CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 43/09
[2009] ZACC 30

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 AND HOUSING, GAUTENG	Third Respondent
THOMAS NEL	Fourth Respondent

Heard on : 18 August 2009

Decided on : 9 October 2009

JUDGMENT

SKWEYIYA J:

Introduction

[1] This is an application for leave to appeal against the judgment of the South Gauteng High Court, Johannesburg (High Court) in *Darries and Others v City of Johannesburg and Others*.[1] The matter concerns the termination of the electricity supply to the applicants' place of residence following the accumulation by the landlord of substantial arrears in payments owing to the City of Johannesburg's electricity service provider, City Power (Pty) Ltd (City Power). In both the High Court and in this Court, the applicants have sought the reconnection of the electricity supply and an order declaring that they were entitled to procedural fairness in the form of notice and an opportunity to make representations to City Power before the electricity supply was terminated.

[2] The difficulties that arise in this case stem from the fact that the applicants are tenants who have no contractual right to receive electricity from the second respondent, City Power. Instead, the applicants pay their electricity bills to their landlord, the fourth respondent, whose company, Ennerdale Mansions (Pty) Ltd, has contracted with City Power for electricity to be supplied to the building. The crux of this case is therefore whether any legal relationship exists between the applicants and City Power outside the

[1] Case No 08/22689, 3 April 2009, as yet unreported. To be reported as *Darries and Others v City of Johannesburg and Others* 2009 (5) SA 284 (GSJ). Ms Darries is no longer an applicant.

bounds of contractual privity that entitles the applicants to procedural fairness before their household electricity supply is terminated.

The parties

[3] The applicants are all tenants of Ennerdale Mansions, a block of 44 apartments in Johannesburg which is owned and let by the fourth respondent, Mr Thomas Nel. Since the decision of the High Court, certain of the tenants who were applicants before the High Court have left Ennerdale Mansions. The first to sixth applicants before this Court are the only remaining parties to the High Court application who are still living in the building.

[4] The first respondent is the City of Johannesburg (the City). The second respondent is City Power, a parastatal that is wholly-owned by the City and responsible for providing electricity to people within the jurisdiction of the City. The first and second respondents have made common cause in this matter and will be referred to collectively as the respondents unless the context requires otherwise.

[5] The third respondent is the Member of the Executive Council for Local Government and Housing, Gauteng, whom the applicants have cited because he may have an interest in their challenge to the constitutional validity of certain municipal by-laws. The third respondent abides by the decision of this Court.

[6] The fourth respondent is the landlord, Mr Thomas Nel, who is cited because he owns the affected building, Ennerdale Mansions. No relief is sought against Mr Nel, and he did not participate in these proceedings.

Factual background

[7] On the morning of 8 July 2008, City Power disconnected the electricity supply to Ennerdale Mansions. The applicants received no prior notice of the disconnection, and aver that they had no idea why the electricity was being cut off. It appears from the record that, at the time of the disconnection, most if not all of the applicants, who were being billed for electricity by Mr Nel, had consistently kept up with their payments. Approximately 30 families were living in the building, including 38 children, and four apartments were occupied by elderly people. The average monthly income of the households in the building was R3 000 to R4 000, although some households had no income at all. A number of shops and businesses also operated from Ennerdale Mansions.

[8] On the evening of the disconnection, Mr Nel's son delivered a note to each apartment, which stated that owing to "unforeseen circumstances" the electricity supply would be disconnected for a few days. On 11 July, following failed attempts to reach the landlord, the tenants formed a committee to investigate the reasons for the electricity disconnection. Members of this committee visited the City Council offices on 14 July and were informed that City Power had disconnected the electricity supply because Mr

Nel was in arrears to the tune of R400 000. The City Council referred the tenants to the South African Human Rights Commission[2] for assistance, which in turn referred them to the Rental Housing Tribunal.[3] The applicants lodged a formal complaint against Mr Nel at the Tribunal, but to no avail. On 18 July, the applicants approached the University of the Witwatersrand Law Clinic[4] and were advised to launch proceedings in the High Court. There, the applicants unsuccessfully sought to have the electricity supply reconnected and to compel City Power to conclude temporary electricity use agreements with them.

[9] The electricity supply to Ennerdale Mansions has not been reconnected. The applicants have been without electricity for some 12 months. Many tenants have left the building because the living conditions have become intolerable as a consequence of the termination of the electricity supply. Those who have remained – that is, the six applicants before this Court – have continued to live there because it is the most affordable family accommodation in the area. They cannot afford to leave.

Proceedings in the High Court

[2] The Commission is one of the institutions created under Chapter 9 of the Constitution to strengthen constitutional democracy. The functions of the Commission are set out in section 184 of the Constitution and include promoting respect for human rights, promoting the protection, development and attainment of human rights, and monitoring the observance of human rights in the Republic.

[3] The Tribunal was established by the Rental Housing Act 50 of 1999. The Tribunal is a quasi-judicial body which serves a regulatory function. This includes *inter alia* setting out guidelines which have to be followed when parties enter into rental agreements and resolving disputes that arise between landlords and tenants.

[4] The University of the Witwatersrand Law Clinic provides free professional legal assistance to persons who cannot afford private legal representation.

[10] The application to the High Court was brought in two parts. First, an urgent application was brought for the immediate reconnection of the electricity supply to Ennerdale Mansions. This application was dismissed by Tsoka J on the basis that the applicants had failed to establish a *prima facie* right. The applicants proceeded to bring an application before Jajbhay J in which they again sought reconnection of the electricity supply and an order declaring that the disconnection without notice to the tenants of Ennerdale Mansions was procedurally unfair in terms of section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[5] The applicants also challenged the

[5] Section 3 of PAJA provides:

"(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

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

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

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

(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

(a) obtain assistance and, in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

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

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

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

constitutionality of certain of the City's by-laws.[6] The High Court found similarly that no rights of the applicants were affected and that they were therefore not entitled to reconnection of their electricity.

