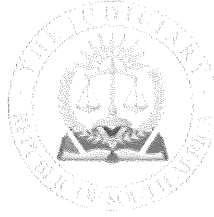


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

17 December 2020

.....  
DATE

SIGNATURE

Case no: 20/38456

In the matter between:

**OCCUPIERS OF ERVEN 139 BEREA**

Applicant

and

**CITY OF JOHANNESBURG**

First Respondent

**CITY POWER**

Second Respondent

**SETHUNYWA FAMILY TRUST**  
**(Registration Number IT53/2016(L))**

Third Respondent

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**JUDGMENT**

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**S BUDLENDER AJ:**

- [1] This is a matter which came before me in the urgent court. It arises from the termination of electricity supply to a block of flats. The applicants ('the residents') contend that the termination was unlawful.

- [2] Given the urgent nature of these proceedings and the need for judgment to be delivered expeditiously, I have set out my reasons more briefly than would normally be the case.

### **The essential facts**

- [3] The residents are the occupiers of block of flats located at 58 Auret Street, Jeppestown, Johannesburg. It is a three-story building. There are 41 households who live there.
- [4] In March 2018, the building was purchased by the third respondent ('the owner'). Registration of transfer took place in August 2019. At the time of the registration, the owner knew of the existence of the residents and the lease agreements they had in place.
- [5] During the course of 2020, the owner instituted eviction proceedings in this Court. Those proceedings remain pending and no eviction order has yet been obtained.
- [6] Nevertheless, on 11 November 2020, the owner requested the City to disconnect the electricity supply to the building. I refer to the first and second respondents collectively as 'the City'.
- [7] On 12 November 2020, the City disconnected the electricity supply to the building.
- [8] The residents responded by bringing an urgent application seeking to have the electricity supply restored to the building. They did so without legal representation.

[9] The application was opposed by all three respondents and came before me in urgent court on 17 November 2020.

[9.1] In view of the nature of the issues at stake, I was concerned that the residents lacked legal representation. After checking that no party had any objection to me doing so, I enquired whether the Socio-Economic Rights Institute of South Africa ('SERI') would be prepared to represent the residents. SERI agreed and Mr Nkosinathi Sithole thereafter acted on their behalf. He did so with considerable diligence and skill and I am grateful to him and SERI for the role they played.

[9.2] After hearing the parties, I postponed the matter by a week to allow for the filing of further affidavits and heads of argument. I coupled this with an interim order directing that the electricity supply be reconnected to the building, pending the determination of this matter. I did so because it was apparent to me that the residents had satisfied the requirements for interim relief.

[9.3] Despite some delay, the reconnection of electricity duly took place.

### **The decision in *Joseph v City of Johannesburg***

[10] The arguments advanced by the parties covered much ground. But in truth the matter can be disposed of fairly crisply in light of the decision of the Constitutional

Court in *Joseph v City of Johannesburg*,<sup>1</sup>

[11] In *Joseph*, the Court dealt with the administrative law duties of local government in relation to disconnections of electricity.

[12] Like the present case, *Joseph* occurred in a context where there was no contractual nexus between the residents and the City. Instead, in both cases, the City had contracted with the building owner, rather than the residents.<sup>2</sup>

[13] The Constitutional Court held that the residents were entitled to be treated in a procedurally fair fashion by the City in relation to the disconnection of the electricity supply to their building.<sup>3</sup>

[14] This was because the City bore a constitutional and statutory obligation to provide basic municipal services, including electricity and the residents were entitled to receive these services.<sup>4</sup> This in turn triggered an obligation to afford the residents some form of procedural fairness under PAJA<sup>5</sup> before taking a decision to disconnect the electricity supply.<sup>6</sup> As the Court explained:

*"[W]hen City Power supplied electricity to Ennerdale Mansions, it did so in fulfillment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. In*

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<sup>1</sup> [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC).

