

# EVALUATING THE Right to electricity



*Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30 (9 October 2009)

The Constitutional Court has ruled that the disconnection of electricity supply to a block of flats by the Johannesburg municipality without prior notice was unlawful, and ordered its immediate reconnection. The Court set aside a decision of the South Gauteng High Court which held that there is no obligation on the Johannesburg municipality to afford procedural fairness to tenants with whom City Power has no contractual relationship before taking a decision to disconnect their electricity.

The case was brought by the tenants of Ennerdale Mansions, which is owned and let by Mr Thomas Nel. The tenants paid their electricity bills to Nel as part of their rent accounts and had kept up with their electricity payments at the time of the disconnection. Nel is contracted with City Power for the supply of electricity to the building and had accumulated arrears of approximately R400 000. As a result, in July 2008, the electricity supply to Ennerdale Mansions was disconnected by City Power. The tenants received no prior notice of the disconnection. They continue to live in Ennerdale Mansions without electricity because they could not afford to leave.

The applicants contended that the Promotion of Administrative Justice Act (PAJA) required City Power to give them a fair hearing before disconnecting their electricity because the decision materially and adversely affected their rights. They also challenged the validity of the City's credit control by-laws insofar as they restricted the duty to afford procedural fairness only to 'customers' of City Power. City Power contended that 'customer' in the by-laws does not include persons who do not have a contractual relationship with a service provider and that this limitation was justified by the municipality's debt-collection policy. City Power disagreed and argued that they owed no duty of procedural fairness to the tenants, but only to the landlord with whom they have contracted.

## key points

- The duty to deliver electricity is part of local government's constitutional duty to deliver basic services.
- It does not arise out of a contractual duty between the municipality and paying consumers, such as landlords.
- Tenants, like all other electricity consumers, have a right to access electricity.
- Municipal decisions that 'materially and adversely' impact this right of access must be implemented in a procedurally fair manner.
- Municipalities credit control and debt collection policy cannot allow for termination 'without notice'.
- Procedural fairness rights not only extend to 'customers' but to all electricity consumers.
- Any credit control and debt collection policy that holds differently is unconstitutional.

In its unanimous judgment handed down on 9 October 2009, the Court held that 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 the City. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. Accordingly, 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 that would materially and adversely affect that right.

The Court held that, on the facts of the case, procedural fairness required that applicants were entitled to 14 days pre-termination notice in the form of a physical notice placed in a prominent position in the building. Implicit in affording pre-termination notice is that users of the municipal service may approach the City, within the notice period, to challenge the proposed termination or to make arrangements to pay off arrears.

With regard to the constitutional validity of the municipal by-laws regulating the supply of electricity in the municipality, the Court held that its credit control and debt collection by-laws can be read consistently with PAJA so that procedural fairness is afforded not only to customers of City Power but to any person whose rights would be materially and adversely affected by termination of the electricity supply. The supply of electricity in the City is also regulated by the municipality's electricity by-laws. The judgment holds that, to the extent that the electricity

by-laws permit the termination of electricity supply 'without notice', it is inconsistent with PAJA and section 33 of the Constitution. This invalidity is cured by severing the words 'without notice' from the by-law, which must be read in the light of PAJA to require pre-termination notice.

The termination of electricity supply to Ennerdale Mansions was declared to be unlawful, and the Johannesburg municipality was ordered to reconnect it immediately.

In its reaction to the judgment, the Centre for Applied Legal Studies said it was:

an important step in changing power relations between landlords and tenants in the City of Johannesburg. It brings to light the nonsensical situation where tenants are paying for electricity but have their supply disconnected without notice because of unscrupulous landlords who accumulate arrears and do not pay, and a technicality in the by-laws which only recognises the landlord as the "customer" and refuses to acknowledge that there are tenants who are also affected by cut-offs and require notice and opportunity to challenge the termination.



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### *City of Johannesburg v Gauteng Development Tribunal (335/08) [2009] ZASCA 106 (22 September 2009)*

In terms of the Development Facilitation Act 67 of 1995 (DFA), the Gauteng Development Tribunal (a provincial tribunal) has the authority to approve land development applications. It may approve them irrespective of the role played by municipalities in terms of land use planning ordinances and the Municipal Systems Act. The City of Johannesburg argued that this authority infringes on its constitutional authority over 'municipal planning', which is listed in Schedule 4B of the Constitution. Matters listed in this Schedule are local government matters.

The Gauteng Development Tribunal argued that 'municipal planning' does not refer to the introduction, administration and enforcement of town planning schemes. It argued that it empowers the municipality to make plans but not to administer them. Provincial government, it argued, has the authority to implement land use planning on the basis of its competency

'urban and rural development', which is listed in the provincial part of Schedule 4, namely in Schedule 4A.

The Court disagreed with the Tribunal. It ruled that the Tribunal's authority to grant or alter land use rights conflicts with the Constitution. The Court based this on two important arguments. Firstly, the constitutional competency 'municipal planning' in Schedule 4B refers to the control and regulation of land use. Secondly, only municipalities have the authority to administer 'municipal planning'. Any legislation that seeks to place that authority elsewhere is invalid. National and provincial government may legislate with respect to 'municipal planning' but may not administer the function.

The Court suspended the declaration of invalidity for 18 months to avoid considerable disruption and allow Parliament to replace that portion of the Act that is invalid. This order must still be confirmed by the Constitutional Court before it has any effect.