[11] The High Court considered the provisions of municipal by-laws regulating the supply of electricity – namely, the Electricity By-laws[7] and the Credit Control By-laws.[8] It found that the Electricity By-laws had been impliedly repealed by the promulgation of the Credit Control By-laws and therefore did not have to be considered. With regard to the Credit Control By-laws, it found that the applicants did not fall within its provisions and were not entitled to the pre-termination notice required to be given to "customers". It found further that to the extent that the Credit Control By-laws did limit any of the applicants' rights, that was justified under section 36 of the Constitution.[9]

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

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

[6] In particular, the applicants challenged by-law 14(1) of the Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-laws, *Provincial Gazette* (Gauteng), GG 16 GN 1610, 17 March 1999, published in terms of section 101 of the Local Government Ordinance 17 of 1939 and by-law 15 of the City of Johannesburg Metropolitan Municipality: Credit Control and Debt Collection By-laws, *Provincial Gazette Extraordinary* (Gauteng), GG 213 GN 1857, 23 May 2005, published in terms of section 13(a) of the Local Government: Municipal Systems Act 32 of 2000.

[7] Above n 6.

[8] Above n 6.

[9] Section 36 of the Constitution 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;

Submissions in this Court

[12] In this Court, the applicants sought essentially the same relief as that sought in the High Court. In arguing that section 3 of PAJA applies, the applicants did not raise a claim based on any legitimate expectation, but argued that their *rights* were materially and adversely affected by the termination of electricity supply. They relied on three rights to support this claim: (i) their right of access to adequate housing under section 26 of the Constitution;[10] (ii) their right to human dignity under section 10 of the Constitution;[11] and (iii) their contractual right to electricity in terms of their contract of lease with Mr Nel.

[13] In view of the High Court's finding that by-law 14 of the Electricity By-laws had been impliedly repealed, the applicants did not persist in challenging its validity. They did, however, challenge the constitutional validity of by-law 15 of the Credit Control By-laws inasmuch as it permits the termination of electricity supply to a building or

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(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."

[10] Section 26 of the Constitution provides:

"(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) 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. No legislation may permit arbitrary evictions."

[11] Section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

residence without affording notice and an opportunity to make representations to occupants with whom the service provider has no contractual relationship.

[14] By-law 15 provides, in relevant part, as follows:

> "(2) Subject to the provisions of subsection (4), the Council may terminate or restrict the provision of water or electricity, or both, whichever service is relevant, in terms of the termination and restriction procedures prescribed or contained in any law, to any premises if the customer in respect of the municipal service concerned—
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> . . . .
>
> (c) fails to comply with any condition or provision in respect of the supply of electricity or water, as the case may be, imposed by the Council;
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> . . . .
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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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> . . . .
>
> (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
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> (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."

[15] "Customer" is defined in the Credit Control By-laws as—

> "any occupier of premises to which the Council has agreed to provide or is actually providing any municipal service, or if there is no occupier, the owner of the premises concerned".

[16] The thrust of the respondents' position was that no specific right of the applicants was infringed by the disconnection and that, as a result, the procedural protections of PAJA do not come into play. The respondents submitted that the Credit Control By-laws do not apply to the applicants to afford them the pre-termination notice due to "customers", as this would undermine the City's debt-collection policy embodied in the Credit Control By-laws. Any limitation of a right to procedural fairness that the applicants may have, the respondents contended, is justifiable under section 36 of the Constitution.

Constitutional issue and leave to appeal

[17] Before I deal with the issues that arise for determination, it is necessary to set out my reasons for granting leave to appeal. This case concerns the interpretation of PAJA and its application to municipal by-laws. The interpretation and application of PAJA necessarily raise a constitutional issue.[12]

[18] The respondents opposed the applicants' coming directly to this Court on the basis that the issues raised fall to be determined primarily by principles of the law of contract,

[12] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

and accordingly argued that the matter should first be considered by the Supreme Court of Appeal. I am of the view that this matter concerns the relationship between a public service provider and consumers with whom it has no contractual relationship, and that principles of administrative and constitutional law – and not the law of contract – govern the issues that arise.

[19] Furthermore, I am not persuaded that other remedies are reasonably available to the applicants *vis-à-vis* the first and second respondents. The applicants may well have common law remedies against Mr Nel. However, this does not preclude them from pursuing public law remedies against the City and City Power. There has already been a long delay in the resolution of this matter and any further delay would be prejudicial to the applicants who have been living without electricity for more than 12 months. It is further important for City Power, as a major service provider, to have clarity in respect of obligations it owes to users of services. It is therefore appropriate for this Court to hear the matter directly.

[20] I conclude, therefore, that a constitutional issue has been raised and that it is in the interests of justice for leave to appeal to be granted.

The issues for determination

[21] The primary issue to be addressed in this case is whether the applicants were entitled to procedural fairness under section 3 of PAJA before City Power terminated the

electricity supply to Ennerdale Mansions. If section 3 of PAJA is found to apply, the following secondary issues arise for determination:

(a) the content of procedural fairness required in the circumstances of this case;

(b) whether the Electricity By-laws were impliedly repealed by the Credit Control By-laws, and if not, whether the Electricity By-laws can be read consistently with PAJA; and

(c) whether the Credit-Control By-laws can be read consistently with PAJA.