<sup>2</sup> At para 2

<sup>3</sup> At para 47

<sup>4</sup> At para 40

<sup>5</sup> Promotion of Administrative Justice Act 3 of 2000

<sup>6</sup> At para 47

*depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.”<sup>7</sup>*

[15] The Court emphasised that the real and acute need for proper debt collection by the City did not justify non-compliance with the procedural fairness obligations of PAJA.<sup>8</sup>

[16] Instead, in the circumstances of the case, procedural fairness required the provision of pre-termination notice to the residents, rather than merely the building owner. Such notice would have to contain all relevant information, including the date and time of the proposed disconnection, the reason for the proposed disconnection, and the place at which the affected parties could challenge the basis of the proposed disconnection. Moreover, it would also have to afford the residents sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wished.<sup>9</sup>

[17] Given the failure to adhere to these obligations, the Court declared the termination of the electricity supply to be unlawful and directed the City to reconnect it forthwith.<sup>10</sup>

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<sup>7</sup> Id

<sup>8</sup> At para 53

<sup>9</sup> At para 61

<sup>10</sup> At paras 78(3) and 78(4)

## Application to the present case

[18] In the present case, it was effectively common cause that the termination of the electricity supply took place without any pre-termination notice being given to the residents by the City.<sup>11</sup>

[19] On the face of it, the decision in *Joseph* means that this is unlawful. The question is what, if anything, distinguishes this case from *Joseph* and demands a different result.

[20] In argument, the various respondents made various attempts to distinguish *Joseph*.

[21] First, the owner placed emphasis on the fact that the residents had no contractual nexus with the City. This is so – but that was also precisely the position in *Joseph*.

[22] Second, the City placed considerable emphasis on the fact that, in this case, the building owner had requested termination of the electricity supply whereas, in *Joseph*, the City had disconnected the electricity of its own accord as part of its debt collection strategies.

[22.1] I am not persuaded that this is a material distinction when it comes to considering the entitlement of the residents to pre-termination notice.

[22.2] From the point of view of the residents, they are interested in the effect

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<sup>11</sup> It was faintly suggested in argument by the owner that the residents had been given notice, via certain correspondence exchanged between the owner and residents. This took place in June and July 2020, five months before the termination. Without addressing the point in detail, it suffices to say that this plainly did not amount to the kind of notice envisaged by *Joseph* and PAJA.

of the City's decision (the termination of their electricity) and their ability to receive advance notice of and seek to influence that decision. It does not matter to them whether the disconnection takes place at the instance of the owner or the City. The bottom-line is the same – they are having their electricity cut off and, on the logic of *Joseph*, are entitled to pre-termination notice.

[22.3] For the sake of argument, I am prepared to accept that there may be some instances where the termination is requested by the owner and where the City is not required to give residents pre-termination notice. This would be on the basis that procedural fairness obligations are variable and depend on the facts of each case.<sup>12</sup> For example, where an owner of a private house requests disconnection, and the City has no reason to think that anyone but the owner is living on the property, it might be contended that posting a pre-termination notice is unnecessary. Or where an owner, in his request for termination, demonstrates that the residents on the property consent to such termination, again it might be contended that pre-termination notice is unnecessary.

[22.4] But I express no final view on these issues and it is not necessary to decide them here.

[22.5] This is because, in the present case, it was abundantly clear to the City both that (a) there were residents other than the owner living on the

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<sup>12</sup> See, for example, paras 56-58 of *Joseph and Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 39.

property; and (b) far from consenting to the disconnection of electricity, the residents were at loggerheads with the owner.

[22.6] This all emerges from the email sent on behalf of the owner to City Power on 11 November 2020, in which disconnection was requested. That letter was sent the day before the disconnection occurred and prompted the disconnection. The email requested the total shutdown of electricity to the building and offered a number of reasons, including: *"The bill is accumulating and they don't pay any cent into our account yet the building is fully occupied"* and *"We have lost control of the building because they threaten us whenever we go there."*

[22.7] In those circumstances, the City plainly ought to have been aware that the rights of residents could well be adversely affected by the termination of electricity. It was therefore required by *Joseph* to afford the residents pre-termination notice.

