thor Street
Ennerdale
Extension 3

DEPARTMENT OF HOUSING
DEPARTMENT VAN BEHUISING
LEFAPHA LA TSA MATLO
UMKHANDLU WEZINDLU

RENTAL HOUSING TRIBUNAL

ENQUIREIS : **Mr. Lesiba Sathekge**
REFERENCE NO : **RT.6631/08**
TEL :(011) 630-5049
FAX :(011) 630-5057
DATE : February 10, 2009

Tenants of Ennerdale Mansion
C/o Sharon Gabie
Flat number 15
158 Percy Street
Ennerdale

Dear Sir/ Madam

RE : CASE BETWEEN TENANTS OF ENNERDALE AND THOMAS NEL

We like to refer to the case lodged on 17/07/2008.

A tribunal hearing toke place on the 16th January 2009 we a ruling was given.

Please note: that the rulings of the tribunal are deemed to be an order of a magistrate's court in terms of the Magistrate' Court Act. 1944 (Act No.32 of 1944)

Should any one fails to comply with the ruling of the Tribunal will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding two years or to both such fine and such imprisonment.

We like to inform you that you matter had been closed in that regard.

Yours faithfully

.....
Mr. Lesiba Sathekge
(Secretariat to the Tribunal)

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IN THE GAUTENG RENTAL HOUSING TRIBUNAL

HELD AT JOHANNESBURG

Case Number: RT6631/08

IN THE MATTER BETWEEN –

TENANTS OF ENNERDALE MANSIONS **COMPLAINANT**

AND

THOMAS NEL **RESPONDENT**

RULING

The Tribunal rules that -

1. This matter is removed from the roll on 16 January 2009;

DATED AT JOHANNESBURG ON 16 JANUARY 2009

GAUTENG PROVINCIAL GOVERNMENT
DEPARTMENT OF HOUSING
35 PRITCHARD STREET
14th FLOOR
JOHANNESBURG
PRIVATE BAG X79
MARSHALLTOWN 2107

TREVOR BAILEY– CHAIRPERSON

MEMBERS P BECK AND T MORABE CONCUR WITH THIS RULING OF CHAIRPERSON T BAILEY

RT6631.08.TenEnnerdaleMansions.Nel.ruling