The conceptual framework

[22] It is important at the outset to explain what was, in my view, a misapprehension affecting the reasoning of the High Court. Rather than adopting PAJA as the starting point, the High Court began its enquiry with the Credit Control By-laws. It focused its attention on whether, for the purposes of the Credit Control By-laws, the applicants were "customers" as defined therein, and whether they were therefore entitled to the protections of PAJA. The High Court failed to take account of the role that PAJA may play in respect of persons who have no contractual relationship with the service provider, and whom it does not regard to be "customers".

[23] Moreover, in viewing the issues through an entirely contractual lens, the High Court misdirected itself insofar as it failed to take account of the link between the contractual relationship between Mr Nel and the applicants on the one hand, and that between Mr Nel and City Power on the other. Mr Nel concluded a contract as a

"customer" with City Power for the sole purpose of facilitating the supply of electricity to tenants in his building. He was a conduit. In supplying electricity to Ennerdale Mansions, City Power knew that it was providing electricity to tenants living in the building. It is therefore, in my view, artificial to think of the contractual relationship between Mr Nel and City Power as being unrelated to the benefits that accrued to the applicants under this contract.

[24] The starting point should therefore be whether any "rights" of the applicants have been affected as that term is understood in PAJA, and if so, whether the relevant municipal by-laws can be read consistently with PAJA. The focus of the enquiry therefore is the relationship, if any, between City Power as a public service provider and users of the service with whom it has no formal contractual relationship. This is similar to the approach adopted by Sachs J in *Residents of Joe Slovo*,[13] in which the lawfulness of the occupation of municipal council land by homeless families was considered. Sachs J observed that this question—

> "must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act. . . . The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law . . . . They

[13] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, Case No CCT 22/08, 10 June 2009, as yet unreported.

> flow instead from an articulation of public responsibilities . . . and possess an ongoing, organic and dynamic character that evolves over time."[14] (Footnote omitted.)

[25] I am of the view that this case is similarly about the "special cluster of relationships" that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level, administrative law principles operate to govern these relations beyond the law of contract.

Were the applicants entitled to procedural fairness under section 3 of PAJA?

[26] The respondents accepted that the decision to terminate the electricity supply constituted administrative action *vis-à-vis* Mr Nel with whom City Power contracted to provide electricity. They further accepted that Mr Nel, as a "customer" of City Power, was entitled to notice before the disconnection of electricity supply, which notice he duly received. The respondents contended, however, that the decision did not constitute administrative action *vis-à-vis* the applicants and that no procedural fairness duties arose toward them, as the decision (i) had no "direct, external legal effect" and (ii) did not materially and adversely affect any of their "rights" as tenants. These contentions are addressed in turn.

[14] Id at para 343.

"Direct, external legal effect"

[27] The qualifying phrase "direct, external legal effect" appears in the definition of administrative action under section 1 of PAJA.[15] I need do no more on the facts of this case than endorse the broad interpretation accorded to this phrase by the Supreme Court of Appeal in *Grey's Marine*,[16] where it stated that the phrase "serv[es] to emphasise that administrative action impacts directly and immediately on individuals."[17] Indeed, a finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a "direct, external legal effect" on the applicants. Conversely, a finding that the rights of the applicants were not materially and adversely affected would have the result that section 3 of PAJA would not apply – barring, of course, a claim based on a legitimate expectation which was not raised in this case.

[28] It was argued by the respondents that the ambit of "legal effect" ought not to be conceptualised too broadly, lest it lead to administrative paralysis. Specifically, the

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[15] Section 1 of PAJA defines "administrative action" as follows:

"any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect . . . ."

[16] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA).

[17] Id at para 23.

respondents argued that as no contractual nexus existed between the applicants and City Power, the termination of electricity supply by City Power could not be said to affect the legal rights of the applicants directly, but rather that the *causa* of any harm suffered by the applicants was the default of the landlord. On this basis, the respondents argued that the decision taken by City Power to terminate the electricity supply did not constitute administrative action as defined under section 1 of PAJA.

[29] The spectre of administrative paralysis raised by the respondents is a legitimate concern.[18] Administrative efficiency is an important goal in a democracy,[19] and courts must remain vigilant not to impose unduly onerous administrative burdens on the state bureaucracy. In my view, however, the issue of administrative efficiency primarily informs the content of the duties imposed under administrative law rather than the scope of the application of administrative law.[20] The latter is fundamentally determined by the relationship that exists between the administrative state and its citizens and should not be strictly delimited. The practical concerns raised by the respondents thus should not be decisive in determining the scope of administrative action, but must inform the content of procedural fairness.

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[18] See *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 41.

[19] Indeed, in mandating the enactment of national legislation to give effect to the constitutional right to administrative justice, section 33(3)(c) of the Constitution required that such legislation "promote an efficient administration".

[20] A similar position is adopted in De Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, Durban 2003) at 221.

[30] I turn now to consider whether any rights of the applicants were materially and adversely affected by the termination of electricity supply to Ennerdale Mansions.

Rights materially and adversely affected

[31] Section 3(1) of PAJA requires procedural fairness not only in the event of a "breach" of a right, but whenever administrative action "materially and adversely affects" a right or legitimate expectation of any person.[21] This distinction is significant on the facts of this case, as the applicants concede that the termination of electricity supply did not breach, but materially and adversely affected, their rights. Taking the phrase "materially and adversely affects" simply to mean that the administrative action had a significant and not trivial effect,[22] I accept that, in the circumstances of this case, if any rights of the applicants were affected, such effect was material and adverse. The key question then is whether any *rights* of the applicants have been affected by the termination of electricity supply.