[22.8] For the same reasons, the City's reliance on section 14(4) of the Standardisation of Electricity By-Laws does not assist it.<sup>13</sup> That clause merely provides that a consumer (the owner in this matter) may request the City to terminate the electricity supply. It is silent on the question of whether this must only be done after pre-termination notice is afforded to the residents. But section 14(4) must, like all statutes dealing with

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<sup>13</sup> Clause 14(4) provides:

*"The council shall, on application by a consumer in a form prescribed by the engineer, disconnect the supply and shall reconnect it on payment of the charge determined by the council."*



administrative action, be read together with PAJA if possible.<sup>14</sup> Once this done, and in light of *Joseph*, it is clear that section 14(4) does not assist the City's case.

[23] Lastly, the City called in aid section 14(2) of the Standardisation of Electricity By-Laws.

[23.1] Section 14(2) allows for the disconnection of electricity without notice, where the electrical installation constitutes a danger or potential danger.

[23.2] It provides:

*"When conditions are found to exist in an electrical installation which in the opinion of the engineer constitute a danger or potential danger to person or property or interface with the supply to any other consumer, the engineer may at any time without notice disconnect the supply to that installation or any part thereof until such conditions have been remedied or removed."*

[23.3] One can readily understand the by-laws dispensing with notice when serious safety issues are at play.

[23.4] But on the present facts, there is no showing that the disconnection was for safety reasons. Even assuming that the reference in the owner's email of 11 November 2020 to "illegal connections" and "bridging", triggered safety concerns for City Power, there is simply no evidence before me that the City Engineer or someone delegated by him or her

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<sup>14</sup> *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 101

found any electrical installation on the property which they regarded as constituting a danger or potential danger to person or property.

[23.5] When I pointed this out, counsel for the City properly accepted that this was so and conceded that the point could not be pursued.

[24] In the circumstances, it seems to me that there is no basis to distinguish this case from *Joseph*. The City's termination of electricity, without any pre-termination notice, was therefore unlawful.

### The order

[25] I therefore intend to make an order, as in *Joseph*, declaring that the disconnection of the electricity supply was unlawful and directing that it be reconnected.

[26] It is not appropriate for me to express any view as to what might occur between the parties after this order is given effect to. It suffices to say, as the Constitutional Court stressed in *Joseph*, that what is really required is the facilitation of a joint endeavour between the City, the owner and the residents to constructively engage in an effort to deal with the arrears and enter into suitable arrangements, including direct billing if needs be.<sup>15</sup>

[27] In relation to costs, the residents have been successful and are entitled to their costs. This is not altered by the fact that SERI was acting pro bono.<sup>16</sup> The only

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<sup>15</sup> *Joseph* at paras 53 – 54 and 63

<sup>16</sup> See section 92 of the Legal Practice Act 28 of 2014:

"(1) Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other person by a legal practitioner or law clinic,

question is whether the costs should be paid by the City alone or also by the owner.

[27.1] I have certain concerns about the timing of the owner's disconnection request – arising as it did in the midst of the pending eviction proceedings. But I do not have sufficient facts to form any final view of this issue and do not do so.

[27.2] Moreover, it is clear that the duty to give pre-termination rested primarily on the City, as the responsible organ of state. It is this duty that has been breached. Given this and taking into account the principles in *Biowatch Trust*,<sup>17</sup> it seems appropriate that it is the City that bears the residents' costs.

[28] I therefore make the following order:

1. The matter is dealt with by way of urgency.
2. The termination of electricity supply to 58 Auret Street, Erf 139, Jeppe, Johannesburg on 12 November 2020 is declared to be unlawful.

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*and costs become payable to that litigant or other person in terms of a judgment of the court or a settlement, or otherwise, that litigant or other person must be deemed to have ceded his or her rights to the costs to that legal practitioner, law clinic or practice.*

...

- (3) *The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the litigant or person to whom the legal services were rendered by the legal practitioner, law clinic or practice actually incurred the costs of obtaining the services of the legal practitioner, law clinic or practice acting on his or her or its behalf in the proceedings or dispute concerned."*

<sup>17</sup> *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 28

3. The first and second respondents are directed to reconnect the supply of electricity to 58 Auret Street, Erf 139, Jeppe, Johannesburg.
4. The costs of this application are to be paid by the first and second respondents, jointly and severally.



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S BUDLENDER  
ACTING JUDGE OF THE HIGH COURT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 December 2020.