IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

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

J U D G M E N T

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*

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

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**
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> (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).
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> (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 –
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> (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 –
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> (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
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> (ii) fails to submit written proof of registration as an indigent person in terms of section 23, before such termination or restriction; ...
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> (e) provides electricity or water to a person who is not entitled thereto or permits such provision to continue;
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> (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;
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> (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 –
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> (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