[32] The applicants relied principally on the right of access to adequate housing in section 26(1) of the Constitution. Invoking the decision of this Court in *Jaftha*,[23] the applicants contended that the termination of electricity supply constituted a retrogressive

[21] For the full text of section 3 of PAJA, see above n 5.

[22] Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) at 358-9; Currie *The Promotion of Administrative Justice Act: A Commentary* 2ed (SiberInk, Cape Town 2007) at 100; and De Ville above n 20 at 223-4.

[23] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 34.

measure which violated the negative obligation to respect the right of access to adequate housing and which, consequently, materially and adversely affected their constitutional right to housing for the purposes of PAJA. In the view I take of the matter it is not necessary to address this contention. Similarly, it is not necessary to consider the right to human dignity[24] as a self-standing right for the purposes of section 3 of PAJA. I am also not persuaded that any rights which the applicants hold against Mr Nel under their contract of lease have been affected by City Power's decision to terminate the electricity supply to Ennerdale Mansions.

[33] The real issue is whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that require the application of section 3 of PAJA.

The "right" to receive electricity as a basic municipal service

[34] The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to

[24] Above n 11.

provide. Indeed they could not have contended otherwise. In *Mkontwana*,[25] Yacoob J held that "municipalities are *obliged* to provide water and *electricity* to the residents in their area *as a matter of public duty*."[26] Electricity is one of the most common and important basic municipal services and has become virtually indispensable,[27] particularly in urban society.

[35] The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation. Section 152(1) of the Constitution sets out the objects of local government in general terms, and creates an overarching set of constitutional obligations that are to be achieved in accordance with section 152(2). Section 152 of the Constitution provides:

> "(1) The objects of local government are—
>
> (a) to provide democratic and accountable government for local communities;

[25] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

[26] Id at para 38. (My emphasis.)

[27] In 2008, the Department of Minerals and Energy (Electrification Policy Development and Management) published the first of an annual survey titled *Socio-Economic Impact of Electrification: Household Perspective*. The survey was conducted in three provinces, Limpopo, KwaZulu-Natal, and the Eastern Cape, and covered a sample of 3 790 participants. The overall results show that electrification greatly improves the quality of life and welfare of households. Its key findings are: (i) over 90% of households use electricity as their main source of lighting; (ii) lighting brings benefits such as increased study time for school children and greater security; (iii) electricity increases access to media which, in turn, increases awareness of several opportunities such as education; (iv) 63% of households use electricity as their main source of energy for cooking, and refrigerator ownership is high at 65%; and (v) a number of enterprises were created as a result of electrification, and businesses were able to operate for more hours. The survey report is available at http://www.dme.gov.za/pdfs/energy/electricity/web.pdf (accessed on 25 September 2009). See also Bekink *Principles of South African Local Government Law* (LexisNexis, Durban 2006) at 312.

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[36] In addition to these objects of local government, the Constitution specifically entrenches the developmental duties of municipalities. Under section 153, a municipality is obliged to prioritise the basic needs of the community and to promote the social and economic development of the community.[28]

[37] The Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) gives legislative content to the various constitutional duties of local government. Section 4(2) of the Municipal Systems Act sets out the duties of municipal councils, which exercise the executive and legislative authority at municipal level. In particular, section 4(2)(f) provides as follows:

[28] Section 153 of the Constitution provides as follows:

"A municipality must—

(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes."

"(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to—

. . . .

(f) give members of the local community equitable access to the municipal services to which they are entitled".

[38] Further content is given to the general duty of a municipality to provide municipal services under section 73 of the Municipal Systems Act, which provides:

"(1) A municipality must give effect to the provisions of the Constitution and—

(a) give priority to the basic needs of the local community;

(b) promote the development of the local community; and

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

(2) Municipal services must—

(a) be equitable and accessible;

(b) be provided in a manner that is conducive to—

(i) the prudent, economic, efficient and effective use of available resources; and

(ii) the improvement of standards of quality over time;

(c) be financially sustainable;

(d) be environmentally sustainable; and

(e) be regularly reviewed with a view to upgrading, extension and improvement."

[39] Finally, the Housing Act 107 of 1997 imposes a specific obligation on municipalities to provide basic municipal services, including electricity. Section 9(1)(a)(iii) provides:

> "(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—
>
> (a) ensure that—
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> . . . .
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> (iii) services in respect of water, sanitation, electricity, roads, storm-water drainage and transport are provided in a manner which is economically efficient".

[40] Taken together, these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water,[29] there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it. Whether the correlative public law right is sufficient to entitle persons to procedural fairness under section 3(1) of PAJA needs to be considered however. It is to this question that I now turn.

A proper interpretation of "rights" under section 3(1) of PAJA

[41] Section 3(1) of PAJA provides that "[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair". The structure of section 3(1) is important as it is indicates the broad application of

[29] Section 27(1)(b) of the Constitution provides that "[e]veryone has the right to have access to sufficient food and water".

the procedural fairness provisions under PAJA. In *Walele*,[30] in considering a procedural fairness claim based on an alleged legitimate expectation, this Court emphasised that section 3 of PAJA must be interpreted generously to give proper effect to section 33(1) of the Constitution.[31] O'Regan J, writing for the minority, observed that "[w]e must be careful, in construing section 3(1), to bear in mind that it is the key provision in PAJA that gives effect to the right entrenched in section 33(1) of the Constitution."[32]

[42] Both this Court and the Supreme Court of Appeal have already expressed support, albeit *obiter*, for a purposive approach to the concept of "rights" under section 3 of PAJA.[33] In *Premier, Mpumalanga*,[34] O'Regan J remarked that "[i]t may be that a broader notion of 'right' than that used in private law may well be appropriate".[35] The importance of procedural fairness is well described by Hoexter:

> "Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the

[30] *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC).

[31] Section 33(1) of the Constitution provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[32] *Walele* above n 30 at para 123. See also the majority judgment of Jafta AJ at para 30.

[33] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 100; *Premier, Mpumalanga* above n 18 at para 31 fn 9; and *Grey's Marine* above n 16 at para 30.

[34] Above n 18.

[35] In support of this approach to rights, O'Regan J (at para 31 fn 9) referred to *Dilokong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Department van Handel en Nywerheid* 1992 (4) SA 1 (A) at 18, which concerned a claim in terms of an export incentive scheme, the details of which had been published in the Government Gazette. There, Botha JA held that although no contractual relationship had been established between the appellant and the respondent, the state had unilaterally incurred liability in terms of the scheme.

> dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."[36]

[43] In my view, proper regard to the import of the right to administrative justice in our constitutional democracy confirms the need for an interpretation of rights under section 3(1) of PAJA that makes clear that the notion of "rights" includes not only vested, private law rights but also legal entitlements that have their basis in the constitutional and statutory obligations of government. The preamble of PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are *inter alia* to "promote an efficient administration and good governance" and to "create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function". These objectives give expression to the founding values in section 1 of the Constitution, namely that South Africa is founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness.[37]

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[36] Hoexter above n 22 at 326-7. (Footnote omitted.)

[37] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[44] In enumerating the basic values and principles governing public administration, section 195(1) of the Constitution affirms our constitutional commitment to a responsive and accountable public administration.[38] In respect of procedural fairness, the following principles are particularly relevant:

> ". . . .
> (d) Services must be provided impartially, fairly, equitably and without bias.
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
> (f) Public administration must be accountable.
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information."

[45] The right to administrative justice is fundamental to the realisation of these constitutional values, and is at the heart of our transition to a constitutional democracy. The scope of the section 33 right to just administrative action and the associated constitutional values, as given effect to under PAJA, must cover the field of public administration and bureaucratic practice in order properly to instrumentalise principles of good governance. It is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decisions which affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness.

[38] Sections 50 and 51 of the Municipal Systems Act affirm the application of the constitutional principles governing public administration to the provision of municipal services.

[46] Taken together, the values and principles described above require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.[39]

[47] In my view therefore, when 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 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.

[39] This approach to the meaning of "rights" in the context of public service delivery is articulated in the national policy of *Batho Pele* ("People First"), described in the *White Paper on Transforming Public Service Delivery* (1997), GG18340 GN 1459, 1 October 1997. *Batho Pele* expresses a commitment to deliver public services to all citizens. It provides that the terms "citizen" and "customer" are interchangeable in the context of public service delivery (para 1.3.4), particularly since public service "customers" have little or no choice over the service provider or the services provided to them (para 1.3.2). It seems to me that *Batho Pele* gives practical expression to the constitutional value of ubuntu which embraces the relational nature of rights (see De Ville above n 20 at 227). Courts must move beyond the common law conception of rights as strict boundaries of individual entitlement.

[48] Before turning to consider what procedural fairness requires in the circumstances of this case, it is necessary to address the respondents' contention that any non-compliance with PAJA was justified by the City's credit control and debt-collection policy.

Was City Power's failure to apply PAJA justifiable?

[49] The respondents disavowed any reliance on section 3(4) of PAJA since they maintained that PAJA was not applicable in respect of the applicants.[40] The respondents argued in the alternative, however, that if this Court found PAJA to be applicable, any failure to comply with its provisions and consequent infringement of section 33 of the Constitution was justifiable under section 36.

[50] They further maintained that any right to receive electricity as a basic municipal service is qualified by the municipality's constitutional and statutory obligations to provide public services in a financially sustainable manner.[41] City Power contended that the requirement of financial sustainability necessitates the development and enforcement of credit control and debt-collection policies by municipalities. To this end, the City

[40] For the full text of section 3(4) of PAJA, see above n 5.

[41] The principle of financial sustainability is contained in section 152 of the Constitution cited at [35] above. See further, section 73(2)(c) of the Municipal Systems Act which provides that "[m]unicipal services must be financially sustainable" and section 4(2)(d) of the Municipal Systems Act which provides:

> "(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to—
>
> . . . .
>
> (d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner".

passed the Credit Control By-laws which oblige it and its service providers to give pre-termination notice only to "customers" as defined therein. The respondents contended that to the extent that the Credit Control By-laws may limit the right of non-customers to just administrative action, such limitation is justified under section 36 of the Constitution.

[51] Nothing in this judgment should be taken to suggest a failure to appreciate the importance of debt collection by local government. The outstanding debts of City Power are staggering. The importance of debt collection by municipalities was emphasised by this Court in *Mkontwana*, where Yacoob J stated that it is "important for unpaid municipal debt to be reduced by all legitimate means."[42] In a separate concurring judgment, O'Regan J affirmed that "[t]here 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."[43]

[52] In addition, rights entail responsibilities. Citizens who can, must take responsibility for paying for services provided to them in fulfilment of government's statutory and constitutional obligations. Government is entitled to require this of citizens. Moreover, government regulation is implicit in the notion of providing electricity.

[42] *Mkontwana* above n 25 at para 52.

[43] Id at para 124.

[53] It seems to me, however, that City Power's reliance on the necessity for debt collection as a means of justifying its non-compliance with PAJA lacks logic. City Power seeks to collect an outstanding debt not from the applicants but from Mr Nel. The use of the applicants as leverage for the payment of Mr Nel's debts was both ineffective and unjust.[44] Affording the applicants procedural fairness prior to termination would have had no effect on City Power's ability to collect the debt owed by Mr Nel. If anything, pre-termination notice may have facilitated a joint endeavour to recover the arrears or to reach agreement on an alternative payment arrangement.

[54] Arguably, at the pre-termination stage, it remained open to City Power and the applicants to arrange for direct billing or some other means of payment, at least for the future supply of electricity. Such negotiations, it seems, are not prohibited by the Credit Control By-laws, which restrict the entering into direct-billing arrangements pending the payment of arrears only at the post-termination stage.[45]

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[44] Compare *Davis v Weir* 497 F.2d 139 (5th Cir. 1974) at 144-6, where the United States' Fifth Circuit Court of Appeals held that a municipal service cannot be denied to a tenant because of a landlord's outstanding debts. To make service provision contingent on fulfilling the financial obligation of a third party was held to lack a rational basis and to be unconstitutionally discriminatory. This decision was followed by the Seventh Circuit Court of Appeals in *Sterling v Village of Maywood* 579 F.2d 1350 (7th Cir. 1978) at 1355 and more recently by the Sixth Circuit Court of Appeals in *Golden v City of Columbus* 404 F.3d 950 (6th Cir. 2005) at 960-2.

[45] By-law 16 of the Credit Control By-laws provides:

> "(1) The Council must reinstate full levels of provision of any electricity or water service terminated or restricted in terms of section 15 after—
>
> (a) the full amount of arrears has been paid; or
>
> (b) an agreement for payment of the arrears contemplated in paragraph (a) has been entered into in terms of section 21; or
>
> (c) the full amount of arrears in respect of any agreement entered into in terms of section 21, and any increased deposit, have been paid, or any additional security required has been provided,

[55] The general rationale for, and legitimacy of, disconnecting a user's electricity supply as a debt-collection mechanism aimed at recovering a debt from someone entirely different has, however, not been challenged in this case. Accordingly, the issue this litigation presents is *not* whether the effect and reach of the debt-collection policy informing the Credit Control By-laws is justifiable, but more narrowly, whether users of municipal services are entitled to procedural fairness when decisions that adversely affect the municipal services they are receiving are taken. It remains open to the applicants to challenge the debt-collection policy underpinning the Credit Control By-laws, and specifically by-law 16, in future proceedings.

What procedural fairness requires in the circumstances of this case

[56] This Court has consistently held that fairness needs to be determined in the light of the circumstances of a particular case. As Ngcobo J stated in *Zondi*, "[t]he overriding consideration will always be what does fairness demand in the circumstances of a particular case."[46] Section 3(2)(a) of PAJA reiterates this cardinal principle. This provision is followed by section 3(2)(b) of PAJA which enumerates a set of minimum

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and any other condition of the Policy that the Council may consider appropriate, has been complied with.

(2) Any reinstatement in terms of subsection (1) may only be done after an authorised official has issued a written certificate of authorisation to the effect that every applicable condition contemplated in subsection (1) has been complied with and that the municipal service concerned may be reinstated."

[46] *Zondi v MEC for Traditional and Local Government Affairs and Others* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 114. See also *Kyalami* above n 33 at para 101; *Premier, Mpumalanga* above n 18 at para 39; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 219.

requirements that an administrator "must" extend to any person entitled to procedural fairness under section 3(1). These requirements include "adequate notice of the nature and purpose of the proposed administrative action" and "a reasonable opportunity to make representations".[47] Section 3(4)(a) allows for departure from the minimum requirements of section 3(2)(b) by providing that "[i]f it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2)", while section 3(4)(b) sets out the factors that an administrator must take into account in determining whether a departure is "reasonable and justifiable".[48]

[57] As noted above, the respondents have not invoked section 3(4) to justify their failure to comply with the requirements under section 3(2)(b). A literal reading of PAJA suggests that the minimum requirements under section 3(2)(b) are mandatory and must be enforced absent any departure by the administrator in terms of section 3(4). A Court would, on this reading, only be entitled to review a procedure that does not meet the minimum requirements of section 3(2)(b) when the administrator takes a decision in terms of section 3(4) to depart from these requirements and when such decision is taken on review.

[58] In my view, such an interpretation fails to take proper account of the variability inherent in the concept of procedural fairness.

[47] Section 3(2)(b)(i) and (ii) respectively.

[48] For the full text of section 3 of PAJA, see above n 5.

[59] A literal approach to section 3 of PAJA would hamstring the courts in cases such as this one, where an administrator fails to recognise that it is bound by the procedural fairness requirements under PAJA, and at the same time seeks guidance from the Court as to what procedural fairness requires in the circumstances. It would, moreover, result in circuitous litigation if this Court were to postpone considering the reasonableness of departing from the minimum requirements until the administrator acts under section 3(4) and such decision is taken on review. Section 3(2)(a) must therefore be read as an empowering provision that allows courts to exercise a discretion in enforcing the minimum procedural fairness requirements under section 3(2)(b).

[60] The applicants argued that the circumstances of this case required pre-termination notice and an opportunity to make representations. They submitted that the posting of a written notice in a prominent place in Ennerdale Mansions would suffice to constitute "adequate notice" for the purposes of section 3(2)(b)(i) of PAJA. The respondents conceded that the form of notice sought by the applicants would not place too onerous an administrative burden on City Power.

[61] I agree that affording notice to the applicants would not undermine City Power's ability to provide an efficient service. Accordingly, City Power must afford the applicants pre-termination notice. For the notice to be "adequate" it must 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 can challenge the basis of the proposed disconnection. Moreover, it must afford the applicants sufficient time to make any necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wish. At a minimum, it seems to me that 14 days' pre-termination notice is fair, and is consistent with the provisions of the Credit Control By-laws.

[62] More difficult however is the requirement of representations. The respondents contested the reasonableness of requiring City Power to receive representations on the basis that it would impose an undue burden on its human resources and administrative capacity. Efficiency and capacity considerations are indeed an important aspect of any contextual determination of the content of procedural fairness. This was expressly recognised in *Premier, Mpumalanga*[49] where this Court stated:

> "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."

[63] There must be hundreds of thousands of tenants in the City who receive electricity pursuant to a contract between their landlords and City Power. I accept that City Power's

[49] *Premier, Mpumalanga* above n 18 at para 41.

administrative capacity would be unduly strained if it were required in every case to process representations from tenants. The nature of the notice described above implies that, upon receiving the notice, it remains open to users to approach City Power to challenge the proposed termination or to tender appropriate arrangements to pay off arrears.[50] It is, however, incumbent on the applicants to approach City Power within the notice period to raise any challenges they may have. Where a grievance is valid, rendering the proposed disconnection untenable, or where suitable payment is made, it must be presumed that City Power, acting in good faith, would not proceed to effect the proposed disconnection.

[64] City Power has committed to engaging with the applicants. This attitude is consistent with that which would be required of the City in circumstances where persons in the position of the applicants lodge a valid grievance following receipt of a pre-termination notice. It is manifestly just that City Power engage with the applicants, and any engagement which would contribute to a sustainable solution is to be wholeheartedly supported.

[50] See by-law 21 of the Credit Control By-laws which allows for the payment of arrears in instalments, with the agreement of the Council. By-law 21 must be read with by-law 3(2)(ii) which regulates the entering into of new service agreements with the City by an existing customer of the Council who is in arrears in respect of any other municipal service.

[65] The only remaining question is whether the Electricity By-laws and the Credit-Control By-laws can be read consistently with PAJA, or whether a declaration of invalidity is necessary.

Application of PAJA to the By-laws

[66] As noted above, by-law 14 of the Electricity By-laws was not expressly challenged before this Court, since the parties proceeded on the High Court's finding that it had been impliedly repealed by the Credit Control By-laws. I do not think that this finding was correct, however. Indeed, by-law 15(2) of the Credit Control By-laws provides *inter alia* that the Council may terminate or restrict the provision of electricity "in terms of the termination and restriction procedures *prescribed or contained in any law*".[51] This provision appears to provide for the continued application of by-law 14 of the Electricity By-laws, despite the later enactment of the Credit Control By-laws.

[67] The common law rule of implied revocation provides that where there is an irreconcilable conflict between two enactments, the later enactment will take precedence over the earlier one. However, this rule is applied with circumspection in the light of the presumption that the Legislature does not intend to alter the existing law more than is necessary.[52] It should thus not readily be inferred that a law has been impliedly repealed.

[51] My emphasis.

[52] De Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 78. See also *Ex Parte the Minister of Justice In re: R v Jekela* 1938 AD 370 at 377; *Principal Immigration Officer v Bhula* 1931 AD 323 at 335; and *Government of the Republic of South Africa and Another v Government of KwaZulu and Another*

This is important for certainty in our law.[53] Absent a clear and unequivocal legislative intention to repeal, I am of the view that the High Court misdirected itself in finding that the Electricity By-laws were impliedly repealed by the passing of the Credit Control By-laws.

[68] Before the High Court, City Power invoked by-law 14 as valid and effective, and denied that it had been impliedly repealed by the Credit Control By-laws. City Power further submitted that by-law 14(1) could be read in line with the Constitution. The interpretation and validity of by-law 14 thus remain at issue and must be addressed.

[69] By-law 14(1) of the Electricity By-laws provides:

> "When any charges due to the council for or in connection with electricity supplied are in arrear, the council may at any time *without notice* disconnect the supply to the electrical installation concerned or any part thereof until such charges together with the reconnection charge determined by the council are fully paid." (My emphasis.)

[70] As is plain from the wording of the provision, by-law 14(1) of the Electricity By-laws allows the Council to dispense with the obligation to afford pre-termination notice to those affected by such termination. In affording the Council this discretion, by-law 14(1) is clearly inconsistent with the procedural fairness requirements under section

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1983 (1) SA 164 (A) at 200D-H. For a discussion of the presumption see De Ville at 170 and Du Plessis *Re-Interpretation of Statutes* (LexisNexis Butterworths, Durban 2002) at 72-7.

[53] Du Plessis *Re-Interpretation of Statutes* above n 52 at 177.

3(2)(b) of PAJA, and is therefore also inconsistent with section 33(1) of the Constitution. City Power did not proffer any justification for the limitation of the right to just administrative action. Indeed, City Power reasoned that the Electricity By-laws had been impliedly repealed.

[71] Given that by-law 14(1) of the Electricity By-laws is still on the municipal statute book and is inconsistent with the Constitution to the extent that it permits disconnection "without notice", it falls to be declared unconstitutional and therefore invalid. The words "without notice" must be severed from by-law 14(1). An order of invalidity coupled with severance is therefore appropriate. Naturally, the provision, in its severed form, must be read in the light of PAJA.

[72] I turn now to by-law 15(3) of the Credit Control By-laws which, on one reading, similarly affords the City Council or its designated service provider discretion to give pre-termination notice to a "customer". By-law 15(3) provides that the City Council "*may* send a termination notice . . . to a customer" where the City wishes to terminate supply. Were the provisions of by-law 15(3) to be interpreted to afford the City Council discretion to give notice to a "customer", it would be in conflict with the Constitution, as this judgment has made plain. The respondents acknowledged this, and welcomed an interpretation that made a notice mandatory in respect of "customers".

[73] The Credit Control By-laws expressly require that by-law 15(3) must be interpreted in the context of by-law 15(4)(d), which stipulates that any action taken in terms of by-law 15(2) and (3) must be subject to PAJA "in so far as it is applicable". In my view, "may" can be read as "must" in accordance with PAJA – a reading that is to be preferred because it produces a constitutional result. Read in this light, "may" in by-law 15(3) is understood to signify an authorisation to exercise a power coupled with a duty to do so when the requisite circumstances are present.[54]

[74] Lastly, the applicants' submission in respect of the definition of "customer" in the Credit Control By-laws needs to be addressed.[55] The applicants submitted that the by-law definition of "customer" could be read broadly to include consumers of a service who have no contractual relationship with the service provider. Such a reading would in my view render the Credit Control By-laws unworkable. The proposed meaning cannot reasonably apply to "customer" as used in other provisions of the By-laws – particularly, by-laws 3(1)(c),[56] 7(1)(b),[57] 11(1),[58] 13(1),[59] 15(2)(a)[60] and 21(1)[61] – which are directed

[54] This interpretive approach was adopted by this Court in *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at paras 14-6 and *Van Rooyen and Others (General Council of the Bar of South Africa Intervening) v the State and Others* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at paras 180-2.

[55] The definition of "customer" is cited in full at [15] above.

[56] By-law 3(1)(c) provides:

> "(1) No municipal service may be provided to any applicant, unless and until—
>
> . . . .
>
> (c) a service agreement, in a form substantially similar to the form of agreement prescribed, has been entered into between the customer and the Council".

[57] By-law 7(1)(b) provides:

> "(1) Subject to the provisions of sections 13 and 21—

at regulating a contractual relationship between a service provider and a paying customer in the context of debt-collection and credit control. I agree with the respondents' submission that the phrase "or is actually providing a municipal service" in the definition of "customer" must be interpreted as catering for situations where the municipality has supplied a service under a *bona fide* but erroneous belief that a contract existed. This interpretation accords with the purpose of the Credit Control By-laws, which are aimed at credit control and the recovery of arrears.

[75] It is not necessary to extend the definition of "customer" to include persons with whom the service provider has no contractual relationship. To do so would strike at the

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. . . .

(b) the Council may, subject to compliance with the provisions of these 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".

[58] By-law 11(1) provides:

"A customer may lodge a query or complaint in respect of the accuracy of any amount due and payable in terms of an account rendered to him or her in terms of these By-laws."

[59] By-law 13(1) provides:

"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."

[60] By-law 15(2)(a) provides:

"(2) Subject to the provisions of subsection (4), the Council may terminate or restrict the provision of water or electricity . . . 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".

[61] By-law 21(1) provides:

"A customer with positive proof of identity or a person authorised, in writing, by such customer, may, subject to the approval of the Council enter into an agreement in a form substantially similar to a form prescribed, for the payment of arrears in instalments."

integrity of the Credit Control By-laws. However, as is evident from what has been said above, persons in the position of the applicants, who are not "customers" for the purposes of the Credit Control By-laws, are entitled to procedural fairness where their rights are materially and adversely affected by the termination of a municipal service. By-law 15(3) must accordingly be read with by-law 15(4)(d) and in the light of PAJA to require that pre-termination notice *must* be sent to all persons whose rights may be materially and adversely affected by the termination of a municipal service. Practically, this reading protects the procedural fairness rights of affected persons, without obstructing the City's credit control and debt-collection policies.

[76] In the result, therefore, by-law 14(1) of the Electricity By-laws falls to be declared invalid to the extent that pre-termination notice to "customers" is not mandatory. To the extent that by-law 15(3) limits the right to pre-termination notice to "customers", the by-law must be read with by-law 15(4)(d) and in the light of PAJA to extend the right to mandatory pre-termination notice to any person whose rights may be materially and adversely affected by the termination.

Costs

[77] It is clear that the applicants have been successful, and they have sought to vindicate their rights against a local government entity. Following this Court's approach

to costs in matters between a private litigant and an organ of state,[62] the applicants are entitled to their costs, and in my view such costs should include the costs in both this Court and in the High Court.

Order

[78] In the event, the following order is made:

(1) The application for leave to appeal is granted.

(2) The appeal is upheld and the order of the South Gauteng High Court, Johannesburg in *Darries and Others v City of Johannesburg and Others*, delivered on 3 April 2009 under Case No 08/22689, is set aside.

(3) The termination of electricity supply to Ennerdale Mansions on 8 July 2008 is declared to be unlawful.

(4) The respondents are ordered to reconnect the electricity supply to Ennerdale Mansions forthwith.

(5) The words "without notice" in by-law 14(1) of the Greater Johannesburg Metropolitan Council: Standardisation of Electricity By-laws (*Provincial Gazette* (Gauteng), GG 16 GN 1610, 17 March 1999), published in terms of section 101 of the Local Government Ordinance 17 of 1939, are

[62] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14, Case No CCT 80/08, 3 June 2009, as yet unreported, at para 22; *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138; and *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 30.

declared to be unconstitutional and invalid and are severed from by-law 14(1).

(6) The respondents are ordered to pay the costs of the applicants in both the High Court and in this Court, such costs to include the costs consequent upon the employment of two counsel.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J and Van der Westhuizen J concur in the judgment of Skweyiya J.

For the Applicants:	Advocate S Budlender and Advocate A Friedman instructed by the Centre for Applied Legal Studies/Wits Law Clinic.
For the First and Second Respondents:	Advocate R Sutherland SC, Advocate NM Maenetje and Advocate Z Khan instructed by Mokhatla Attorneys.